The Implications of the Proposed EU Charter of Fundamental Rights

-A political declaration or a legally binding instrument?

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ABBREVIATIONS

BDA	Confederation of German Employers Associations
BDI	Federation of German Industries
CBI	Confederation of British Industry
CDU	Christlich Democratische Union Deutschlands
CFSP	Common Foreign and Security Policy
CSU	Christlich-Soziale Union in Bayern
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
EEC	European Economic Community
EEF	Engineering Employers Federation
EC	European Community
ECR	European Court Reports
ETS	European Treaty Series
ETUC	European Trade Union Confederation
EU	European Union
FIDH	International Federation of Human Rights
ILO	International Labour Organisation
IGC	Intergovernmental Conference
JEF	Young European Federalists
JHA	Justice and Home Affairs
MEP	Member of the European Parliament
NGO	Non-governmental Organisation
OJ	Official Journal
OSCE	Organisation for Security and Cooperation in Europe
SEA	Single European Act
TEC	Treaty of European Community
TEU	Treaty of European Union
UEF	Union of European Federalists
UN	United Nations
UNICE	Union of Industrial Employers of Europe

1. Introduction

1.1. General overview

The political discussion concerning fundamental rights/human rights protection within the European Union/European Community can be traced back to the early 1970s. Since the beginning of the 1970s, there has been an ongoing discussion about the status and role of human rights/fundamental rights in the Community/Union.[1] The discussions have involved the options of accession by the Community to the ECHR[2] and adopting a Bill of Rights for the European Community/Union. The founding EEC Treaty did not contain any express provisions for the protection of human rights. The EEC Treaty established a Community whose purposes were designed and limited to economic integration based upon liberal free market principles. 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). Fundamental rights were only included and protected to the extent it was necessary for the economic integration. The Court of Justice (ECJ) was however confronted with human/fundamental rights issues at an early stage. Since late 1960s, the ECJ 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

[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] Convention for the protection of Human Rights and Fundamental Freedoms, ETS No. 5, opened for signature on 4 November 1950, entry into force on 3 September 1953.

reference to constitutional principles that are common to the Member States as well as to international treaties and conventions that 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. Despite of the jurisprudence of the ECJ, there has been no clear-cut understanding of the material content of the human rights protection within the Community legal order. The case law of the ECJ does not give a precise and clear picture of the rights, which are protected within the community legal order.[3] In other words, the human rights protection is lacking the element of legal certainty and predictability. This is perhaps one of the strongest arguments used for the current need to draw up a Bill of Rights for the European Union.

The EU is firmly committed to respect human rights and is a defender of human rights both internally and externally. The critique that has been raised is that the EU is lacking a comprehensive and coherent human rights policy. The idea of adopting a fundamental rights catalogue for the EU is certainly not a new one. However, not until the late 1980s, two fundamental rights catalogues were introduced in the Community. In 1989, the Parliament adopted a Declaration of Fundamental rights and Freedoms.[4] The European Parliament declaration was the first attempt to produce a catalogue of fundamental freedoms for the Community. The declaration only had a symbolic value and is a non-legislative resolution of the Parliament. The declaration was meant as an element in building the European identity for Community citizens and residents and also as an important statement to the meaning of belonging to the Community.[5] 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

[3] Ojanen, 1998, p. 116 and Pentikäinen & Scheinin, 1993, p. 100.

[4] OJ C 120/51 (1989).

[5] Weiler, 1991, Vol. II, p. 622.

legal order, either gradually or in one go.[6] 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 resulting in the Maastricht Treaty. The declaration of the Parliament has been described as "the first measure, which responds in a concrete way to the call for a written catalogue".[7] The second significant step was taken when the Community Charter of Fundamental Social Rights of Workers was adopted by eleven of the Member States.[8] The United Kingdom did not adopt the Charter.

The Treaty of Amsterdam affirms the commitment to human rights and fundamental freedoms. Article 6 (1) TEU prescribes, "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". Furthermore, article 6(2) continues 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. The Treaty of Amsterdam affirms the commitment to fundamental social rights in its Preamble[9] as defined in the 1961 European Social Charter[10] and in the 1989 Community Charter of the Fundamental Social Rights of Workers.[11] Articles 2 and 3 TEC sets out a number of social policies or

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[6] 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).

[7] Cassese, Clapham and Weiler, 1991, p. 21.

[8] COM 1989 471.

[9] The preamble TEU states that the Union confirms the attachment to fundamental social rights is determined to promote economic and social progress for their peoples…

[10] European Social Charter, ETS No. 35, opened for signature on 18 October 1961, entry into force on 26 February 1965.

[11] A commitment to social rights was explicitly made through the adoption of this Charter. 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. The Community Charter of 1989 is a legally non-binding instrument. Ojanen, 1998, p. 292.

activities that the Community shall promote, such as a high level of employment and social protection, equality between men and women, the raising of the standard of living and quality of life and economic and social cohesion and solidarity among Member States. The reference to social rights standards in the preamble TEU is noteworthy, since a reference to social rights was "dropped out" in the Maastricht Treaty.[12] Article 136 TEC 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 of Fundamental Social Rights of Workers. [13] The provisions in the Amsterdam Treaty concerning fundamental rights aiming at strengthening the human rights protection within the EU are generally speaking of a cautious nature. However, the Treaty of Amsterdam sets out important social *objectives* for Member States and for the Union, such as promotion of employment, improved living and working conditions, proper social protection in accordance with the above-mentioned instruments.[14] Article 137 TEC states that "the Community shall support and complement the activities of the Member States in order to achieve the objectives" mentioned in article 136. Article 141 TEC does consolidate some of the ECJ case law by including the concept of equal pay for work of equal value providing also a legal base for the further measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation including the principle of explicit prohibition against wage discrimination based on gender.[15] The Amsterdam Treaty establishes new procedures for securing social rights protection as guidelines for activities in the Community and in Member States. Article

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

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

[14] Rosas, 2000, pp. 96-97.

[15] Szyszczak, 1999, p. 152.

13 TEC empowers the Council after consultation with the European Parliament to take appropriate action in order to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The focus has been on developing social policy rather than to concentrate on setting up explicit social rights in the Amsterdam Treaty.[16]

The GV V (now employment and social affairs) within the Commission established an independent expert group on fundamental Rights in 1999 in order to review the status of fundamental social rights in the treaties and in particular in the Amsterdam Treaty and to review the possibility of a Bill of Rights in the next revision of the treaties. [17] The expert group chaired by prof. Simitis took a quite critical approach to the system of references to certain human rights conventions as a way of stating the Union's commitment to fundamental rights. According to an Expert Group, the system of references "suggest that fundamental rights are put on the same level irrespective of the document they are defined in."[18] 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".[19] 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. The Treaty of Amsterdam has 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".[20] The general approach to human rights in the EU in treaty

[16] For a more through analysis of the concept of social rights and social policy within the EU, see for example Maduro, 1999, pp. 455-472 and Sciarra, 1999, pp. 473-501, Szyszczak, 1999, pp. 141-155.

[17] Affirming fundamental rights in the European Union. Time to act. Report of the Expert Group on Fundamental Rights, 1999.
http://europa.eu.int/comm/dgs/employment_social/publicat/fundamri/simitis_en.pdf.

[18] Ibid., p. 9.

[19] Ibid., p. 10.

context is often based on a broader reference to democracy, human rights and the rule of law as mentioned in article 6 (1) TEU. There can be no doubt about the ECJ's role in developing a human rights doctrine for the EU. This has also been a source of inspiration for treaty provisions, in particular article 6 (2) TEU. The combination of the human rights declaration made by the Community institutions, the preamble of the SEA, the preamble TEU and the treaty provisions including the case law from the ECJ on human rights as part of general principles of Community law can be said to have contributed to the development or to make human/fundamental rights protection a general objective for the EU.[21] The question of civil and political rights is considered to be less problematic and is covered by the EC concept of human rights. Perhaps more controversial and contested is the question concerning the status and role of economic, social and cultural rights. Social rights have had a contested role in the European integration in promoting economic freedom and deregulation and at the same time challenging the concept of social rights both at the national level as well as on the EU level. In general, there is a tendency in the EU to focus on social policy designed to promote social protection or social exclusion rather than to focus on social rights. The Treaty of Amsterdam does not contain a coherent set of neither civil and political rights nor economic and social rights.[22]

The idea to elaborate a Charter on Fundamental Rights emerged during the German Presidency chairing the European Council in 1999.[23] The German Minister of

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[20] Ibid., p. 7.

[21] Taking into account the new provisions of the Amsterdam Treaty, it seems to be difficult to argue that human rights protection would not be an objective for the EU. Rosas-Brandtner, 1998, p. 470.

[22] The revision of the social rights provisions in the Amsterdam Treaty fell considerably short in the light of the proposals presented for example in the report presented by the Comité des Sages "For a Europe of Civic and Social Rights" in 1996.

[23] The German Presidency programme "Europe's Path into the 21st Century-making it part of their daily lives" stated "Europeans decisions must be meaningful to European citizens. European policies, like the policies of the Union's Member States, should demonstrably respect the rights of the people. Germany therefore strongly supports the idea of a Charter of Human Rights, which would have pride of place among Europe's treaties. The European Parliament, the national parliaments and as many social groups as possible should participate in the debate and the drafting of such a charter".

Foreign Affairs, Joseph Fischer, stated on 12 January 1999 in Strasbourg to the European Parliament as follows:

> In order to strengthen the rights of the citizens, Germany proposes in the long run the elaboration of a European Charter on Fundamental Rights. We intend to launch an initiative in this direction during our presidency. Our aim is to consolidate the legitimacy and identity of the EU. The European Parliament, which provided important preliminary work elaborating the draft constitution of 1994, as well as the national parliaments and possibly many other social groups shall participate in the drafting of such a Charter on Fundamental Rights.[24]

This initiative was welcomed and strongly supported across the party lines in Germany. German MEP Georg Jarzembowski stressed that the EU is more and more turning into a federal state and that it is important for the EU citizens to know which fundamental rights they are entitled to.[25] The CDU party Chairman, Mr Wolfgang Schäuble, and the foreign affairs spokesman of the CDU/CSU fraction in the German Bundestag, Mr Karl Lamers stated that the creation of a "European Constitutional Treaty" ("Europäischer Verfassungsvertrag") would strengthen the question of fundamental values tying the Europeans together.[26] During a Conference in Cologne on 27 April 1999, the German Minister of Justice announced the intention as the holder of the Presidency of the European Council to put forward an initiative of elaborating a European Charter of Fundamental Rights to the Cologne European Council. The German Minister of Justice, Mrs Herta Däubler-Gmelin stated at the conference that the best way of guaranteeing fundamental rights protection within the EU is to draw up a European Charter of Fundamental Rights in order to ensure clear, transparent and enforceable rights for all citizens of Europe. The Charter is also intended to promote the strengthening of European awareness among EU citizens. The idea introduced by Germany during the German Presidency was to adopt a legally binding document.

The Cologne European Council decided to move ahead with the discussion of adopting a Bill of Rights for the European Union by stating "at the present stage of

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[24] EP *Minutes*, 12 January 1999.

[25] Frankfurter Allegemeine Zeitung of 24 December 1999.

development of the European Union, the fundamental rights *applicable at Union level*[27] should be consolidated in a Charter and thereby made more evident".[28] In relation to this statement, the Cologne European Council stated in Annex IV "there appears to be a need, at the present stage of the Union's development, to establish a Charter of Fundamental Rights in order to make their overriding importance and relevance more visible for the Union's citizens".[29] It is to be noted that a reference is made specifically to the *European Union* rather than just merely to the European Community. The secretariat of the drafting body submitted on request by the Chairman on horizontal questions that "The Charter applies to the institutions of the Union, and the Cologne European Council does not refer to the Community alone. The Charter should therefore be drafted in such a way as to apply within the framework not only of the Treaty on European Union but also of the EC Treaties. In other words, the Charter applies to Titles V (CFSP) and VI (JHA) of the Treaty on European Union".[30] In other words, the protection of fundamental rights is an indispensable prerequisite of the Union's legitimacy. The Cologne European Council stated that it believed that the EU Charter should contain fundamental rights and freedoms including procedural rights guaranteed by the ECHR and from constitutional traditions common to the Member States as general principles of Community law. This is in line with article 6 (2) TEU. Furthermore, account should also be taken of economic and social rights as contained in the European Social Charter and the Community Charter of Fundamental Social Rights of Workers in accordance with article 136 TEC "insofar as they do not merely establish objections for action by the Union", in other words, insofar as they can be formulated as proper individual rights.[31] The Cologne European Council stated that a distinction

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[26] "Europa braucht einen Verfassungsvertrag" in Frankfurter Allegemeine Zeitung of 4 May 1999.

[27] My italics.

[28] Presidency Conclusions based upon the Cologne European Council of 3-4 June 1999. European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union, p. 18.

[29] Ibid., Annex IV, p. 76.

[30] Draft Charter of Fundamental Rights of the European Union, CHARTE 4111/00, Body 3, p. 3.

[31] Rosas, 2000, p. 97.

should also be made to certain fundamental rights that only should be addressed to Union's citizens. This was the starting point and the mandate given by the European Council in 1999. During the Tampere European Council, it was agreed upon the working methods of the drafting body. The mandate given by the Cologne European Council was to draft a political declaration and not a legally binding document. This approach taken by the European Council has been criticised by many based on the argument that the Community has already adopted various "solemn declarations" in order to improve fundamental rights protection.[32] The ambition in drafting a EU Charter was to tackle the current lack of visibility of fundamental rights. The idea was to clarify applicable fundamental rights within the Community legal order including the case law of the ECJ. This idea is simply based on the fact that fundamental rights can only fulfil their function if the citizens first and foremost are aware of their existence.[33] The "Convention" (name of body drafting the EU Charter) had freedom to define its aims and setting criteria in formulating the rights to be included.

During the Cologne European Council meeting 3 and 4 June 1999, it was decided that a body composed of representatives of the Heads of State and Government and of the President of the Commission as well as members of the European Parliament and National Parliaments should present a draft document on a Charter of Fundamental Rights for the European Union in advance of the European Council meeting in December 2000. The first meeting of this *ad hoc* body was held on 17 December 1999 in accordance with the rules on the composition, method of work and practical arrangements set out in annex to the presidency conclusions following the Tampere

[32] Examples of such instruments are the joint declaration by the European Parliament, the Council and the Commission on fundamental rights of April 1977, OJ-C103/1, the European Parliament declaration of Human Rights and Fundamental Freedoms of April 1989, OJ-C120/51, Community Charter of Fundamental Social Rights of the Workers adopted by the Heads of State and of Government on 9 December 1989. For further references, see Opinion 2/94, ECR I-1759, para. III.5. Eicke, 2000, pp. 280-81.

[33] Affirming fundamental rights in the European Union. Time to act. Report of the Expert Group on Fundamental Rights, 1999, p. 12. See note 17 above.

European Council on 15 and 16 October 1999.[34] The EU Charter is intended to apply to the Union's institutions leaving outside of its scope the activities of Member States falling outside the scope of Union activity. The aim of the EU Charter is to establish a Bill of Rights rather than to confer new powers on the Union to legislate in the field of fundamental rights. The mandate given by the Cologne European Council in 1999 gave no indication as to what form the draft Charter resulting from the drafting body's work should take.

Mr. Nikula, representing the Presidency of the European Council during the Finnish presidency drew attention with regard to the mandate given to the drafting body underlining that 1) the body is not an Intergovernmental Conference within the meaning TEU, 2) the purpose was not to alter the responsibilities of the EU, 3) the objective was to draw up a list of fundamental rights as they applied to the activities of the EU drawing a distinction to the activities falling outside the scope of the EU.[35] The objective of adopting a Charter of Fundamental Rights for the European Union is intended at first to be merely a political commitment and not a legally binding instrument.[36] The possible inclusion of the Charter into the treaties is to be determined at a later stage. Although the starting point for the elaboration of a EU Charter of Fundamental Rights was a political declaration, the "Convention" was committed to draft a Charter aiming to be a legally binding document to be incorporated into the treaties in the future. The "Convention" was working on the "as if" notion, i.e. that the EU Charter would ultimately have full legal effect. Mr. Roman Herzog (elected Chairman of the drafting body) stated in his opening speech on 17.12. 1999 that "we should therefore proceed as if we had to submit a legally binding list, and we should not forget that our mandate is in principle to draft a list addressed to the bodies of the

[34] Presidency Conclusions based upon the Tampere European Council on 15-16 October 1999. The Tampere European Council set up the rules and composition and method of work for the body. See Annex, pp. 18-20.

[35] CHARTE 4105/00, Body 1, p. 2.

[36] The option of choosing a non-binding political declaration certainly involves less complicated questions with regard to the material and personal scope of the Charter.

European Union, by which they will be bound". [37] On the basis of the draft presented during the French Presidency, the European Council would propose to the European Parliament and to the Commission that these institutions together with the Council would solemnly proclaim a European Charter of Fundamental Rights. The European Parliament has always been in favour of adopting a legally binding fundamental rights catalogue for the EU. This became also evident during the opening speech held by Mr. Inigo Mendez de Vigo (leader of the EP representation). "The Charter of Fundamental Rights must be binding and must be incorporated into the Treaty. To the extent that the Treaties constitute the Constitutional Charter of the European Union, as reaffirmed by the case law of the Court of Justice, the Charter of Fundamental Rights should be part of it".[38]

The Charter is composed of 54 articles. Seven chapters of the Charter address *dignity, freedoms, equality, solidarity, citizens' rights, justice* and *general provisions.* The EU Charter on fundamental rights does include not only civil and political rights but also economic and social rights. The EU Charter on Fundamental Rights is considered to be an important dimension of the European development of human rights standards. However, it is of great importance to focus on a general debate on the implications connected with adopting a Charter on Fundamental Rights for the European Union. The idea is to follow up the general debate during the drafting process. Is this new EU Charter merely only a codification of applicable human rights doctrine established by the European Court of Justice and Treaty provisions or does it develop the human rights protection/doctrine within the EU to a new dimension? It is also interesting to analyse how this new EU Charter of fundamental Rights will affect the fundamental/Human Rights protection in Europe. In this respect, special attention will be paid to the horizontal articles included in the EU Charter, referred to as articles 51-54 in the Charter.

[37] CHARTE 4105/00, Body 1, p. 9.

[38] CHARTE 4105/00, Body 1, p. 12.

1.2. Aim and purpose of the study

The objective with this research project is to analyse the European Charter on Fundamental rights in the light of its status as a soft law instrument and its possible inclusion to the treaties establishing the European Union. The initial questions are related to the very need and intention of adopting a EU Charter of Fundamental Rights having in mind that the mandate was to codify already applicable fundamental rights within the European Union. What are the reasons for adopting a EU Charter of Fundamental Rights? Ever since the Cologne European Council decision of 1999, different opinions have been presented with regard to the need for a EU Charter of fundamental rights. Four main arguments have been presented against the adoption of a Charter for the Union. The first argument is based on the notion that human rights are already well protected by the combination of the ECHR and the ECJ jurisprudence. Adopting a new Charter would undermine the existing protection currently offered by the ECJ by creating "the risk of inconsistency between different definitions of human rights and their interpretation".[39] Adopting a EU Charter would also create a risk of differing interpretation of human rights between the European Court of Human Rights and the ECJ. The second argument is based on the fear that this project would create a dual system of fundamental rights protection in Europe, one within the Council of Europe and one within the European Union. This would create a new dividing line in Europe, this time in the field of human rights. The fear is that the creation of a EU Charter would undermine the ECHR. Thirdly, the Charter would inevitably result in widening the Community competences. This would ultimately result in a written constitution for a federal European state. Fourthly, the adoption would increase the power of the ECJ, which is already seen as having too much power in relation to democratically elected legislatures within the member states. [40]

[39] Fredman & McCrudden & Freedland, 2000, p.180.

[40] Ibid. p. 181.

The arguments used for the necessity of a Charter are based on the changing structure of the European Union. The Union wants to create an image of a "peoples' Europe" emphasising a common European citizenship. The expanding of the competences of the union into new areas of co-operation has also created new demands for protection of fundamental rights. The expansion to include new countries of Eastern Europe not having a tradition of human rights protection creates pressure on the Union to emphasise the requirement of human rights protection as a precondition for accession. Human rights have also gained increased importance in the external policies of the Union. Since the early 1990s, the EC/EU has included more or less systematically a human rights clause in its trade and co-operation agreements demanding that third countries must respect human rights. Therefore it is only consistent that the European Union commits itself to fundamental rights by adopting a Charter. Secondly, one of the major problems is the uncertain legal basis of human and social rights activities of the Community institutions. The human rights standards are characterised by their vagueness and the uncertain status of the ECHR, the European Social Charter. This has resulted in a doctrine developed by the ECJ on a case-by case basis.[41] Indeed, a recent report has concluded that the lack of a coherent human rights policy in the Union is "of almost intentional constitutional ambiguity towards human rights, of wilful lack of clarity as regards Community competences and jurisdiction, and the embarrassing realisation that in this field, the Community has had to act by stealth and questionable constitutional means".[42]

The drafting process within the "Convention" as a whole is worthwhile analysing. Especially the composition of the "Convention" is interesting. Does this have any implications for future preparation or drafting of, for example, a constitution for the EU? Various NGOs and labour organisations have taken an active part in the discussion concerning the EU Charter. Is there a common NGO opinion concerning the EU Charter? Are these various NGOs and labour organisations arguing for a political

[41] Ibid.

declaration or a legally binding instrument and what are their arguments in support for their views? The idea is to analyse the input given by NGOs and labour organisations in drafting the EU Charter. Also an interesting point to analyse is if there exist any "hidden agendas" in drawing up a fundamental rights catalogue seen from the federalist point of view. Is this EU Charter of Fundamental Rights another concrete example of moving towards a closer integration between the EU member states? What is the role of the EU Charter with regard to the EU as an integration project? The starting point for this study is that this EU Charter will eventually to be included in the treaties and therefore constitute a legally binding document. What are the possible implications of adopting a EU Charter, which is eventually intended to be included in the treaties and therefore constitute a legally binding document? Could an adoption of a EU Charter on Fundamental Rights involve a risk of legal uncertainty for the individual in having two different systems protecting fundamental/human rights in Europe? One of the principal concerns that have been suggested with adopting a Charter of fundamental rights for the EU is that Europe generally would start to move in different levels of fundamental rights protection in Europe as a whole. In other words, does the adoption of a EU Charter establish a dual system of human rights protection in Europe, i.e. one the European Union and one within the framework of Council of Europe? It is very important to avoid a situation where the European Court of Justice in Luxembourg would "compete" with the European Court for Human Rights in Strasbourg in protecting fundamental/human rights.

The question of the scope of application is interesting. As noted above, the Treaty of Amsterdam did not take any decisive steps in developing a clear recognition of fundamental rights protection by the EU. The Treaty of Amsterdam did not incorporate any specific fundamental rights in a form of a written fundamental rights catalogue or committing to accession of the Community/Union to the ECHR. However, the Amsterdam Treaty introduced an important change with regard to the jurisdiction of

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[42] Alston & Weiler, 1998, p. 30.

the ECJ. The jurisdiction of the ECJ is in principle restricted to Community law and does not cover the second and third ”pillars”. 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. 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. In this regard, it is necessary also to analyse the question of the scope of application of the new proposed EU Charter. Is the proposed EU Charter meant to be applicable only within the Community law or would it extend its application also to cover the second and third “pillars”? Would this therefore have any implications with regard to the jurisdiction of the ECJ?

Finally, the intention is to discuss the Charter in general terms. Is the adoption of the EU Charter a step forward in protecting fundamental rights within the European Union? Of course, this is not an easy task to analyse at this stage. This is a question that can be more thoroughly analysed in the years to come, but some general preliminary conclusions can certainly be drawn. These are some of the questions that need to be addressed with regard to adoption of a EU Charter of Fundamental Rights. Another interesting question is whether the option of an EC/EU accession to the European Convention on Human Rights is to be forgotten or whether it still is an option worthwhile considering despite the project of adopting a fundamental rights catalogue for the EU. Does this proposed EU Charter end the debate of accession of the EC/EU to the ECHR and to other international human rights treaties?

2. Adopting a Charter of Fundamental rights for the European Union

2.1. Composition of the convention- a new solution

As already noted above, during the Tampere European Council of 15-16 October 1999, the composition, method of work and other practical arrangements was agreed. In accordance with the decisions taken, the drafting body ("Convention") was composed of one representative of head of State or Government from each Member States, sixteen members of the European Parliament, thirty members of national parliaments (two representatives from each National Parliament) and finally one representative of the President of the European Commission.[43] In addition, observer status was given to two representatives of the ECJ and two of the Council of Europe. The "Convention" was working outside the normal framework of the decision/legislation-making structure. It was already clear from the beginning that this *ad hoc* drafting body was not a body entrusted to draft a legally binding document, but rather an EU Charter on fundamental rights, which legal status should be determined at a later stage. In the Cologne European Council decision, it is mentioned that it is to be considered "whether and, if so, how the Charter should be integrated into the treaties". This "Convention" was neither part of the IGC 2000.

The composition of the drafting body is totally new. Never before has such a composition been used within the European Union. The drafting body did not have the power to produce a legislative act in the strict sense of the word.[44] According to the mandate given by the Cologne European Council, the task for this drafting body was

[43] This decision is in accordance with the Cologne European Council decision of 3-4 June 1999, Annex IV, p. 76.

[44] In this context, strictly speaking one can hardly say that this "Convention" reflects the concept of a "legislator". This drafting body is to be considered as no more than an *ad hoc* body codifying applicable fundamental rights within the EU. Furthermore, it is to be kept in mind that this drafting body of the EU Charter did not have mandate to determine the legal status of this EU Charter. Helander, 2001, p. 57.

not to produce a new legislative act concerning human rights/fundamental rights protection within the EU. On the contrary, the aim and objective for this drafting body was to codify *applicable* fundamental rights based on the ECHR, common constitutional traditions of Member States also including economic and social rights as far as they could be formulated as individual rights. In other words, to give concrete content to the wording used in article 6 (2), which prescribes 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". The working method of the "Convention" were intended to reflect the political nature of the representation chosen by the European Council bearing in mind the predominant place reserved for the parliamentary representation. This solution is certainly new and innovative. In a speech given on 17.12.1999, Mr. Vitorino, representative of the Commission in the drafting body, pointed out that never before has a Community/Union act been drafted by a composition including both representatives of Member States and representatives of the European Union. He also welcomed this innovatory configuration where democratically elected representatives of national parliaments and from the European Parliament form the parliamentary predominance of the drafting body. It is to be noticed that Mr. Vitorino was convinced that the "wise combination of the Community and national sides and, above all, the parliamentary predominance will help bolster the draft Charter's legitimacy in the eyes of a public which is often critical of the complex decision-making machinery at European level". [45]

The Cologne European Council set the timetable and the procedural framework for the drawing up of the Charter. The European Council asked the Finnish presidency to take the necessary steps prior to the Tampere European Council meeting in October 1999. The Council had to decide the issue of the composition of the drafting body, the

[45] CHARTE 4105/Body 1. p. 16.

chair of the drafting body and procedural questions. The Tampere European Council reached agreement on the composition and working methods of the "Convention". Agreement was reached prior to the Tampere European Council meeting concerning the three component parts the drafting body (representatives of the Heads of State or Government, members of the European Parliament and members of the national parliaments) to be represented in the "Convention". However, the question concerning the Chairmanship of the drafting body was to some extent controversial. Three options were discussed: a) the representative of the Presidium chair, b) permanent chairman, c) permanent chairman to be determined by the drafting body itself. A large majority of the Council supported the idea that the drafting body should be chaired by the representative of the Presidency of the Council, given the link which existed between the drafting body and the European Council and having in mind the responsibility of the Presidency to lead the work to a successful conclusion. The other option was to select a permanent Chairperson to be designated for the duration of the body's work in order to ensure efficiency and continuity of the proceedings. The latter option was chosen.

With regard to the procedural questions, a Presidium (drafting group) was established composed of the Chairman, vice-chairpersons assisted by the General Secretariat of the Council having the task of elaborating preliminary draft text versions. In practice, this meant that the secretariat of the European Council and its task force had an important role in proposing new draft texts first to be elaborated by the Presidium to be further discussed by the "Convention". With regard to the adoption of the Charter by the drafting body, the model of consensus was chosen. The Chairperson working closely with the vice-chairpersons concluded that the Charter should be adopted by the "Convention" as soon as they were convinced that a consensus had been achieved. The work of the "Convention" was divided into plenary sessions and working group meetings.[46] During a working group meeting, no formal decisions were taken. The

[46] The "Convention" met in working group meeting formation nine (9) times and in plenary meeting formation seven (7) times during the whole drafting process. The Presidency met twenty-one (21) times.

alternate members of the "Convention" had the right to speak during a working group meeting. During a plenary session, only permanent members of the "Convention" had the right to speak. The "Convention" decided not organise itself into working groups based on different categories of rights, due to reasons of difficulties in coordination and ensuring the openness of the proceedings to all the members of the "Convention".

Is the statement from the European Council and an attempt to try to bring the EU closer to the citizens by involving democratically elected representatives from both the national and European level? Certainly, one can consider the drafting body to reflect the democratic nature of the drafting process. However, democracy ultimately rests on the representative role of governments, responsible to elected national Parliaments and that the latter does have a decisive role in either accepting or rejecting any new dimension of supranational cooperation. This solution does certainly reflect the idea of bringing the European Union closer to its citizens in a field that has great relevance for the individual vis-à-vis the Union. One must however draw the conclusion that in introducing such a composition for the drafting process, the European Council had in mind the question of the legitimacy of drawing up a EU Charter of fundamental rights in the eyes of the European citizens.[47] The procedure in the drafting process was to a great extent transparent giving the possibilities for anyone to comment on the draft during the whole drafting procedure.[48] This was a way of seeking popular legitimacy for the political entity among the citizens.[49] However, critique has also been raised that the drafting process was not genuinely a participative process in nature, as the Charter initiative was aimed at strengthening the protection of the citizens, but rather composed of only institutional representatives from national and European level excluding for instance representatives of civil society.[50] The Tampere European Council invited "other bodies, social groups or experts" to give their views on the drafting process, but

[47] Carrasco Macía, 2001, p. 188.

[48] All the documents submitted to the "Convention" during the drafting process were published on the Internet. http://db.consilium.eu.int/df/home.asp?lang=en

[49] Burca, 2001, p. 130.

representatives of civil society were excluded from formal involvement in the drafting process. Representatives of civil society had however the opportunity to address the "Convention" throughout the whole drafting procedure.[51] Another critique that has been raised is the timeframe that within the "Convention" had to submit a final draft version. The timeframe given for this demanding task of drafting a fundamental rights catalogue was very limited. Already at the starting point, the Cologne European Council gave a timeframe for the drafting body to elaborate the fundamental rights catalogue. This approach taken by the European Council has to be considered as somehow questionable. It has been criticised that the timeframe did not allow for an effective consultation process of independent experts and representatives of NGOs.[52] Why did the European Council stress the need for a quick solution bearing in mind that the discussion of drawing up a fundamental rights catalogue has been discussed within the Community/Union context already since the 1970s? On the other hand, voices have been raised also in favour of limiting the timeframe given by the Cologne European Council. This has been seen as the "secret of success". It is true that the "Convention" succeeded within the given time limit and that must certainly be seen as a success in itself. In drafting a fundamental rights catalogue for the European Union, the starting point for this project was to draw up a non-legally binding instrument. In the light of this approach taken by the European Council, it is somehow easier to set up a new composition to elaborate a new legally non-binding instrument outside the normal complex norm-setting structure.

A question that one could ask is what would happen if the Charter, after some years of experience, is seen as unsatisfactory and before the Charter were to be incorporated into the Treaties, there would be willingness to change the content of the

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[50] Ibid. p. 131.

[51] Some NGOs have also expressed their satisfaction concerning the transparency and method of preparation of the Charter.

[52] House of Lords, Committee on European Union, Eighth report "EU Charter of Fundamental Rights", 16.5. 2000. www.parliament.the-stationery-office.co.uk/pa/ld199900/ldselect/ldeucom/67/6701.htm. 2.1. 2001.

Charter. First of all, is it possible to change the content of the Charter? Who has the competence to change the content of the Charter if it is felt necessary? The "Convention" was an *ad hoc* body created especially for elaborating the EU Charter and was by no means part of the IGC 2000. It was created solely for the elaboration of the Charter and once this work was finished, the task of the "Convention" was completed. However, whether it is desired to change the content of the Charter, this should be done by way of a similar composition and that the text could not amended by a different kind of body or institution. The European Council created a special body for the elaboration of the Charter. Therefore, also the same body and only the same body should have the authority to amend the Charter if it is felt necessary. The European Council should give the Convention a new mandate in order to amend the material content of the Charter if so desired.[53] In other words, it is questionable whether the European Council is in a position to make any changes concerning the content of the Charter if and when the Charter will be incorporated into the treaties. Therefore, the "Convention" had to keep in mind that the outcome of the process had to be a compromise that could politically be agreed by all the Member States. The European Council, primarily having the Nice European Council in mind, only two choices. It could either reject the Charter presented by the "Convention" or accept the final outcome. The question concerning the formal legal status of the Charter is on the other hand to be determined by the Member States. It is however highly unlikely that Member States could reach consensus on the amendments and that it is likely that the Charter will be incorporated into the treaties as such. The question whether the Charter will be incorporated into the treaties is a matter for the ICG.

If one of the political objectives was to legitimise the need to draw up a fundamental rights catalogue, at the present stage of the Union's development and in the eyes of the European citizens, the innovative idea of the composition of "Convention" must been seen as a success. Perhaps more of a problem than the

[53] Discussion with Mr. Clemens Ladenburger of the Legal Service of the European Commission on 15 February 2001 in Brussels. However, this is a very problematic question that needs to be further elaborated.

composition of the "Convention" was the timeframe that the "Convention" had to work within. Another problem is related to the procedural question concerning the rules of decision-making or perhaps the lack of rules concerning the decision-making within the "Convention". The Chairman, Mr. R. Herzog, felt that is was necessary to work on the basis of a consensus rather than holding numerical voting. In other words, concerning the rules for deciding when a discussion on any particular right was considered as closed, the chairman had a decisive role in ending the debate "after broad enough consensus had been reached". In this respect, the Chairperson together with the Presidium had substantial power in the drafting process. Certain members of the "Convention" have commented upon the difficulties in reaching or identifying conclusions of a particular discussion.[54] If a similar kind of compositions will be used in a different context, the procedural questions have to be addressed more thoroughly.

2.2. *General discussion during the drafting process*

Having in mind the Cologne European Council decision, it was clear from the very start that the EU Charter should contain both civil and political rights as well as economic and social rights. This has certainly not always been the case in the discussion on the protection of fundamental rights within the European Community/Union. For example, 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 in a fundamental rights catalogue.[55] Social rights are not only less capable of being formulated in a clear and unequivocal manner than civil and political rights, but also they are also less susceptible for direct application and enforcement by the courts.[56] The inclusion of

[54] Ibid.

[55] Bulletin of the EC – S 5/76, Annex.

social rights into a community catalogue of fundamental rights would probably have an effect on the judicial protection according to Bernhardt.[57] 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 of economic and social rights in the short term. The general feeling at that time was that agreement could not be reached between Member States on the content of, in particular, economic and social rights.

In accordance with the agreement within the "Convention", the secretariat suggested that the starting point for the drafting work should be that no definitive distinction could be made between the main types of rights, i.e. civil and political rights and economic, social and cultural rights. The Chairman asked the secretariat of the "Convention" to draw up a first preliminary draft version for a Charter based on Community Treaties, international human rights conventions, and national constitutions including various Community texts to be discussed by the "Convention".[58] Among several members of the "Convention", it was felt that in accordance with the Cologne European Council decision, the EU Charter should only include fundamental rights that are recognized at the Union level. However, the problem with this approach was that it is difficult to recognize which rights are to be considered as existing fundamental rights within the Community legal order deriving from international treaties and constitutional traditions of member states. During the second meeting of the "Convention" 1-2 February, the main questions discussed were focused on the legal status of the Charter and how this should reflect the writing

[56] The concept of economic and social rights has been subject for debate and controversy. Some see them as not "true individual rights", but rather as programmatic rights or objectives requiring positive action by the State. However, some argue that at least some economic and social rights are by nature justiciable. For a discussion on the legal nature of economic and social rights and the issue of justiciability, see, Scheinin, 2001, pp. 29- 54.

[57] Ibid.

[58] CHARTE 4112/00, Body 4. The first draft was divided in civil and political rights, rights of the citizens of the union and in economic and social rights/objectives.

process. Some of the members of the "Convention", in particular members of the European Parliament, stressed the need to draw up a legally binding instrument. On the other hand, certain members were of the opinion that a political declaration should be the aim and nothing more. These opinions reflected also the views on whether the Union is developing into a federal state. Members in favour of a federal state generally argued for a legally binding EU Charter. The Chairman, Mr. Herzog, stressed that despite of the fact that the "Convention" did not have the mandate to decide upon the legal nature of the Charter, the work should be done having in mind that the Charter could be integrated into the treaties as such.[59] According to the Chairman, the EU Charter should also be drafted in terms of rights rather than in terms of principles. He underlined that it was important to draft the EU Charter in a way that it could be inserted into the treaties. In other words, it should be drafted "as if" the Charter would become a legally binding document. The "Convention" made it clear that the decision of the final legal status of the Charter was a political decision that is to be taken by the Member States. The question of the relationship between the Charter and the ECHR was frequently raised during the drafting process. The "drafting group" (Presidium) had prepared for the working group meeting on 24-25. 2. 2000 a first outline on civil and political rights for a draft Charter to be discussed by the "Convention".[60] During the meeting, the question concerning the relationship between the EU Charter and the ECHR gained attention.[61] The issue raised was to what extent the wording of rights could differ from the wording in the ECHR. The Chairman, Mr. Herzog concluded from the discussion that it would be important to try to formulate specific rights in identical terms with the wording of the ECHR in order to avoid any diverging interpretation. Mr. Herzog stated that the ECHR should be kept as the basis for the drafting and on an article-by-article basis consider whether it would be useful to "update" the wording of the ECHR. Furthermore, it was underlined that the ECHR

[59] EU Kokousraportti HELD435-8, 4.2.2000. EU:n perusoikeuskirjan valmistelukunnan kokous 1-2.2. 2000.

[60] CHARTE 4123/00, Convent 5.

[61] EU-Kokousraportti HELD586-200, 14. 7. 2000.

should not be the only human rights convention that should form the basis for the drafting of the Charter. Different opinions among government representatives became evident. One view presented was that the EU Charter should have an autonomous and an independent status in relation to the ECHR. Especially Spain, Portugal Greece, and Italy supported this view. The other option raised was to connect the EU Charter closely to the wording of the ECHR and the European Social Charter and to the jurisprudence of the European Court of Human Rights. Especially the United Kingdom, Sweden, Denmark, Ireland and the Netherlands supported this view. Furthermore, it was important to include a clause in the Charter that the level of protection should not be lower than that offered by the ECHR.[62]

The discussion of civil and political rights was less controversial and did not raise as much attention during the drafting process as the discussion concerning economic and social rights.[63] It was easier for the "Convention" to reach agreement on civil and political rights than on economic and social rights. Within the "Convention", one could easily detect different views on the question of economic and social rights. On the one hand, one could detect a view that human rights are indivisible and interrelated where it no longer is necessary to make a distinction between civil and political rights and economic and social rights. On the other hand, certain members of the "Convention" underlined that only justiciable rights should be included into the Charter and that certain social rights are by nature not directly enforceable in a court. This view reflected the idea that only judicially enforceable rights should be included in a fundamental rights Charter. The drafting group presented a first draft on social rights to be discussed by the "Convention" on 3-4 April.[64] The initial examination of social rights gave raise to a general discussion concerning the content and scope to be given to

[62] EU-Kokousraportti HELD435-16, 29.2. 2000.

[63] The number of amendments presented during the drafting process concerning civil and political rights including rights of the citizens of the Union was 606 and amendments concerning economic and social rights were 448. In total, 355 contributions were received of which 100 from the members of the "Convention" and 255 from the civil society. The "Convention" heard 67 non-governmental organisations and 13 applicant counties.

the economic and social rights bearing in mind the mandate given by the Cologne European Council. The question that arose concerned the binding value to be assigned to articles dealing with social rights. Some members of the "Convention" clearly pointed out that social rights could constitute a real added value with regard to the current situation. On the other hand, others were concerned about the power of decision-making being transferred outside the normal decisions-making structure of the Union resulting perhaps in the inclusion economic and social rights into the treaties.[65] A great deal of the members of the "Convention" was of the opinion that economic and social rights should be drafted in rather vague terms. This argument was partly based on grounds that future developments more easily could be taken into account and also because it simply would be easier for the Member States to accept the concept of social rights in the EU Charter.

Furthermore, drafting social rights in rather vague terms would make it possible to take into account different implementation mechanisms in the Member States. It was felt that it would be important to make a distinction between fundamental social rights and "other social rights" in that only certain fundamental social rights should be included into the EU Charter.[66] In general, within the "Convention", there seemed to be different views concerning fundamental social rights. On 5 June, the discussion concerning the concept of economic and social rights continued on a general level. The Chairman, Mr. Herzog, stated that the question is to what extent economic and social rights should be included into the EU Charter. It became apparent that the question of economic and social rights would be a compromise between France arguing for an extensive Charter of economic and social rights while the United Kingdom was in favour of only including "existing rights" putting into question the whole concept of social rights. The French representative for the French government, Mr. Braibant, argued that it would be impossible to think of a modern fundamental rights catalogue

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[64] CHARTE 4192/00, Convent 18 and CHARTE 4193/00. Convent 19.

[65] CHARTE 4304/00, Convent 30.

without the inclusion economic and social rights. According to Mr. Braibant, the mandate given by the Cologne European Council was an opportunity as well as a duty to include social rights into the Charter. He argued that social rights are existing rights within the Community legal order despite the fact that social rights haven't been included in a coherent way. Mr. Braibant did however underline the importance of the principle of subsidiarity with regard to economic and social rights. The views presented by the French representative were supported by the "Convention". If the concept of economic and social rights were left out from the Charter, the legitimacy of the Charter would be questionable. The UK representative, Lord Goldsmith, did not agree with the view that the Cologne European Council decision did state that it was a duty to include economic and social rights into the Charter. Lord Goldsmith underlined in his argumentation that one should not include principles into a fundamental rights charter, but only existing rights. He underlined that it was important not to alter new responsibilities for the Member States. The views presented by Lord Goldsmith gained support by the Swedish government representative Mr. Tarschys arguing in the same lines that economic and social rights should be drafted keeping in mind the principle of subsidiarity. According to Mr. Tarschys, Sweden does not want an international court to define the content and level of economic and social rights. According to Mr. Tarschys, the EU Charter should only contain such economic and social rights that are "deliverable rights".[67] Economic and social rights did raise questions concerning the difference between rights and principles. The "Convention" had to look for a compromise between the French approach where economic and social rights could not be separated from civil and political rights and the United Kingdom approach where economic and social rights could be included as principles, but not necessarily as justiciable rights. The United Kingdom was however willing to make a compromise regarding economic and social rights if a reference to national legislation would be inserted which would mean that Member States would not have to alter new

[66] EU-Kokousraportti HELD435-40, 8.5.2000.

[67] EU-Kokousraportti HELD435-47, 7.6. 2000.

responsibilities.[68] The question of economic and social rights was also problematic for Ireland. Both representatives of respective governments underlined their view that social rights are by nature different and not justiciable in the same sense as civil and political rights.[69] Despite of certain disagreement within the "Convention" concerning especially the status of economic and social rights, the "Convention" reached a consensus concerning the content of the Charter. This agreement was a result of the will, especially with regard to economic and social rights, to compromise by the United Kingdom and Ireland. Furthermore, it was felt that it was important to keep the deadline set out in the Cologne European Council decision in having a draft version of the EU Charter well ahead before the Nice European Council. One could say that the draft EU Charter certainly is a compromise reached within the "Convention". One could say that the United Kingdom played an important role in pressing for the inclusion in the Charter of references to national law and practise as well as concerning the principle of subsidiarity. Despite of all demands presented by the United Kingdom, the willingness to compromise reflects a change of attitude of the British government. The final version of the draft of the EU Charter was adopted by the "Convention" on 2 October 2000 after some 10 months of deliberation and was presented to the European Council in advance of its meeting in Biarritz on 13-14 October 2000.

[68] EU-Kokousraportti HELD1221-20, 18.9. 2000

[69] EU-Kokousraportti HELD1123-259.

2.3. General discussion by civil society actors concerning the legal status of the EU Charter

2.3.1. An NGO input to the discussion

The NGO input before and during the drafting process of the Charter was substantial. The Charter could be said to be a culmination of a campaign for the recognition of fundamental rights, which was conducted by NGOs and trade unions since the mid 1990s. During the German presidency in 1999, NGOs had lobbied the German Government in drawing attention on the need for the EU to formally recognise the importance of fundamental rights. After the decision of the Cologne European Council, the conclusions of the Tampere European Council stated that the "Convention" should consult the civil society during the elaboration of the Charter. The drafting of a EU Charter of Fundamental Rights for the EU was an open and transparent process. Various institutions and NGOs had the opportunity to address the "Convention" with their comments and suggestions concerning the drafting of the Charter throughout the whole procedure.[70] The drafting process activated many NGOs to give their view of the process and the content of the Charter. Naturally, different NGOs and other institutions have different agendas. In this study, the aim is to study whether these various NGOs have a common view primarily with regard to the question of the legal status of the EU Charter. The aim is to focus on a general level using the arguments presented by joint statements given by NGO networks in order to get as broad a picture as possible rather than focus on a specific NGOs unless it is considered necessary. Are the NGOs arguing for a legally binding Charter or for a political declaration and what are the main arguments concerning the legal status?

The *Advisory Council on International Affairs*[71] submitted a general report concerning the EU Charter in May 2000.[72] The Advisory Council discussed in its report

[70] The concept of NGOs is dealt with in a broad sense.

the adoption of the EU Charter as an alternative to accession of the EC/EU to the ECHR. In its report, the Advisory Council on International Affairs favoured the adoption of a legally binding Charter as the best alternative to the accession of the EU to the ECHR.[73] To adopt a legally non-binding instrument is certainly the least dramatic approach, but not preferable as it would not add any legal protection and would give false expectations among the general public. The Advisory Council on International Affairs underlined certain essential criteria for the EU Charter. Such criteria were the interrelationship and indivisibility of civil and political rights and economic and social rights. The EU has emphasized the interrelationship and indivisibility of all human rights. It is clear from the developments in international human rights doctrine that the classical distinction between legally enforceable and legally non-enforceable rights no longer corresponds to the distinction between civil and political rights and economic and social rights.[74] The second criterion concerned the question of discrimination between EU citizens and third-country nationals. Human rights are by nature not discriminatory in applying to everyone. However, within a EU context, the question concerning distinction between EU citizens and third-country nationals is highly complex. The general point of departure should be that "third-country nationals should have the same rights as EU citizens unless there are objective and reasonable grounds for departing from this general rule…"[75] Furthermore, the Advisory Council underlined the importance of the expansion of the existing legal remedies. The current criteria is that action taken by the EU institutions should be of "direct and individual

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[71] The advisory Council on International Affairs is an independent advisory body to the Dutch Government and Parliament.

[72] CHARTE 4451/00, Contrib. 305. The Dutch Ministry of Foreign Affair asked the Advisory Council to prepare an advisory report on the proposed Charter.

[73] The Advisory Council sees the EU Charter as "an intermediate stage, whose direction can best be determined once it is clear what the long-term perspective is". Ibid., p. 8. The emphasis is very strongly on the EU's accession to the ECHR as the far most preferable option together with accession to the ESC and to the ILO "human rights" conventions.

[74] The advisory Council underlined however that this does not mean automatically that all rights have the same legal force. Ibid. p.12

[75] Ibid. p.15.

concern" for the individual in order to gain access to the ECJ in accordance with article 230 TEU.

The *International Institute for Rights of Nationality and Regionality* submitted a report on the EU Charter touching upon the question of the legal status.[76] The institute drew attention to both a political declaration and a legally binding document. With regard to a political declaration, a comparison to OSCE instruments was made stating that a clear advantage of such a solution is the inclination of the negotiating parties to make farther reaching commitments and to formulate the provisions more clearly than they would be if a binding international treaty would be negotiated…"[77]. However, it cannot be denied that such political arrangements did not entail a significant improvement with regard to the substantive legal position of the individual within the OSCE area. The EU Charter could be adopted as a policy agenda leaving it to the ECJ to incorporate the Charter into the human rights doctrine of the EU through its jurisprudence. This solution is however not favoured due to the fact that the ECJ is reluctant to declare provisions directly applicable unless a provision is "sufficiently precise and unconditional". Therefore, the EU Charter should be integrated into the treaties in a way that the ECJ have jurisdiction over the rights also with regard to the "second and third pillars".[78]

On 2 March, the drafting Committee heard 4 NGOs, the *Permanent Forum for Civil Society*[79], the *European Trade Union Confederation* (ETUC)[80], the *platform of Social NGOs*[81]

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[76] CHARTE 4301/00, Contrib. 173.

[77] Ibid. p. 11.

[78] Ibid. p. 12.

[79] The Permanent Forum of Civil Society is composed of more than one hundred Non Governmental Organisations and citizens' associations, working at the European, national or local level in different area of activities (trade unions, environmental groups, social work, cultural action).

[80] The ETUC is composed National Trade Union Confederations from 28 countries and 14 European Industry Federations with a total of 59 million members. In addition there are 6 National Trade Union Confederations and one European Industry Federation with observer status. The ETUC is recognised by the European Union, by the Council of Europe and by EFTA as the only representative cross-sectoral trade union organisation at a European level. The process of European integration, including recent developments such as the single Market and Economic and Monetary Union is a challenge for the

and *NGOs-Fundamental rights co-ordination*.[82] Particular emphasis were put on the question of social rights, where it was underlined by these NGOs that the "Convention" had a real chance to make substantial progress towards recognition of these rights having the revised European Social Charter as the basis for the drafting of social rights, in particular trade union rights, the right to a minimum wage, the right to housing and the right to protection from social exclusion. These NGOs also emphasised that it was important that the EU Charter should not be addressed solely to the EU citizens within the meaning of the treaties, but also with regard to third-country nationals. Furthermore, it was felt that is important to make a clear distinction between enforceable social rights and social objectives. On the basis on of the discussion with the above-mentioned NGOs, the drafting group decided to organise a hearing for the NGOs to present their views to the "Convention".

On April 27th, the "Convention" organised a public hearing for NGOs to give their views concerning the EU Charter to the "Convention". The "Convention" heard as many as sixty-six NGOs specialising in human rights issues. The hearing was designed to give the opportunity for the civil society to give their comments and suggestions on the drafting of the EU Charter. Several comments made concerned social rights and the question of non-discrimination and equality. However, quite a few NGOs did not make any specific statement concerning the legal status of the EU Charter. This is due to the fact that many NGOs tried to influence the outcome of a specific article in the EU Charter. Some NGOs took actively part in the discussion during the drafting process separately but also by forming or using existing networks with other NGOs. In general terms, one could sum up the positions of the NGOs submitted to the "Convention"

European Trade Union, where the changing setting in which European Trade Unions operate has changed fundamentally. This integrated economic area must be matched by a social and collective bargaining dimension, which can safeguard and promote workers' rights – and to achieve this, trade unions must be capable of speaking with a single voice at a European level.

[81] The Platform of European Social NGOs was established to promote co-operation between Social NGOs and the European Union. It is composed of 30 NGOs operating in the social field representing a wide range of different groups throughout the EU.

[82] CHARTE 4148/00, Convent 12.

concerning the legal status of the EU Charter by stating that NGOs are in favour of a legally binding EU Charter. In looking for arguments to support this statement, the general argument used was that the EU should meet the expectations of the people of Member States by making fundamental rights more visible and directly enforceable. A EU Charter being merely a political declaration would miss the aim of recognising basic rights and hopes of strengthening the citizen's acceptance of the EU through clearly recognisable fundamental rights. For example, Eurolink Age[83] argued that it is important that the Charter is legally binding which individuals could ultimately rely upon. The argument was based on the Cologne European Council statement that the aim is "to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens". Unless the Charter is applied in practice, the original goal set out by the European Council becomes unacceptable. The Eurolink Age underlined in particular that the fundamental rights should be accessible to all without making any distinction between EU Citizens and other people not protected by the EC treaties. If the EU Charter is to be relied upon individuals as a legally binding document where fundamental rights are enforceable through the national judicial systems and the ECJ, legal procedures must also be made more efficient.[84]

An important aspect raised by the NGOs was the universality and indivisibility and that human rights are interrelated where it no longer could be justified to make a distinction between civil and political rights and economic and social rights. The NGOs very often argued for that EU Charter must be applicable for all people within the jurisdiction of the European Union. *Platform of European Social NGOs* together with the *European Trade Union Confederation* (ETUC) raised a joint campaign, "Fundamental Rights: The Heart of Europe", campaigning for a legally binding EU Charter to be incorporated in the treaties. This joint statement by the NGOs and the ETUC underlined

[83] Eurolink Age is a network of NGO organisations throughout the EU promoting good policy and practise on ageing in the EU.

[84] CHARTE 4293/00, Contrib. 165.

the importance of fundamental rights as an indispensable part in building the social dimension and safeguarding the developing of the European social model. These NGOs and ETUC together argued for a legally enforceable instrument guaranteeing civil and political rights as well as economic, social and cultural rights. A political declaration would fall short considering what is needed in constructing the EU also with regard to the enlargement process. An argument presented is that the ECHR and the European Social Charter are "neither broad enough, nor sufficiently enforceable to guarantee a full range of civil, political, economic and social rights".[85] The EU Charter could instead be the first instrument providing for enforceable wide-ranging human rights.[86] The NGOs and the ETUC underlined that fundamental rights protection must become an integral and coherent part of the commitments of the Union with regard both to its internal and the external dimension. These NGOs underlined that if the EU is to achieve its stated aim of a citizens Union, then the fundamental rights must be made visible to the people living in Europe including the right to seek legal redress if fundamental rights are violated.[87] Rights included in the EU Charter should be subject to enforcement on an individual or a collective basis where the ECJ should take into consideration jurisprudence of competent international bodies of the UN, ILO and the European Court of Human Rights in order to avoid lowering the level of protection in the EU. The EU Charter should avoid making a distinction between EU citizens and third-country nationals. Fundamental rights were seen as an indispensable part of strengthening the social dimension of the EU. For example, *Solidar*[88] stressed the link between the Charter and the Social Policy Agenda, which was adopted during the Nice European Council as being the instrument for strengthening the social rights highlighted in the Charter giving effect to these rights.[89] Solidar furthermore underlined

[85] CHARTE 4194/1/00 REV 1, Contrib. 75.

[86] Ibid.

[87] CHARTE 4387/00, Contrib. 246.

[88] Solidar is an independent international alliance of 24 NGOs historically linked to the free and democratic labour and trade union movement. Solidar believes in the indivisibility of social, economic, civil, political, and cultural human rights and affirms that equity can best be achieved through solidarity.

that the drafting proved that the Charter is a living and dynamic document taking into account the evolution of rights, such as the inclusion of rights concerning biotechnology. With regard to the status of the Charter, initially a reference in article 6 (2) TEU to the EU Charter would be preferable followed by a process examining how the Charter could become legally binding within the Treaty.[90]

International Federation of Human Rights[91] (FIDH) underlined the importance of universality of human rights. All individuals under the jurisdiction of the European Union Member States should benefit from the EU Charter. The EU Charter should not establish categories of beneficiaries distinguishing between European citizens and other third-county nationals, but the rights included in the EU Charter should apply to all human beings and rights enshrined to EU citizens should be an exception to this general rule. Human rights are also indivisible, interdependent and of equal importance. Therefore, it would desirable that the EU Charter should contain all human rights making no distinction between civil and political rights and economic and social rights. In other words, the EU Charter should address the universal character of human rights, recognise equality between women and men, recognise the principle of non-discrimination, protect the rights of minorities, protect collective rights and the rights of trade unions and associations, declare that the Charter secures indivisible rights, secure transparency and the right to information, recognise the right to democracy and supplement and strengthen and build on existing fundamental rights based on Council of Europe, UN and ILO conventions. This could be done either by incorporating the EU Charter into the treaties or by adopting a separate additional protocol to the treaties.[92] The elaboration of the EU Charter should however not rule out the possibility of the EU

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[89]Presidency conclusions of the Nice European Council, Annex 1.

[90] http://www.solidar.org/Document.asp?DocID=2277&tod=25557, 11.12.-00.

[91] International Federation of Human Rights brings together 105 human rights organisations from 86 countries. It provides them with a network of expertise and solidarity, as well as a clear guide to the procedures of international organisations. The FIDH is working for the implementation of all the rights defined by the Universal Declaration of Human Rights and the other international instruments protecting human rights.

accession to the ECHR and to the revised European Social Charter. By adopting the EU Charter, Member states would take a big step towards the accession of the EU to the ECHR. FIDH made a recommendation to include the EU Charter into the Treaties in order to make it a legally binding document.[93]

Amnesty International saw the EU Charter as a positive initiative taken by the EU in that it offers a chance for real improvement in the human rights protection within the EU.[94] Amnesty International stated that the incorporation of the Charter or adopting a protocol to the EU Treaties would be the best way of strengthening fundamental rights protection and is arguing for incorporation of the Charter into the treaties provided that certain conditions are fulfilled. Amnesty International gave the following reasoning: First, the status of human rights in the EU legal order would be clarified correcting the current uncertainty concerning human rights protection in the EU. Secondly, human rights would obtain enhanced status in the EU legal order ensuring that human rights are not considered as "inferior law" as being subordinated to "higher law" of the economic freedoms in accordance with the Treaty of the European Community. Thirdly, a new layer of human rights protection would be established, while the option of accession of the EC/EU to the ECHR would still be available.[95] A legally binding Charter would however have to meet certain conditions in order to constitute a real improvement of human rights protection within the EU: 1) The adoption of the EU Charter must not result in a possible diminution of the current level of protection that human rights enjoy in its Member States under the ECHR or any other relevant international human rights instruments. 2) The EU Charter should take into account the developments in international law, both of treaty and customary law as well as developments in certain soft law instruments including also new rights. In other words, the Charter should go beyond the minimum level of protection afforded by the ECHR

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[92] CHARTE 4324/00, Contrib. 190.

[93] CHARTE 4243/00 ADD 1, Contrib., 106.

[94] CHARTE 4290/00, Contrib. 162.

[95] Ibid. p. 4.

and other international human rights instruments adopting the highest level of protection for individuals within its jurisdiction. 3) Everyone's fundamental rights must be recognized without discrimination in accordance with this fundamental principle in international human rights law. Nobody's fundamental rights can be subject to discrimination on account of national origin. 4) The EU Charter must be justiciable. Necessary treaty amendments should be adopted to ensure that the ECJ would have jurisdiction in all the "three pillars" in their entirety in relation to human rights violations.[96] In sum, Amnesty International is arguing for a legally binding document provided that the EU Charter is guaranteeing fundamental rights for all individuals without discrimination. The EU Charter should also strengthen the current level of protection within the EU being fully justiciable by the ECJ including national courts in implementing EC/EU law. With regard to the scope of application, Amnesty International stated that also different actors created by the TEU apart from the traditional actors, particularly within the framework of second and third pillars, should be bound by the EU Charter as they are likely to have an effect on fundamental rights. Furthermore, Amnesty International argues in favour of an EU accession to the ECHR. This is due to the fact that EU activities lack the international accountability taking into account that Member States have ceded increasing areas of competence to the Union. Amnesty International is arguing for accountability of states and supra-national bodies for human rights compliance with international human rights enforcement mechanisms. This would however require a Treaty amendment. An accession by the EU to the ECHR could also be one way of solving the problem of diverging interpretations between the ECJ and the European Court for Human Rights concerning the interpretation of the ECHR.[97]

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[96] Amnesty International argues for a treaty amendment for improving the access for individual complaints concerning violation of fundamental rights and that the ECJ should have jurisdiction in all the areas of EU activity, including title V in Common Foreign and Security Policy and title VI in justice and Home Affairs TEU.

[97] The question of accession will be discussed in chapter 4.

2.3.2. Discussion among labour organisations

It is fairly easy to distinguish a trend among Trade Union Confederations and organisations that they are in favour of adopting a EU Charter of fundamental rights. With regard to the legal status of the Charter, the Trade Union Confederations support the idea of a political declaration based on the argument that a political declaration would not jeopardise legal certainty. Especially the British Trade Union Confederations took an active part in the discussion arguing for a political declaration with regard to the legal status. The *Confederation of British Industry*[98] (CBI) supported the European Council's initiative to adopt a EU Charter of fundamental rights making rights more visible to the European citizen. The CBI underlined that the EU Member States already are part of a successful system of human rights protection (ECHR) and that therefore the EU Charter should not compete with, but rather complement the existing system. This could be done by only including applicable and recognized rights in the EU and not by creating "new rights". The CBI supported that the EU Charter should be adopted as a political declaration clearly setting out the scope and status of fundamental rights, which are recognized by the EU. A political declaration would be more flexible in highlighting fundamental rights within a wider context in comparison with a legally binding document. Adopting a legally binding document would in accordance with the CBI undermine the existing rights protection system in Europe. The overlap of jurisdiction between the European Court of Human Rights and the ECJ would eventually lead to different interpretation of fundamental rights creating legal uncertainty. This would according to the CBI also lead to two-speed system between EU members and non-EU member states in Europe resulting in weakening of the Council of Europe system. The CBI argued that that the inclusion of new rights into the Charter is not acceptable as this could only be crated through the process of an ICG. The CBI argued that the intention of the European Council was not to create new rights by setting aside the normal decision making process in the EU. Furthermore, the CBI

[98] The Confederation of British Industry is the voice of British business, representing more than 250.000 employers, large and small, industrial and commercial.

argued that it would be dangerous to set up political aspirations especially on economic and social issues in a "rights language", but must be recognized as such and not being given legal status.[99] The term "fundamental social rights" is a confusing concept for the CBI. Fundamental social rights as defined in the European Social Charter and in the 1989 European Social Charter are political aspirations, values and policy objectives without any legal effect in the views of the CBI and should therefore not be included in a EU Charter as not having the same justiciable character as civil and political rights.[100] The CBI expressed its concerns of extending the list of applicable rights and making the Charter legally binding. A legally binding EU Charter would in the views of CBI aim at developing a European Constitution by creating new legally binding fundamental rights at the EU level. This would not be in line with the mandate given by the Cologne European Council.[101]

The *Union of Industrial Employers' Confederation of Europe*[102] (UNICE) underlined that it is vital that Europe should remain competitive in a global and open trading system. This is the best way to guarantee social well-being and employment. The UNICE stressed that the four fundamental freedoms recognized in the Treaties (free movement of persons, goods, services and capital) should explicitly be included in the Charter as these freedoms represent an important dimension of the European

[99] CHARTE 4226/00, Contrib. 101.

[100] CHARTE 4298/00, Contrib. 170.

[101] The *Engineering Employers' Federation* (EEF) is arguing in the same lines as the CBI, especially with regard to "new economic and social rights". The EEF is arguing for a political declaration in the same line with CBI. The EEF is representing the UK engineering industry. It is a nationwide federation of 13 Regional Associations and the Engineering Construction industry Association. The EEF CHARTE 4317/00, Contrib. 183. Furthermore, the *Irish Business Berau* (IBB) and *Employers Confederation* (IBEC) underlined in their joint statement on 27th April that the question of the legal status is a key question. The binding nature would not be a problem if the Charter would only contain justiciable rights. CHARTE 4273/00, Contrib. 146.

[102] The Union of Industrial and Employer's Confederations of Europe (UNICE) has as members the 34 principal business federations from 27 European countries, plus 6 federations as observers, covering the continent from Ireland in the West to Turkey in the East; from Iceland in the North to Malta in the South. The mission is to promote the common professional interests of the firms represented by its members; to inform the decision-making process at European level so that policies and legislative proposals, which

citizenship. In accordance with the UNICE, the scope of application of the Charter should be limited to the institutions and bodies of the EU within the present context of EU legislative competence in accordance with the Union treaties. The EU Charter should not be a constraint on the Community's action and should not give a free licence to legislate. The UNICE were in favour of the making fundamental rights more visible for the European citizens giving a clear statement of the common values of democracy, tolerance and liberty for all people although respecting the European diversity. The UNICE reminded that the social and employment chapters in the treaties have set out the powers of the Union to act on a European level. Any change to the present state should be an IGC matter. In other words, the UNICE underlined that the EU Charter should not include "new rights" but rather codify applicable fundamental and inalienable rights. Under the Social Chapter, subjects such as pay, the right to association, the right to strike and the right to impose lockout are excluded from the present legislative competence of the Union and should therefore not be included into the EU Charter. With regard to the legal status, The UNICE did not take a clear stand in whether the EU Charter should be a legally binding document or merely a political declaration. The UNICE stated however that it is of paramount importance that the EU Charter should not give rise to legal uncertainty. The EU Charter should not be a compromise of applicable rights in international human rights instruments nor raise a conflict of jurisprudence between the ECJ and, in particular, the European Court of Human Rights. Furthermore, the UNICE stressed that overlapping jurisdiction should be avoided.[103]

The *European Study Group*[104] welcomed the EU Charter, as it would raise the profile and visibility of human rights within the EU. The European Study Group stated that the EU Charter should be clear and simple based on applicable human rights not

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affect business in Europe, take account of companies' needs and to represent its members in the dialogue between social partners enshrined in the Treaty on European Union.

[103] CHARTE, 4236/00, Contrib. 109.

filling any gaps or adopting any "new rights" into the Charter. The European Study Group supported the statement given by the Cologne European Council that the EU Charter should be a political declaration rather than a legally binding Charter. The Member Companies of the European Study Group are firmly of the view that that the EU Charter should be a "showcase of existing rights" materialising the governing principles of the European Union. Along the lines of UNICE, the European Study Group did question the competence of the "Convention" to include certain social rights into the EU Charter as remaining outside the scope of EU legislative power. The European Study Group underlined that the legitimacy of the Charter will be questionable if "new rights" are included into the Charter by not using the existing decision-making structure.[105]

The *federation of German Industries* (BDI) and *Confederation of German Employers Associations* (BDA) submitted a joint statement. The German business and industry supported the strengthening of the integration by adopting a EU Charter of fundamental rights. The view of the BDI and BDA is that even if the EU Charter would be merely adopted as a political declaration, is would be binding in law of the reason that the ECJ will use the EU Charter as an important source in its future jurisprudence.[106] On the other hand, the Trade Union Confederation representing the employees or the workers was clearly in favour of a legally binding EU Charter. A Charter based on a political declaration would fall short of the needs and objectives set out by the Cologne European Council according to the *European Trade Union Confederation* (ETUC). ETUC adopted a resolution in September 1999, "civic, social and trade union rights into the European Union Treaties", where it stated its position with regard to the EU Charter.[107] ETUC agrees fully with the European Council that there is

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[104] The European Study Group is an Association of private sector employers, all of who are substantial employers in the Members States of the EU.

[105] CHARTE 4403/00, Contrib. 260.

[106] CHARTE 4489/00, Contrib. 339.

[107] CHARTE 4124/00, Contrib. 19.

a clear need to make fundamental rights more relevant and visible in the eyes of the Union's citizens. The protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for the legitimacy of the Union. ETUC underlined that the social implications of the realisation of the European Monetary Union and the introduction of the EURO underpins the importance of securing fundamental rights at the European Union level. ETUC considered that fundamental rights are an indispensable part in building the Social Union and in safeguarding the European Social model. Fundamental rights cannot be separated from the European social model. The adoption of the EU Charter is also an important element in the realisation of the Citizen's Europe. The Cologne European Council did state whether the EU Charter would be integrated into the treaties. ETUC made a clear statement that solemn political declaration is not sufficient to meet the objectives of the EU. A real protection of fundamental rights implies the incorporation of the EU Charter into the treaties. The EU Charter should therefore be incorporated into the treaties. The ETUC stated that "above all, bringing the Union closer to its citizens requires political, civil, social and trade union rights- including cross-border sympathy action, including strikes- to be fully recognized by the Union and enshrined in the Treaty".[108] A Charter based on a political declaration would fall short of the needs and objectives set out by the Cologne European Council. ETUC argued for the incorporation in the Treaty in a binding manner an "EU Bill of Rights" based upon applicable core rights of international instruments combined with EU specific cross border and transitional rights. Reducing the Charter on fundamental rights to a solemn declaration would be unacceptable and would be an inadequate response to the expectations of citizens and to the goals of European integration and enlargement.[109] Workers and citizens could interpret merely a political declaration as a negative signal from the Union concerning real recognition by the Union of common values to be given the same priority as the

[108] Ibid. See also the Platform of European Social NGOs and ETUC´s joint campaign "Fundamental Rights: The Heart of Europe", CHARTE 4194/1/00 REV 1, Contrib. 75.

[109] Ibid.

economic co-operation. The views of ETUC correspond to a great extent with positions of the NGOs concerning the legal status of the EU Charter. Several NGOs and ETUC together argued for a legally enforceable instrument guaranteeing civil and political rights as well as economic, social and cultural rights and a political declaration would fall short considering what is needed in constructing the EU in the future. ETUC welcomed the fact that the EU Charter reflects the indivisibility of political, civil, social and trade union rights. Although the selection of social rights reflects a narrow interpretation of the existing rights formulated in a rather vague way, the EU Charter constitutes still an added value to the present protection of fundamental rights in the EU.

2.3.3. Discussion among the so-called federalist movement

In accordance with the Cologne European Council decision, the European Council stated that "*at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident*". This statement involves two separate notions, first of all the need to establish a fundamental rights catalogue as a result of the present stage of the Union's development and secondly to make fundamental rights more visible to the Union's citizens. What the European Council meant by stating "at the present stage of the development of the Union" is unclear and a very complex matter that has lately gained more attention.[110] The EU has developed from being at the beginning an organisation focusing on trade and commerce developing a single market to being a highly political organisation dealing with a whole range of issues. In short, there has been a transfer of power from the Member States to the EU, which also has meant that fundamental rights have become more a more important also in an EU context. One could talk about a

[110] Helander, 2001, pp. 58-59.

"rapid movement towards an ever closer Union".[111] The EU is an organisation in Europe, along with the Council of Europe and the OSCE, which is to a great extent concerned with ensuring that human rights are protected. Another feature is this context is also the continuing political discussion about federalism. The idea of adopting a Community catalogue of fundamental rights for the EU has by many been seen as a symbol for the development of the Union into a federal state. There can be no doubt about the importance of the status of fundamental rights and the binding nature seen from a federalist point of view. According to Antola, the elaboration of the EU Charter of fundamental rights could be seen as the first step towards the elaboration of a EU constitution.[112] Another question is what is meant by federalism. However, one could ask if one of the political goals in adopting a Charter of fundamental rights for the EU is to further develop the idea of a federal state in Europe seen in the light of the expression used by the Cologne European Council in their argument for a need of an EU Charter of fundamental rights.

The Chairman of the drafting body, Mr Roman Herzog made it clear in his opening speech after being elected as chairman, that the elaboration of an EU Charter of fundamental rights was *not* a project involving the idea of a federal state or talking about a European constitution. He underlined that the mandate was not to discuss fundamental rights of the European Union in the light of federalism.

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[111] An agenda was launched at a Conference held in Vienna in October 1998 "Leading by Example: A Human Rights Agenda for the European Union For the Year 2000". In this agenda, it was argued for why the EU needs to develop its human rights policy. These include: the rapid movement towards an "ever closer Union" and towards a comprehensive single market; the adoption of a single currency for close to 300 million people; the increasing incidence of racism, xenophobia and ethnic hatred within Europe; the tendency towards a "fortress Europe" which is hostile to "outsiders" and discourages refugees and asylum seekers; the growing cooperation in policy and security matters, which is not matched by adequate human rights safeguards; the increasingly complex political and administrative system that governs the Union and is supported by a bureaucracy with extensive powers; and the aspiration to bring at least five and perhaps as many as thirteen countries within the Union's fold in the years ahead. Report prepared for the *Comité des Sages* in Leading by Example: A Human Rights Agenda for the European Union for the Year 2000, p. 2.

[112] Antola, 2000, p. 26.

> We are not talking about a European Constitution here, and the issue is not whether in setting itself fundamental rights the European Union stands to gain in terms of statehood, which, incidentally, I don't believe it would. We are not talking about the emergence of a federal state, supervision by a constitutional court, or anything like that. Those are all issues, which will have to be clarified and decided on in their own time.[113]

However, lately the discussion about federalism in the context of this EU Charter has gained more attention. As noted above, the European Council in Cologne set out two arguments in support of the need to develop a EU Charter. It seems that the first notion, at the present stage of the Unions development", is certainly more politically controversial than the other objective, "making rights more visible", in arguing for the need of an EU Charter of fundamental rights. There can be no doubt that the project of drafting a catalogue of fundamental rights does have an important political dimension. Does the adoption of a EU Charter have institutional consequences beyond the fundamental rights question itself? Is the adoption of a fundamental rights catalogue a decisive step towards a federal Europe? In other words, is the adoption of the EU Charter related to a "hidden agenda" for reasons that might not be directly related to the question of an optimal system of protection for human rights within the EU and in Europe? This is very much a question that has lately gained attention. Is the adoption of the EU Charter related to a constitutionalisation of the EU? The ECJ has already in its case law referred to the treaties as being "constitutionalised" by stating that the EC Treaty is in fact the "basic constitutional charter of the Community".[114] Prof. J.H.H. Weiler has stated that that "the Community's "operating system" is no longer governed by general principles of public international law, but by a specified interstate governmental structure defined by a constitutional charter and constitutional principles".[115] The jurisprudence of the Court has been interpreted by Weiler as a

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[113] CHARTE 4105/Body 1. P. 9.

[114] Case 294/83, Parti Ecologiste, "Les Verts" v. European Parliament ECR (1986) 1339.

[115] Weiler, 1999, p. 12.

statement that the EU legal order has shifted or transformed into a constitutional legal order.[116]

The discussion among the so-called "federalist-movement" has been very much focused on arguments in favour of adopting a European constitution for the EU. In a number of pro-European circles, the feeling has been that the "Convention" could be of constituent or pre-constituent importance. Most of the constitutions of the world's democracies contain some kind of a catalogue of fundamental rights. Therefore, the elaboration of a fundamental rights declaration is seen as an exercise of a prominently constitutional nature. Among the arguments, apart from the introduction of the EURO, of the "federalist movement" used in need for a constitution are based on the ever-growing weakness of the democratic institutions, which constitute the guarantee of fundamental rights, in Member States of the European Union. This argument is based on the expansion of populist, xenophobic and authoritarian parties, mass employment and increasing international criminality, which are seen as threats to the democratic and social cohesion in Europe. Furthermore, the question of a democratic deficit of the EU institutions is seen as a problem of legitimacy of the EU. The current problem is not so much related to the absence of a declaration or even a legally binding fundamental rights catalogue but rather in the structural incapacity of the existing institutions at both the national and on EU level to resolve concrete problems. Therefore, the basic problem is not seen in drawing up a new declaration of rights but rather in the creation of a European federal power being capable of restoring the trust between its institutions and the citizens by defending the well-being and promoting the dignity of the Union's citizen. The vision is based on a Federal European Constitution proceeded by a preamble including fundamental rights. The critique raised among the "federalist movement" is based on grounds that the elaboration of the EU Charter is seen as a

[116] With the expression "constitutionalization of the Community legal order", prof. Weiler is referring to the doctrine of direct effect, doctrine of supremacy, doctrine of implied powers and the doctrine of human rights. Ibid. pp. 19-26. The "constitutional jurisprudence"of the ECJ can be found in cases such as Case 26/62 *van Gend en Loos v. Nederlandse Administratie der Belastingen*, ECR 1 and Case 6/64 ECR *585 Costa v. Enel*.

preamble without a constitution.[117] The Young European Federalists (JEF) and the Union of European Federalists (UEF) saw the elaboration of the EU Charter in a broader context arguing for not only a legally binding document but also as way of achieving an important step in the process of the constitutionalisation of the European Union. This EU Charter could be the embryo a EU constitution that should be elaborated by a similar kind of composition as the "Convention" to work on further elements of a European Constitution. The Young European Federalists saw the EU Charter as an instrument to achieve certain political goals.[118] The establishment of a Charter of Fundamental Rights of the European citizens is according to JEF a crucial achievement that could offer a first piece of a real European Constitution. JEF sees the establishment of a EU Charter as a mark the start of a new Europe focussed on moving towards a real Political Union. JEF is arguing for a radical reform of the Union's foundations and institutions leading to a "true European federal Constitution". JEF is strongly arguing for a legally binding Charter forming an integral part of the Treaties. A legally enforceable Charter would according to JEF enhance the legitimacy and credibility of the future work and actions of the Union institutions. The draft Charter was also seen as further evidence of a "new democratic method" in that the "Convention" was implementing its open and transparent proceedings.[119] However, the EU Charter is according to JEF far from being sufficient to mark the start of a new Union focussed on the European citizen. The EU Charter does not provide the union with a vision for new challenges facing European democracy, economy society and culture in the new millennium. However, JEF drew attention to two problems concerning the Charter. First, the question of the Charter's legally binding character has not been solved and secondly the Charter's role in paving a way to establishing a real European Constitution. A Charter, which is not directly enforceable in courts would widen the

[117] European Letter No. 14, May 2000. The "European Letter" is published by the Luciano Bolis European Foundation in support of the "Campaign for a European Constitution" run by the Union of European Federalists and the Young European Federalists.

[118] CHARTE 4262/00, Contrib. 135.

[119] CHARTE 4480/00, Contrib. 331.

gap between the citizens and the Union and would certainly be a "betrayal of expectations raised with the establishment of the Charter".[120] The Treaties should also be modified to allow the citizens of the Union to address the ECJ in issues included in the Charter. However, the draft EU Charter was still seen as far from being a sufficient mark to start a new Union focussed on the European citizens not providing a vision for the challenges facing European democracy, economy society and culture. Furthermore, JEF regrets that the concept of European citizenship still remains an empty word, as the Charter does not provide the right to citizenship where the citizens are given the power to decide the government and the policies of the Union. In other words, the Union is not implementing the fundamental principle of democracy.[121] Along the same lines as JEF, the Union of European Federalists insisted that the EU Charter must not be a substitute for a European Union Constitution in stating that the elaboration of the EU Charter is an important step towards a European Constitution.[122] The UEF argued also for the incorporation of the EU Charter into the treaties making the Charter a legally binding document. The UEF sees the elaboration of the EU Charter of fundamental rights as an important step in the constitutionalisation of the European Union. The discussion by these two NGOs is more focused on the constitutionalisation of the EU than rather on the EU Charter in itself. The support for the EU Charter by JEF and the UEF is strongly connected to the idea of arguing for the need of a constitution for the EU.[123]

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[120] Ibid.

[121] Ibid.

[122] CHARTE 4258/00, Contrib. 131

[123] It is also worthwhile noticing that within the European Parliament, there operates a "federalist movement". An intergroup called "European Constitution" was founded in September 1999. This informal EP grouping is working across the political parties in order to promote a new method of revising the treaties ensuring the effective participation of the European Parliament in that process, the constitutionalisation of the European Union, opening a dialogue between the EP and national parliaments on constitutionalisation and promoting a debate with citizens and the civil society about the

2.4. The Content of the EU Charter

2.4.1. General overview

On the 7th December 2000, the Commission, the European Parliament and the European Council jointly signed the EU Charter of Fundamental Rights during the opening of the Nice European Council.[124] The EU Charter was adopted as a legally non-binding document. 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. The second obvious advantage in creating a special Bill of Rights for the Union is that it can be adapted fully to the particular characteristics and needs of the European Union. What is the content of the Charter and does it add any value to the present protection of fundamental rights within the EU? The task given to the "Convention" was by no means an easy task in putting together existing fundamental rights drawing inspiration from the ECHR, common national constitutional traditions of the Member States, the European Social Charter and the Community Charter of Fundamental Social Rights of Workers. The initial problem for the "Convention" was what was to be understood as "applicable fundamental rights".

In accordance with the preamble, the Charter reaffirms the rights, with due regard to the principle of subsidiarity, from the constitutional traditions and international obligations common to the Member States, the Treaty of the European Union, the Community treaties, the ECHR, the Social Charters adopted by the Community and the Council of Europe including the case law of the ECJ and of the European Court of Human Rights.[125] These are the legal sources and the basis for the EU Charter. The EU Charter consists of 54 Articles and an introductory preamble. The

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constitutionalisation of the EU. The Intergroup "European Constitution" is meeting regularly during the Parliament's Sessions in Strasbourg.

[124] *Charter of Fundamental Rights of the European Union*. OJ C 364/01, 18.12. 2000.

articles are grouped in six chapters 1) *dignity*; articles 1-5, 2) *freedoms*; articles 6- 19, 3) *equality*; articles 20-26, 4) *solidarity*; articles 27- 38, 5) *citizens rights*; articles 39-46, 6) *justice*; articles 47-50 and *general provision*; articles 51-54.

The EU Charter of Fundamental Rights contains both traditional civil and political rights as well as economic and social rights, i.e. the EU Charter reflects the indivisibility and interdependence of human rights. The Charter represents real progress in recognising the need for a coherent fundamental rights instrument at the EU level. General human rights instruments normally apply to all within a jurisdiction of a contracting state. The equality principle together with non-discrimination principle are fundamental principles of international human rights law. The positive expression of the right to equality and the negative right to freedom from discrimination constitute a part of the core of human rights law. With regard to the EU Charter and the universality of rights, most of the rights are granted to *everyone* within the jurisdiction of the EU. The preamble states, "…the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity". However, the question of holders of the guaranteed rights created some problems.[126] The question to which extent rights would apply to third-country nationals would depend on Community law. In other words, the "Convention" had to find a good balance between the concept of universalism and regionalism. The legal status of third-country nationals within the EU is a complex matter in that their rights derive from many different sources. The main characteristic difference between EU citizens and third-country nationals in terms of rights is related political, economic and social rights. However, the general point of departure is that third-country nationals enjoy the same rights as EU citizens to a large extent. This

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[125] Ibid.

[126] The EU Charter differs from general human rights instruments in the sense that not all rights are universal in character. Certain rights in the Charter are granted to specific groups of people, namely *to union citizens*: freedom to work, seek, to settle or provide services in any Member State (article 15:2); *to citizens of the Union and persons residing in the Union*: equivalent working conditions with those of citizens of union (article 15:3); right to access to documents (article 42); right to refer cases to the Ombudsman (article 43); right to petition to the European Parliament (article 44).

complex issue was solved by the "Convention" in a very pragmatic way. To implement to the fullest extent these fundamental principles of human rights law in the EU Charter would have created certain difficulties, especially with regard to certain social rights which may not be applied systematically to workers from third countries with regard to freedom of movement and also rights linked to European citizenship. The EU Charter includes the principles of equality and non-discrimination in articles 20-21. Article 21 sets out the fundamental principle of prohibition of discrimination by stating that "any discrimination based on *any grounds* such as sex, race colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".[127] However, discrimination based on nationality is only mentioned in the second paragraph dealing with discrimination within the scope of application of the treaties establishing the EC and EU. The prohibition of discrimination based on nationality is connected to the objective of creating a single European market characterised by the free movement of goods, persons, services and capital, i.e. the four freedoms. In other words, the inclusion on discrimination based on nationality is in principle restricted to discrimination against citizens of Member States of the EU. This fundamental principle of non-discrimination was drafted in a way listing certain grounds on which discrimination is prohibited. This list is by no means exhaustive, but rather exemplifies certain grounds on which discrimination is prohibited. Is this to be understood also as discrimination based on nationality to be prohibited in accordance with the general provision on discrimination although discrimination based on nationality is explicitly mentioned in the second paragraph?

[127] Community law has been focused on sex discrimination principally divided into three areas, namely equal pay between men and women (article 141 TEC, directive 75/117), equal treatment (directive 76/207, 86/613 and 92/85) and social security (directive 79/7 and 86/378). Article 12 TEC prohibits any discrimination based on nationality. Article 13 TEU sets out that the Council acting unanimously on a proposal from the Commission after consulting the European Parliament may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. However, there is no general prohibition on discrimination in the EC Treaty, which could be relied upon by individuals. See further on gender equality in the European Union in Barnard, 1999, pp. 215-279.

In human rights law, the protection against discrimination applies to everybody without making any distinction on specific grounds. It remains uncertain why discrimination based on nationality is not included in the exemplified list on grounds of prohibited discrimination. However, discrimination is prohibited on *any grounds,* which could be interpreted as also including prohibition of discrimination on grounds of nationality. If this is the right interpretation, also discrimination based on nationality should be included in the general provision of discrimination as stated in article 14 of the ECHR. On the other hand, the drafters of the EU Charter wanted explicitly to mention the prohibition of discrimination on grounds of nationality within the context of application of EC/EU law. This could be understood as a specific feature of the Union in making a distinction between EU citizens and third-country nationals. According to Lemmens, the combination of para. 1 and 2 is probably intended, in areas covered by EU law, to prohibit discrimination between EU citizens whereas different treatment between EU citizens and non-citizens can be justified. This preferential treatment of EU citizens is according to Prof. Lemmens compatible with article 14 of the ECHR "given the existence of a special EU legal order and the establishment of a specific EU citizenship".[128] In the case *Gaygusuz v. Austria,*[129] the European Court of Human Rights underlined that a "difference of treatment is discriminatory, for the purposes of Article 14 (art. 14), if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". Moreover, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention". In the case *Moustaquim v. Belgium*[130],

[128] Lemmens, 2001, forthcoming.

[129] Case of Gaygusuz v. Austria, judgement of 16. September 1996, para. 42.

[130] Case Moustaquim v. Belgium, judgement of 18 February 1991, para. 49.

the European Court of Human Rights has concluded that such weighty reasons of objective and reasonable grounds for preferential treatment of EU citizens are connected to the creation of special legal order. The main rule is that third-country nationals enjoy the same rights as EU citizens. If there are objective and reasonable grounds for preferential treatment of EU citizens, as in the case of certain political rights, this is not contradictory to the general non-discrimination clause. It is however the Strasbourg Court that *in casu* will determine the content of the notion "very weighty reasons" and whether preferential treatment based on the ground of nationality as prescribed in article 21:2 of the Charter is compatible with the ECHR.

The adoption of the EU Charter must been seen as a positive step in the process of strengthening the fundamental rights protection within the EU. The objective of making fundamental rights more visible has certainly been achieved with this process. The preamble states in its fourth paragraph "it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter". The Charter is contemporary in that it includes the protection of personal data (art. 8), as well as rights in the field of bio-ethics required by the advance of information technologies and genetic engineering. The "new rights", such as the right to integrity of the person including the prohibition of eugenic practices and the prohibition of cloning of human beings represents the contemporary character of the Charter (art. 3:2). Trafficking of human beings is prohibited (art. 5:3). Furthermore, scientific research shall be free of constraint and academic freedom shall be respected. As a response to the substantial inclusion of "worker's rights" in the Charter, freedom to conduct a business was included into the Charter in accordance with Community law and national laws and practices. It is noteworthy that also the principles of environmental protection and the right to a good administration were introduced into the fundamental rights Charter. Environmental NGOs have however criticised the formulation of the environmental provision as being far too vague to have a significant impact on Europe's environment. The protection of minorities is not included in the Charter of fundamental rights.

Considering that national, ethnic or linguistic minorities in any country might be in a vulnerable situation often being subject to discrimination, it would be important to include positive obligations upon Member States and the Union to protect the rights of minorities. The inclusion of the protection of minorities was however opposed by France. A small conciliation is however that article 21 includes that discrimination based on membership of a national minority is prohibited and article 22 states that the Union shall respect cultural, religious and linguistic diversity. It would be preferable that the Union would include the rights of minorities to enjoy their culture, language, religion, and traditions individually and collectively. It is noteworthy that article 23 proclaims that equality between men and women must be ensured *in all areas*, including employment, work and pay.

With regard to civil and political rights, most of the rights guaranteed in the Charter are based on the ECHR. These include traditional rights, such as the right to life, prohibition of torture, freedom and liberty rights including the traditional justice rights, such as the right to a fair trial. In conjunction with the right to freedom of thought conscience and religion, the right to conscientious objection is recognised in accordance with national laws. The provisions included in the Charter are drafted in short paragraphs in order to avoid long and complicated articles in the Charter in order to achieve the goal of being visible and also readable. The final outcome of the Charter is a compromise reached among the "Convention" members concerning the content and the formulation of specific rights. This is especially true with regard to economic and social rights.

With regard to social rights, considerable attention was paid to the protection of rights related to the labour market under the conditions provided by Community law including national laws and practices. In fact, most of the social rights in the Charter are subjected to this restriction clause. One can find a substantial number of provisions with regard to worker's rights, i.e. right to information and consultation (article 27); right of collective bargaining and action (article 28); protection in the event of unjustified

dismissal (article 30); fair and just working conditions (article 31); prohibition of child labour and protection of young people at work (article 32). The Charter includes also the right negotiate and conclude collective agreements at appropriate level and to take collective action in defending the interests of the workers and employers including the right to strike (article 28). The right to strike was considered as very important to include into the Charter by the trade union organisations representing workers. Furthermore, protection from dismissal for reasons connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child, social security and social assistance in cases such as maternity, illness, industrial accidents, dependency or old age, loss of employment (articles 33 and 34) are included. The right to social security and social assistance (article 34) relates to cases in which such services have been introduced to provide certain advantages in accordance with Community law and national law and practices, but does not imply in case of absence of such benefits that such services must be created according to the Charter. However, one must keep in mind that Member States also have treaty obligations under other human rights treaties, such as the 1961 European social Charter and the 1966 Convention of Economic, Social and Cultural Rights.

The rights of workers seems to be somehow hardly relevant for the Charter which is designed to be applicable in relation to the institutions of the Union and to Member States to the extent they are implementing EC law unless they are not made legally binding upon Member States. For example, article 30 states that every worker has the right to protection against unjustified dismissal. This provision is however only applicable when Member States are implementing EC law and not as general protection against unjustified dismissal. The Charter guarantees equality between men and women in all areas, including employment, work and pay. The Charter recognises measures of positive discrimination in order to achieve the principle of equality between men and women. The Charter includes rights that are traditional but also constitutes a contemporary catalogue of fundamental rights introducing certain "new rights" into an international fundamental rights instrument. However, an important

question remains unresolved, i.e. the question of enforceability of the Charter. The status of the Charter, which is to be determined at a later stage, will certainly be the key issue concerning its impact on the individual. The charter prescribes the rights and principles to be respected by the European Union and the member States in the application of Community law. The "Convention" drew up short articles and it looked for formulas easily understandable by the citizens.

2.4.2. The EU Charter and the ECHR- some substantive aspects

Within the European Council, a concern was raised about the possible negative effects on the ECHR and its protection mechanism as soon as the Cologne European Council decided to adopt a EU Charter of fundamental rights.[131] The Parliamentary Assembly adopted a resolution in which it invited the EU "to incorporate the rights guaranteed in the European Convention on Human Rights and its protocols in the Charter of Fundamental Rights and to do its utmost to safeguard the coherence of the protection of human rights in Europe and to avoid diverging interpretation of those rights".[132] This has been a concern during the whole drafting process of the Charter within the Council of Europe and also within the drafting "Convention". It was seen as very important to avoid a situation of two human rights/fundamental rights instruments having different standards. The question of coherence was seen as a very important element. The relationship between the Charter and the ECHR was stressed by Mr. Fischbach (judge at the European Court of Human Rights) and Mr. Krüger (observer of the Council of Europe) already at the first meeting of the "Convention" in December 1999 by stating "as far as civil and political rights are concerned, the Charter should build on the European Convention on Human Rights. The rights and freedoms contained in the

[131] Lemmens, 2001, forthcoming.

[132] Resolution 1210 of 25 January 2000 on the Charter of Fundamental Rights of the European Union, CHARTE 4115/00, Contrib. 11.

Convention and its additional protocols are worded in such a way that they could be incorporated lock, stock and barrel into Community law".[133] This approach has however not been followed by the drafters of the Charter. It was accepted that that the ECHR was to be considered as a minimum standard and that the Charter could be taking steps backwards in relation to the ECHR.[134] With regard to the horizontal articles in the Charter, the drafting group included in the first draft an article stating that no provision of the Charter could be interpreted as placing restrictions on the protection afforded by the ECHR, i.e. that the level of protection of human rights in the Charter could not be inferior in relation to the ECHR "regardless of the wording of the Charter".[135] The "Convention" opted also for the model of a general limitation clause similar to the German Constitution without providing for a specific limitation grounds for each of the rights and freedoms included into the Charter.[136] This approach might be somehow problematic in that there might be a risk of reducing the level of protection afforded.[137] It became evident that any specific limitation clauses tailored to a particular right or freedom was not accepted. The drafting group presented a text on the question of limitations that restrictions to the rights and liberties that were also recognised by the ECHR could not be exceeded under any circumstances.[138] During the discussions on the horizontal provisions on 29 and 30 June, Mr. Fischbach stated that observers of the Council of Europe generally were satisfied with the horizontal provisions in that they would "exclude all wider restrictions than those permitted by the ECHR, or a level of protection lower than that afforded by the ECHR".[139] However, he underlined the need to extend the reference to the ECHR also to include a reference to the protocols and to

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[133] CHARTE 4105/00, Body 1, p. 25.

[134] CHARTE 4111/00, Body 3, p. 5.

[135] CHARTE 4123/1/00, Rev. 1, Convent 5. Draft of a limitation clause, article Z.

[136] Lemmens, 2001, forthcoming.

[137] The observers of the Council of Europe underlined this risk in their statements. See CHARTE 4139/00, Contrib. 31, pp. 1-2 and CHARTE 4178/00 Contrib. 61, p. 2.

[138] SN 3340/00 of 29.6. 2000, p. 3.

[139] CHARTE 4411/00, Contrib. 268, p. 2.

the case law of the European Court of Human Rights in the interest of legal certainty. He also underlined that a reference to the case law would not be a threat to the autonomy of the Charter in that nothing would prohibit an interpretation beyond the minimum level provided by the ECHR. No reference to the case law was included in article 52 (3) of the Charter since the European Court of Human Rights cannot set the standard for the interpretation of the Charter.[140] However, a reference to the case law of the European Court of Human Rights can be found in the preamble, which shows that the case law of the Court has been noted by the "Convention". In addition, in the explanatory statement given by the "Convention" relating to the specific provisions of the Charter, it is recognised that the reference to the ECHR also includes both the convention and the protocols. The scope of guaranteed rights are also determined not only be the ECHR, but also by the case law of the European Court of Human Rights and by the ECJ. The observers of the Council of Europe expressed their satisfaction with the EU Charter as being coherent with the ECHR. This is expressed in articles 52 (3) and 53 of the Charter, "whose effect, in substance, is to ensure an identify of scope and meaning between the rights contained in the two instruments, without preventing Union law from affording wider protection than provided under the ECHR".[141] The ECHR is in other words recognised as a minimum standard for the interpretation and application of the Charter. The Charter is therefore not to be interpreted in a way that could lead to a result lower than the level of protection offered by the ECHR as being the minimum standard. Here, the idea is to look into some substantive aspects of the Charter in relation to the ECHR. The drafting of the Charter did present the opportunity to advance and develop the human rights standards beyond the content in existing instruments. While the ECHR being *the* standard of interpretation of the Charter, an attempt will be made to indicate to what extent it is intended that the rights afforded in the Charter, and thus corresponding to the ECHR, is more extensive. [142]

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[140] Lemmens, 2001, forthcoming.

[141] CHARTE 4961/00, Contrib. 356, p. 2.

Article 3 provides for the right to the integrity of the person. According to the explanations to the Charter, the principles of article 3 are already included in the ECHR and the Convention on Biomedicine. One cannot find any reference to a specific article in the ECHR. However, according to the case law of the European Court of Human rights, physical and moral integrity of the person is covered by the notion "private life" in article 8 of the ECHR.[143] The drafters of the Charter may however have had in mind to offer a wider protection than guaranteed in article 8 of the ECHR and the protection offered in the Convention on Biomedicine.[144]

According to article 8, protection of personal data, everyone has the rights in relation to the processing of one's personal data. Article 8 has no correspondence in the ECHR. However, the European Court of Human rights have held that processing data relating to "private life" or data relating to an identified or identifiable individual is within the scope of article 8 (1) of the ECHR.[145] This includes also, under certain conditions, a right of access to the data relating to a person.[146] Lemmens concludes that the drafters of the Charter wanted to give a more extensive protection than that offered by article 8 of the ECHR in that a reference in the explanations to the Charter is made to article 286 TEC and to directive 95/46/EC[147], which regulate explicitly and in more detail the protection of individuals concerning the processing of personal data. [148]

Article 9 guarantees the right to marry and the right to found a family. These rights are not two aspects of one right, but are separated into two specific autonomous rights unlike article 12 in the ECHR. In addition, these rights are not restricted to only

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[142] For this part, the discussion is based on the explanations to the Charter that have been prepared by the Presidium (Convent 49), pp. 48-50 and the article prepared by Mr. Lemmens, forthcoming. The explanations of the provisions of the Charter have no legal value and are simply intended to clarify the provisions of the Charter.

[143] X and Y v. Netherlands, judgement of 26.3. 1985. Series A vol. 91, para. 22.

[144] Lemmens, 2001, forthcoming.

[145] Leander case, judgement of 26.3. 1987. Series A 116, para 48.

[146] Gaskin case, judgement of 7.7 1989. Series A, vol 160, para. 34-49.

[147] OJ L 281, 23.11. 1995.

"men and women of a marriageable age" but are simply guaranteed under no further restrictions with regard to the holders of the rights. This wording has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. As stated in the explanations, article 9 of the Charter neither prohibits nor imposes the grating of status of marriage to unions between peoples of the same sex if national legislation so provides. The scope of article 9 of the Charter is therefore wider than article 12 of the ECHR.

Article 14 (2), right to education and vocational training, is guaranteed in the Charter. This right is recognised in the ECHR, protocol 1 article 2 in a more general way. Article 2 of protocol 1 does not require the state to ensure education of any particular type or at any particular level. The right to receive free compulsory education is new in comparison to the ECHR. This principle implies that each child has the possibility of attending an establishment which offers free education. To the extent this right applies to the Union, the training policies of the Union must respect free compulsory education.

With regard to article 17, right to property, the Charter mentions conditions for the lawfulness of certain of interferences with the right to property, namely in situations of public interest and in the cases and under the conditions provided for by law. This article is different compared to the other articles in the Charter in that it includes a restriction clause. Article 2 of the protocol to the ECHR does not guarantee a right to compensation in case of expropriation. The Charter does however explicitly state that expropriations are "subject to fair compensation being paid in good time for their loss".[149]

Article 19 (2)[150] appears to advance the protection offered by the ECHR with regard to expulsion or extradition of persons who face death penalty abroad. The

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[148] Lemmens, 2001, forthcoming.

[149] Ibid.

European Court of Human Rights has in its case law in the famous *Soering case*[151] on article 3 stated that it is a breach of the ECHR to extradite a person to face torture, inhuman or degrading treatment or punishment, such as detention on death row as in this case. However, the Court has not yet accepted that extradition to face death penalty in itself as a breach of the ECHR. In other words, with regard to extradition to a State where there is a serious risk to be subjected to death penalty, the Charter offers a more extensive protection compared to the ECHR. The impact of article 1 of protocol 6 to the ECHR, which abolishes the death penalty, is uncertain. Here, the EU Charter does provide a clear basis for protection with regard to death penalty and expulsion or extradition.

With regard to non-discrimination, article 21, its scope is wider than the corresponding article 14 in the ECHR. The non-discrimination article in the ECHR prohibits discrimination only in "the enjoyment of the rights and freedoms set forth in this Convention". Article 14 of the ECHR is not an independent right. However, protocol 12 has been signed on 4.11. 2000 containing in article 1 a non-discrimination clause corresponding to article 21 (1) of the Charter. Article 1 of the protocol 12 to the ECHR states "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1". This protocol is not yet in force, but once it will be, the meaning and scope of article 21 (1) of the Charter will be the same as in article 1 of the 12th protocol to the ECHR.[152]

Article 47, the right to effective remedy and to a fair trial, states that everyone's rights that have been violated have the right to an effective remedy before a tribunal in

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[150] Article 19 (2) states that "no one shall be removed, expelled or extradited to a State where he could be subjected to the death penalty, torture, or other inhuman or degrading treatment".

[151] Soering v. United Kingdom, judgement of 7.7. 1989.

[152] Lemmens, 2001, forthcoming.

case of an alleged violation of rights and freedoms. In comparison with article 13 of the ECHR, which states that everyone shall have the right to effective remedy "before a national authority", the Charter goes further in that it provides for an effective remedy not just merely before a national authority but before a court. The right to a fair trial (article 47 (2)) corresponds to article 6 (1) of the ECHR. The scope of the protection is however wider in that article 47 (2) does not contain any restriction such as stated in article 6 (1) of the ECHR in that it applies only when there is a "determination his civil rights and obligations or of any criminal charge against him".

Article 49 proclaims the principles "*nullum crimen sine lege*" and "*nulla poena sine lege*". Article 49 corresponds to article 7 of the ECHR adding the principle of the retroactivity of a more lenient penal law drawing inspiration from article 15 of the ICCPR. Furthermore, article 49 (3) proclaims the principle of proportionately between the penalties and the criminal offence, which is not to be found in the ECHR.

Article 50 proclaims the principle of "*non bis in idem*". The scope of protection is however wider than article 4 in the 7th protocol to the ECHR in that the provision in the protocol to the ECHR prohibits a second trial or a punishment only within the jurisdiction of one and the same state. Article 50 prohibits a second trial or a punishment in any state of the European Union. In other words, article 50 applies not only within the jurisdiction of one state but also within the jurisdiction of several states, i.e. the Member States of the European Union.

These are some examples of how the Charter de facto is offering a wider protection in comparison to the ECHR. The Charter is however to a large extent, concerning civil and political rights, drafted having the ECHR as the basis. The ECHR is also considered as the standard of interpretation of the Charter concerning corresponding rights that are to be found in both of the instruments. Article 52 (3) of the Charter is a guarantee ensuring that the Charter and the ECHR to the extent they include corresponding rights also receive the same interpretation. The only exception is when the Charter can provide a more extensive protection the ECHR.

3. Implications of adopting a EU Charter for the European Union

3.1. A political declaration or a legally binding instrument?

The above-mentioned question is the central theme for this study. The question of the legal nature of the Charter has been a central theme of the debate ever since the Cologne European Council decided to start the process of preparing the Charter. The European Council decided to address this question in two stages, namely that the Charter should be solemnly proclaimed by the European Parliament, the Commission and the Council and after that it will have to be considered whether and, if so, how the Charter should be integrated into the treaties. The question concerning the implications or consequences of an adoption of the EU Charter will be discussed throughout the whole chapter. In accordance with the Cologne European Council decision in 1999 and Nice European Council decision in December 2000, the legal status of the EU Charter is to be determined at a later stage. Gráinne de Burca sees the question of uncertainty concerning the nature of the Charter, specially concerning the legal status of the Charter as a reflection of a contradictory political motivation for drawing up a fundamental rights Charter for the EU.[153]

The president of the European Parliament, Mrs Nicoline Fontaine, stated on the occasion of the signing of the Charter of fundamental rights that as far as the Parliament is concerned, the Charter would be law guiding the actions of the Assembly that the European citizens have elected. The president stated that from now on, the Charter is the point of reference for all parliament acts that have a direct or indirect effect for the European citizen throughout the Union, i.e. the Charter will be binding upon the European Parliament.[154] The President of the Commission, Mr Romano Prodi, made a statement at the proclamation of the Charter that it "marks the commitment of the institutions to respect the Charter in all the activities and policies of the

[153] Burca, 2001, p. 128.

Union…Citizens can rely on the Commission to respect it in all aspects of the life of the Union".[155] Mr. Jacques Chirac, representing the European Council during the French Presidency, stated on the 12th of December in Strasbourg: "In Nice, we proclaimed the European Union Charter of Fundamental Rights, a text which is of major political importance. Its full significance will become apparent in the future and I wish to pay tribute to your Assembly for the major contribution it has made to its drafting". In signing the Charter, the institutions in question have committed themselves in respecting the provisions of the Charter. However, one could question to what extent the institutions of the Union commit themselves to a formally legally non-binding document. The Commission has stated that "it is reasonable to assume that the Charter will produce all its effects, legal and others, whatever its nature. It is clear that it would be difficult for the parliament and the Council, who are to proclaim it solemnly, to ignore in the future, in their legislative function, an instrument prepared at the request of the European Council by the full range of sources of national and European legitimacy acting in concert".[156] It seems to be rather clear, also looking from a historical perspective, that the European Parliament and the Commission have committed themselves to the adoption of a fundamental rights catalogue for the Union. Both these institutions have been in favour of committing the institutions of the Union to a fundamental rights catalogue for a long time, either by adopting a catalogue for the Union of its own or by acceding to the ECHR. The European Parliament has adopted several resolutions stressing the need to commit the Community/Union to a fundamental rights catalogue. Therefore, it seems to be rather clear that both the European Parliament and the Commission are willing to commit themselves to this EU Charter, be it only adopted for the time being in a form of a recommendation. Both these institutions are in favour of incorporating the Charter into the treaties. However, one cannot find a similar kind of commitment from the European Council as compared

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[154] Statement given on 7th December 2000 in Nice.

[155] Statement given on 7th December 2000 in Nice.

to the European Parliament and the Commission. Several Member States have not been willing to adopt the Charter in a legally binding form, at least not yet.[157] Neither has all Member States been willing to commit themselves to the idea of accession of the Community/Union to the ECHR. It is true that the invitation to elaborate a fundamental rights catalogue for the Union came from the European Council. However, the European Council was not willing to commit itself at this stage to a binding EU Charter. The initiator in the European Council, Germany, has been willing to adopt a legally binding Charter from the very start. This was not however a realistic approach for the European Council. Therefore, it was much more easier for Germany, as holder of the Presidency at the time in 1999, to agree upon a model where the legal status of the Charter were to be decided at a later stage. One can perhaps put into question to what extent the European Council indeed has committed itself to the Charter of Fundamental rights as merely a soft-law instrument. However, at the end of the day, it is up to the courts in Member States and the Court of First Instance and the ECJ to take into account the Charter if they so desire at this stage. According to the Commission, it is likely that the ECJ will seek inspiration in the Charter and that "it can reasonably be expected that the Charter will become mandatory through the Court's interpretation of it as belonging to the general principles of law".[158] In other words, the ECJ would have a central role in giving mandatory effect to the Charter through its jurisprudence.

It is clear that there exists a wide range of opinions and expectations with regard to the legal status of the EU Charter. Having in mind the mandate given by the Cologne European Council, one need to address the question of the need for Union to adopt a Charter of Fundamental Rights. Certainly, one of the most important political goals with this project has been to increase the visibility and clarity of fundamental rights.

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[156] Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM 644 final, 11.10.2000.

[157] Ireland, United Kingdom, the Netherlands, Sweden, Finland and Denmark rejected the idea to incorporate the Charter into the Treaties.

[158] Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM 644 final, 11.10.2000.

The Charter is intended to improve the protection of fundamental rights by enhancing public awareness of their basic rights. Prof. Simitis has stated that "it (the Charter) materialises the governing principles of the union, ensures the visibility of fundamental rights, promotes the development of the Union marked by the awareness of both the individual's rights and the need to prevent and combat discrimination, furthers the identification of the EU-citizens with the policies of the Union and increases its credibility".[159]

One argument in favour of a fundamental rights catalogue is connected to the expansion Community/Union competences into new areas. The transformation of powers from a State to an international organisation needs to be followed by equally adequate protection of fundamental rights within that international organisation. Another argument in favour is the need of clarification of the current protection of fundamental rights within the Community legal order. An important issue would be to tackle the current inconsistency in protecting rights under the different pillars. Some commentators have underlined that there have been many declarations and proclamations made by various EU institutions concerning human rights and have therefore questioned the value of adopting yet another document in a form of a political declaration. It is clear that these declarations are not binding instruments and therefore not directly enforceable by national courts or the ECJ. For example, the British Institute of Human Rights[160] has stated " we are not as yet convinced that the present initiative to draft an EU Charter is the best way to improve respect for human rights, in the absence of a coherent human rights policy".[161] Alston and Weiler have further stated that " A cleavage between the increasingly generous verbal affirmation of commitment to human rights without matching the rhetoric with visible, systematic and

[159] House of Lords, Committee on European Union, Eighth report "EU Charter of Fundamental Rights", 16.5. 2000, para. 48.

[160] The British Institute for Human Rights is accommodated by the Law School of King's College London.

[161] House of Lords, Committee on European Union, Eighth report "EU Charter of Fundamental Rights", 16.5. 2000, para. 57.

comprehensive action will eventually undermine the legitimacy of the European construct".[162]

It has become clear that most of the NGOs are arguing for a legally binding Charter. Anything less would be disappointing. As already noted above, both the European Parliament and the Commission have argued a long time already for the need of the Community/Union to commit itself to a fundamental rights catalogue, either by adopting a catalogue for the Community/Union or by an accession of the Community/Union to the ECHR. In its resolution in March 2000, the European Parliament stated that "a Charter of fundamental rights constituting merely a non-binding declaration and, in addition, doing no more than merely listing existing rights would disappoint citizens' legitimate expectations".[163] The Parliament has "insisted that the Charter should be included eventually within the Treaty on European Union".[164] In similar terms, the Commission has in a communication on the legal nature of the Charter concluded that "it is unlikely that the expectations aroused in the public opinion by the decision to prepare the Charter could be satisfied by mere proclamation by the Community institutions without the incorporation of the Charter in the treaties".[165]

According to Mr. Sevon, judge at the ECJ, to the extent the EU Charter is including rights that are already protected by the ECJ and therefore are legally binding, the question of the legal status of the Charter is less interesting.[166] A large number of the provisions of the Charter confirm or codify already applicable fundamental rights.

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[162] Alston & Weiler, Final project Report on the Agenda for the year 2000, p.38.

[163] European Parliament resolution, C5-0058/1999-1999/2064 (COS).

[164] European Parliament Report, Committee on Constitutional Affairs, A5-0064/2000, p. 12. The Economic and Social Committee has also in its report been in favour of incorporating the Charter into the treaties. "A binding Charter of Fundamental Rights adds a further dimension to the European Union as an area of freedom, security and justice in that the Union is formally committed a clear Community of values". Opinion of the Economic and Social Committee on "Towards an EU Charter of Fundamental Rights", SOC/013, 20.9. 2000.

[165] Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM 644 final, 11.10.2000.

According to Mr. Sevon, one possible problem that might arise from this approach and create confusion is that the EU Charter in containing already applicable and protected rights in EC law are presented in a non-legally binding form if it is not stated that certain rights already are legally binding through the jurisprudence of the Court.[167] Prof. Eeckhout has stated that in terms of legal practise, it would not make much difference whether the EU Charter is legally binding or merely adopted as a political declaration. He points out that it would be difficult for the courts not to use the Charter in support of their arguments merely on the ground that the "Charter is not a binding legal instrument and therefore the Court has no jurisdiction to apply it".[168] It is clear that the ECJ cannot use the EU Charter as such a legal source of law in protecting fundamental rights within the Community legal order. Formally, the ECJ will probably still have to use article 6 (2) as the legal basis concerning fundamental rights issues. The principal source of law for fundamental rights protection in the Community legal order is general principles of Community law. The ECJ has summarised the current state in its opinion 2/94 by stating that

> It is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or which they are signatories. In this regard, the Court has stated that the ECHR has special significance.[169]

Indeed, it is not very likely that the ECJ would be able to use the Charter as such as a reflection of general principles of Community law. In that sense, seen from an ECJ point of view, the present model for arguing in cases dealing with fundamental rights will not

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[166] Sevon, 2000, p. 404.

[167] Ibid.

[168] Eeckhout, 2000, p. 104.

[169] Opinion 2/94 ECR I-1759, para. 33. This corresponds to article 6 (2) TEU.

change much. This, due to the fact that the Nice European Council was not willing to include a reference to the Charter in article 6 (2) TEU despite of the proposal made by the European Parliament and the Commission. The ECJ will probably still use the ECHR and common constitutional traditions as a source of "inspiration" and "guidelines" in its jurisprudence. However, it is likely that one can find references or similar wording in the case law of the ECJ as stated in the EU Charter.

Helander, on the other hand, makes a point slightly in a different direct direction in stating that the ECJ no longer or to a lesser extent need to use the mechanism of reference to international human rights instruments and in particular to the ECHR as well as to common constitutional traditions of the Member States as "general principles of law". The determination and definition of which rights are to be protected, i.e. the content of this "general principles of law-doctrine", would now come from the Charter as being an authoritative codification of fundamental rights.[170] The ECJ would simply use the Charter as a confirmation rather than a legal basis. The Charter in itself would not be a source of law but rather a guide to law. This is naturally purely speculative in character and should therefore also be treated as such. It remains to be seen how the ECJ will take into account the Charter in its jurisprudence.

It seems to be somehow strange that the EU is engaging itself in a project of drafting fundamental rights Charter only to be adopted in a form of recommendation. As prof. Eeckhout has stated that "it is in the very essence of fundamental rights that they are made binding".[171] There is a clear risk that in principal a non-enforceable declaration might create tension between the expectations and the actual effect of the Charter. However, one should take into account that the Charter is an authoritative codification of applicable rights, which have been adopted by the European Parliament, the Commission and the European Council. There seems to a broad consensus and discussion among parliamentarians in national parliaments, European Parliament,

[170] Helander, 2001, p. 63.

[171] Eeckhout (a), 2000, p. 101.

Commission, scholars and also within the civil society that the Charter is going to be included into the treaties in one way or the other and therefore formally also have legally binding force. In other words, it is felt that adopting a non-legally binding instrument is not enough. This is however not the case among several Member States. It cannot be contested that with regard to the question of enforceability, there would be great advantages in including the Charter into the founding treaties in that it would provide for greater legitimacy for the ECJ in ensuring the protection of fundamental rights.[172] In drafting the Charter, the "Convention" was working on the "as if" notion in the sense that the Charter was drafted based on the assumption that will be a legally binding document which easily could be incorporated into the treaties.

The horizontal clauses (articles 51-54) were carefully elaborated by the "Convention" during the whole drafting process having in mind that the Charter eventually will be legally binding. The horizontal clauses seek to offer an appropriate response to highly important questions related to incorporation of the Charter into the treaties. If the aim solely were to codify applicable fundamental rights without having in mind that merely a political declaration is not sufficient enough, why would there have been any need to emphasise the importance of the horizontal articles? Therefore, one must consider the Charter as being something more than just an exercise of putting together already applicable fundamental rights. However, a Charter whose aim is merely to be informative rather than enforceable in character would not provide anything else than greater transparency. A non-legally binding instrument would certainly have some value. The question is whether a declaratory Charter would bring any added value to the existing system of protecting fundamental rights. A solemnly proclaimed Charter does not oblige the ECJ to take any notice whatsoever of the Charter. Nevertheless, an instrument prepared by such a composition is likely to have some affect on the jurisprudence of the ECJ. Mr Sevon, judge at the ECJ, has stated that it cannot be excluded that the ECJ would take notice of the Charter as a soft-law instrument in defining fundamental rights that are protected by the Court insofar as the

[172] Ibid. p. 102.

Charter is offering a higher level of protection in comparison with the ECHR.[173] However, this does not necessarily mean that the ECJ will make a direct reference to the EU Charter as such. According to Sevon, the ECJ is not willing to overlook the decision taken by the European Council stating that the legal status of the Charter is to be determined at a later stage.[174] Mr. Lenaerts, judge of the Court of First Instance, has stated whatever the status of the EU Charter will have, "it will in any event be a strong statement on the values and principles the European Union stands for and this both *vis-à-vis* the present Member Stats and the other European States applying for European Union membership".[175] According to Mr. Tizzano, Advocate General of the ECJ, "the EU Charter of Fundamental Rights of the European Union has not been recognized as having genuine legislative scope in the strict sense…the fact remains that it includes statements which appear in large measures to reaffirm rights which are enshrined in other instruments…I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved-Member States, institutions, natural and legal persons – in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right" (article 31 (2) of the Charter).[176] In other words, Advocate General Tizzano argues that in a particular case concerning the nature and scope of a fundamental right, EU Charter cannot be ignored whether merely adopted in a form of a recommendation.[177] In the

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[173] Speech held by Judge Sevon in the Swedish Parliament 18.5. 2000.

[174] Speech given by Mr. Sevon in Tallinn, 6.4. 2001, Conference Centre of the National Library of Estonia on a seminar held on the European Charter of Fundamental Rights. A conference organised jointly by the Technical Assistance Information Exchange office of the European Commission (TAIEX Office) in cooperation with the Ministry of Justice of Estonia.

[175] Lenaerts, 2000, pp. 599-600.

[176] Case C – 173/99 Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of state for Trade and Industry, Opinion of Advocate General Tizzano, 8.2. 2001, para. 26-28.

[177] Case C-270/99 P, Z v. European Parliament. Advocate General Jacobs made a reference to the EU Charter stating that while the Charter in itself is not legally binding, it proclaims a generally recognised principle of good administration. General advocate Jacobs did not discuss the impact of the Charter as

Mannesmannröhren-Werke AG case,[178] the Court of First Instance was requested by the applicant to have regard of the new EU Charter in determining the case on the grounds that the Charter constitutes a new point of law concerning the applicability of article 6 (1) of the ECHR. The Court stated however that the Charter had no relevance to the case for the purposes to review a contested measure adopted by the Commission due to the reason that the contested measure was taken prior to the date of the adoption of the EU Charter. Therefore, the Court did not take into account the EU Charter of Fundamental Rights. In other words, in this way the Court of First Instance avoided taking a stand concerning the question of the legal status of the EU Charter. The Charter has been described as a "showcase" of existing rights that are already protected within the Community/Union or putting "flesh on the bones of article 6 (2) TEU".[179] As noted already above, in advance of the Nice European Council, the European Parliament and the Commission proposed that article 6 (2) TEU should be amended also to make a reference to the Charter. This proposal was however not successful. This would however still fall short of incorporating the Charter into the Treaties. The Charter most certainly has contributed to the problem of lack of visibility of fundamental rights protected within the Community legal order but having enforceable rights at ones disposal are in reality two different concepts. The report presented by the select Committee on the European Union for the House of Lords in Great Britain have concluded that a declaratory Charter might help to clarify the obligations of the institutions of the EU but would however not confer direct and tangible benefits on individuals.[180]

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such. However, the fact that he makes a reference to the Charter is noteworthy. Opinion of Advocate General Jacobs, 22.3.2001, para. 40.

[178] Case T-112/98, Mannesmannröhren-Werke AG v. Commission, judgement of the Court of First Instance, 20.2.2001, para. 15 and 76.

[179] House of Lords, Committee on European Union, Eighth report "EU Charter of Fundamental Rights", 16.5. 2000, para. 125.

[180] Ibid. para. 126.

3.2. Horizontal questions- scope of application and problems involved

According to article 51 (1) "the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers". The Charter is in other words applicable to the Union's institutions and not the activities of Member States falling outside the scope of Community law. With regard to the application of the Charter upon Member States, this approach follows the case law of the ECJ that the requirement to respect fundamental rights as defined in an Union context is binding only to the extent when Member States are acting in the context of Community law. In other words, the Charter has not been designed to be of general application within the Member States of the EU, whether made legally binding or not. In the *Wachauf case*[181], the ECJ stated that the requirements to respect fundamental rights are also binding on Member States when they implement Community rules. The ECJ has also recently stated that "it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States, when they implement Community rules".[182] In the *Kremzow case*[183], the ECJ on the other hand held that "where national legislation is concerned with a situation… which does not fall within the field of application of Community law, the Court cannot, in a reference for a preliminary ruling give the interpretative guidance necessary for the national court to determine whether that national legislation is in conformity with the fundamental rights whose

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[181] Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, case C 5/88, judgement of 13 July 1989, ECR 1989, p. 2609, para. 19.

[182] Kjell Karlsson and others, Refererence on a preliminary ruling, Regeringsrätten-Sweden, Case C-292/97, judgement of 13 April 2000, para. 37.

[183] Kremzow v. Republik Österreich, case C-299/95, judgement of 29 May 1997, ECR para. 19. See also Cinétheque and others v. Federation nationale des cinemas Francais, joined cases 60 and 61/84, judgement of 11 July 1985, ECR 1985, P. 2605, para. 26 where the court states that "although is is true that it is the duty of this court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility of European Convention of national legislation, which concerns, in this case, an area which falls within the jurisdiction of national legislator".

the Court observes, such as those deriving in particular from the Convention (ECHR)". The ECJ makes it clear that issues falling outside the scope of Community law relating to fundamental rights questions are not within its jurisdiction. Furthermore, article 52 (2) states that "rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties". In addition, article 51 (2) provides that "this Charter does not establish any new powers or task for the Community or the Union, or modify powers and tasks defined by the Treaties". In other words, the Charter does not establish any new competence to legislate in the field of human rights, even if the Charter would become legally binding. This reflects the opinion presented by the secretariat to the drafting body on certain horizontal questions where it was concluded "the aim of the Charter is to establish a bill of rights, rather than to confer new powers on the Union to legislate in the field of human rights."[184] The secretariat followed rather strictly the ECJ and its famous opinion 2/94 where the court "made a distinction between the obligation to respect fundamental rights and the power to legislate with regard to fundamental rights". [185] In other words, "the obligation to respect fundamental rights is a constraint on the Community's action and not a licence to legislate in this field".[186] The Charter does not extend the competences of the Union and is therefore not extending the competence regarding fundamental rights.

The adoption of the Charter is a result of the concern of fundamental rights protection in the context of activities by the Union. As noted above, the scope of application is primarily addressed to the institutions of the Union and is therefore not of general application in the Member States. As long as there is no formal link between fundamental rights protected in the Charter and Union law in itself, the rights protected

[184] CHARTE 4111/00, Body 3.

[185] "No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international Convention in this field". Opinion 2/94, para. 27. P. Alston and J. Weiler has stated that "the Union cannot be a credible defender of human rights in multilateral for and in other countries while insisting that it has no general competence of its own in relation to those same human rights". Alston & Weiler, 1998, p. 34.

in the Charter are not applicable. In a concrete situation, it is not enough to have a link to a fundamental rights issue, but also a link must be established to EC law for a specific right to be applicable.

It was clear that the Charter was not intended to bring any additional new competence's for the Union and would not have any effect on Member States acting within their explicit competence. Article 51 clearly establishes that the Charter applies primary to the institutions and bodies of the Union with due regard to the principle of subsidiarity. With the term "institutions" is meant the institutions as referred to in article 7 TEC and the term "body" is referring to all the authorities set up by the Treaties and secondary legislation. In other words, the Charter is addressed to all the institutions set by the Union under all the three pillars and not merely restricted to EC law. The inclusion of the subsidiarity principle was considered important. Member States were seen as the primary guarantee of fundamental rights. The Charter is however primarily addressed to the institutions and bodies of the Union and not to Member States. It is difficult to see what is the use of the reference to the principle of subsidiarity in the context of fundamental rights protection within the Union. The European Parliament has quite rightly recognized that the principle of subsidiarity is a difficult concept to apply in relation to fundamental rights. The application of the subsidiarity principle to the Charter implies a non-interference of the Union in the relationship between the nationals and their own state authorities in matters falling outside the scope of Union competence.[187] The European Parliament has recognized in its report that it is difficult to identify a clear-cut separation of competence between the Member States and the Union in stating "powers and responsibilities are more often shared between the EU level and Member State governments than they are delegated exclusively to the EU institutions".[188] The main purpose of the Charter is to make sure that the union fully respects and guarantees modern standards of fundamental rights in area where the

[186] CHARTE 41111, Body 3.

[187] Ibid.

Union has competence to act. It is clear that the reference to the principle of subsidiarity in the context of fundamental rights protection is closely related to the protection of especially economic and social rights. As already noted above, a substantial number of social rights are subjected to a restriction clause "in accordance with national laws and practices".

According to the principle of subsidiarity, the general rule is that action at Community level is justified only to the extent it would produce clear benefits by reason of effects in comparison with action on Member State level. The protocol to the Amsterdam Treaty on the Application of the Principles of Subsidiarity and Proportionality prescribes the criteria in the terms of "the objectives of the proposed action cannot be sufficiently achieved by member States´ action in the framework of the national constitutional system and can therefore be better achieved by action on the part of the Community".[189] In practise, it is difficult to apply the principle of subsidiarity due to reasons that different views could be held to what extent Community action is necessary. The subsidiarity principle applies only in the area falling outside the scope of Unions exclusive competence. In other words, the principle of subsidiarity is only applicable where the Community has a concurrent position with Member States with regard to the question of competence. The subsidiarity principle cannot be used to question the powers of the Community but rather question the exercise of those powers by passing specific legislative acts.[190] The general principle concerning subsidiarity is that the competence to act should remain with Member States except in situations where it is considered as justified that a matter can better be dealt with at the Union level.[191] However, it is very difficult to formulate what in fact the principle of subsidiarity in practical terms does mean. The question is whether the principle of subsidiarity essentially is a political concept rather than a legal concept. Mr. Usher

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[188] European Parliament report of 3.3. 2000, A5-0064/2000, p. 11.

[189] Para. 5.

[190] Hartley, 1999, p. 86.

[191] Ibid., p. 84.

concludes that that this is essentially a question of political nature to be decided by the Council and to challenge an legislative act based on a Council decision would rather have to based on the concept of necessity for Community action or on grounds of misuse of power.[192] The primary aim with the Charter is to ensure that individuals within the jurisdiction of the Union should not be less protected of their fundamental rights in relation to the Union institutions in comparison with protection offered under national law against violations of fundamental rights by national authorities. Therefore, the idea was not to transform any new legislative competence from Member States to the Union concerning fundamental rights. Mr. Eicke sees this point as a "clear expression of the principle of subsidiarity in action".[193]

The important question with regard to scope of application of the Charter or the effect of the Charter on Member States is when national authorities are acting in an EC law context and when that is not the case. This is an important question and many times difficult to resolve.[194] This question is of paramount importance concerning the application and effect of the Charter. In practise, it is many times difficult to separate the legal systems of Member States and the EC legal system, as the EC law is very much integrated with national legal systems. The Community legal order has achieved a relatively autonomous status in relation to Member States legal systems. The EC legal system is at least in theory a separate legal system of its own. In the case *Van Gend en Loos*, the ECJ stated that

[192] Usher, 1998, pp. 89-101.

[193] Eicke, 2000, p 292.

[194] The question concerning the separation of power between the Union and Member States is not subject of study within this research project. This problem is however most problematic in areas with pararell competence between the Union and with regard to the doctrine of implied powers. However, it is to be noted that it in an important question with regard to the applicability of the Charter, which is primarily addressed to the institutions of the Union. For an analysis of this problem, see for example Helander, 1998, pp. 11-31.

> The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble of the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.
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> In addition, the task assigned to the Court of Justice under article 177 (now 234), the object of which is to have uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before these courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only Member States, but also their nationals.[195]

The ECJ has recognised at an early stage that the EEC Treaty has established a legal system of its own, which has become an integral part of the legal system of the Member States, which their courts are bound to apply.[196] The ECJ has in the case *Les Verts*[197] dropped the reference of "international law" in recognizing the EEC Treaty amounting to a constitution in stating that " The European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty". The reference to constitutional character of the EEC Treaty was stated again by the Court in the *Opinion 1/91* where it declared that the "EEC Treaty, albeit concluded in the from of an international agreement nonetheless constitutes the constitutional charter of a Community based on the rule of law".[198] Community law cannot however be considered as totally independent from the Member States legal systems in that Community law could not function unless it was recognized and applied by the courts themselves at national level. An concrete example that the Community legal system is

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[195] Case 26/62, Van Gend en Loos, ECR 1 (1963)

[196] Case, 6/64, Costa v. Enel, ECR, 585, (1964).

[197] Case 294/83, Parti Ecologiste, "Les Verts" v. European Parliament ECR (1986) 1339.

[198] Opinion 1/91 of the European Court of Justice, ECR I-6069, para.21.

dependent of Member States legal systems is the amendment procedures of Treaty law in that the amendments made to the Treaties must be ratified by all Member States "in accordance with their respective constitutional requirements" (article 48, TEU). The legal system of the Community is recognised as an autonomous legal system, but is hardly independent from international law and the legal systems of Member States. In other words, it is safe to say that the EC legal system is a separate legal system, which however is integrated with the national legal systems, for example through the concepts of direct effect and supremacy of community law.

The discussion about fundamental rights within the context of EC law has for several decades focused on the relationship between the Community legal order and national legal systems and in particular with regard to national constitutions. It is now widely accepted that EC law is supreme in relation to national legal systems in the fields, which the Treaty has given the Community competences to act. The lack of a written catalogue of fundamental rights within the Community legal order was subject for concern in national courts, especially in Germany, but also in Italy. In the first so called Solange case, Solange I,[199] 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,[200] the German Constitutional Court was convinced of the protection of human rights within

[199] Internationale Handelsgeschellschaft CMLR, 1974:2, p. 540

[200] Wunsche Handelgesellschaft CMLR, 1987:3, p. 225.

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.

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.[201] 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 was obviously not satisfied with the fundamental rights protection and was seeking for a more clear indication of which rights are protected in Community law.[202] The Court was obviously concerned with the lack of legal certainty in the Community legal order in protecting human rights.

If the Charter were to be incorporated into the treaties, the Charter would become primary law of the Union. This would however not have any effects on fundamental rights guaranteed in national constitutions, i.e. through the doctrine of

[201] Brunner v The European Treaty CMLR, 1994:1 p. 57

[202] Betten & Grief, 1998, pp. 66-68.

direct effect or supremacy of Community law. The Charter is designed to be applicable only with regard to EU institutions and Member States when they implement Union law. Furthermore, article 53 of the Charter explicitly states that "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, *in their respective fields of application*, by Union law and international law and by international agreements to which the Union, the Community or the Member States are party, including the European Convention for the protection of Human Rights and Fundamental freedoms, and by the Member States' constitutions". This approach taken by the "Convention" in drafting the horizontal articles could according to Helander implicitly be interpreted as a statement by the "Convention" underlining the autonomous status of EC law in relation to both international law and national legal systems.[203] Helander points out that article 53 implicitly makes a distinction between international law and national legal systems as autonomous legal systems seen from a Community law perspective, specially with regard to national constitutions and their fundamental rights provisions. In that sense, these legal systems would have an autonomous status in relation to each other diminishing the effect of supremacy concerning fundamental rights.[204] Even if the Charter were to be incorporated into the Treaties, its status would not be higher of higher rank in relation to national constitutions as recognized in article 53 as is therefore not recognising the supremacy of EC law in relation to national constitutions but rather reflects the parallel position in relation to national constitutions.

The general rule is that in order for the Charter to be applicable, one has to find a link between Union law and a fundamental rights issue. Otherwise, the Charter is not applicable in a case regardless of its legal status. In other words, the applicability of the Charter is connected with the material content of Union law. In other words, the Charter is designed not to affect fundamental rights protection in Member States outside the scope of Community law and is therefore not to be of general application

[203] Helander, 2001, p. 68.

whether legally binding or merely as an declaration. As long as the Charter is not made legally binding upon Member States, it is difficult to see what the impact it would have especially with regard to certain economic and social rights, which are drafted in such a way that they are put under the conditions provided for by Community law and national law and practices. This might create some confusion, especially if the Charter is made legally binding. The Charter provisions are, as noted above, addressed to the institutions and bodies of the Union and only to Member States when they are implementing Union law. Prof. Eeckhout sees a paradox in this approach in that the Charter contains substantial provisions in the social policy field, "which seem to make little or no sense unless they are made legally binding upon Member States".[205] Having in mind that the "Convention" was working on this "as if" notion, certain Member States underlined the importance of the reference to national laws and practices on a substantial number of provisions dealing with social rights. This was a way of insisting that social rights are to be protected on national level in accordance with national laws and practices in the light of the principle of subsidiarity. This was a way to make sure that the Charter would not include any new obligations for the Member States and that the level of protection concerning social rights would be determined on Member State level and would therefore not be determined by the ECJ. Article 51 (2) states that the "Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined in the treaties". In other words, the intention was not to extend the competence of the union into new areas purely as a result of adopting a Charter of Fundamental Rights, whether legally binding or in a form of a declaration. However, it is interesting to note that for example article 28 of the Charter states that workers and employers have the right to collective bargaining and action including the right to strike however subject to Community law including national laws and practices. However, article 137 (6) TEC explicitly excludes "pay, the right to association, the right to strike or the right to impose lock-outs from the competence of the Union".

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[204] Ibid.

[205] Eeckhout (a), 2000, p. 109.

Furthermore, to give some more examples, article 14 "right to education" is not within the competence of the EU. Another example is article 24 "rights of the child". In other words, the EU Charter does include some rights, which are clearly not within the competence of the Union. One has to remember that the EU Charter is mainly applicable with regard to the Union and only concerning Member States when they implement Community/Union law. This is not a fundamental rights catalogue, which is applicable directly to Member States as such as stated in article 51 (1) of the Charter.

3.3. Implications for the European Court of Justice-the question of jurisdiction

The ECJ has jurisdiction to look into fundamental rights issues in order to ensure that they are observed by the institutions of the Union and also by Member States when implementing Community law. There is nearly a complete lack of jurisdiction of the court with regard to the second and third pillars of the Union.[206] However, some changes were made with regard to the jurisdiction of the court in the Amsterdam treaty. For example, certain elements relating to common visa, immigration and asylum policy has been transferred from the third pillar to the first pillar of the European Community, while police and judicial co-operation in criminal matters are left in the third pillar. According to article 46 (d) of the Treaty of European Union, 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 therefore mainly restricted to Community law (I pillar) but includes areas mentioned in article 46 of the EU Treaty.[207] Amendments introduced by the Amsterdam

[206] 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.

Treaty have extended the Court's jurisdiction in a way that may have some implications concerning the fundamental rights protection in that article 6 (2) now is justiciable.[208] Beyond this change, article 6 (2) still remains a "respect clause" in that it does not incorporate any substantive provisions of the ECHR into Community law.[209] Mr. Lenaerts states "this empowers the Court to examine the compatibility of "actions of the institutions" with fundamental rights in the normal exercise its powers under the E.C. Treaty and the Treaty on European Union".[210] Article 46 requires the ECJ to examine the compatibility of action by the institutions with the ECHR and common constitutional traditions within the Community legal order. By committing itself to the provisions of the ECHR in the context of Community law, the institutions are required to respect fundamental rights to at least the same extent as they must be respected by national authorities acting outside the competence of the Union.[211] Article 46 falls short with regard to respect of article 6 (2) *vis-à-vis* Member States acting within the scope of Community law in only authorising the ECJ to examine the compatibility of action by the institutions concerning fundamental rights.[212] The protection of fundamental rights in the Union is therefore ultimately based on article 220 TEC in stating that "the Court of Justice shall ensure that that in the interpretation and application of this Treaty the law is observed" in recognising the jurisdiction of the court to examine Member State legislation implementing Community law. The Court has specifically relied upon the ECHR as a source of inspiration in protecting fundamental rights in the Community

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[207] Rosas, 1999, p. 204.

[208] 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.

[209] Langrish, 1998, p. 14.

[210] Lenaerts, 2000, p. 577.

[211] Ibid., p. 578.

[212] Mr. Lenaerts concludes from this that the case law doctrine must also in the future be based article 220 when the Court is examining the compatibility of Member States action with fundamental rights protected within EC law in implementing Community law. Ibid., p. 588.

legal order.[213] 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.[214] Furthermore, the ECJ is interpreting fundamental rights issues in light of Community law.[215] The system is in other words characterised by an indirect form of protection provided by case law of the ECJ. Certain problems arise from this approach. The first and an obvious problem relate to the fact that the ECJ is restricted to develop fundamental rights solely based on its jurisprudence. This does not necessarily mean that a particular fundamental right is not protected by the ECJ. From this follows that it is difficult to see a clear picture of the fundamental rights that are or could be protected by the ECJ.[216] Despite of the jurisprudence of the ECJ, there has been no clear-cut understanding of the material content of the human rights protection within the Community legal order. This leaves a vague and unclear picture for the citizens what rights are protected at the Union level. As a result, the Cologne European Council stated "the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident". In practise, this meant that the "Convention" had to codify the case law on fundamental rights of the ECJ and therefore give concrete content to article 6 (2). However, one has to keep in mind that neither the ECJ's case law nor the treaties set out clearly what the content of the fundamental rights are that the Union institutions have to respect.

As noted above, the jurisdiction is in principle restricted to EC law not including actions regarding the provisions on police and judicial co-operation with the exceptions mentioned in articles 35 and 40 on the EU Treaty and provisions on a common foreign and security policy.[217] A limited expansion of the court's jurisdiction is connected with

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[213] 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.

[214] Rosas, 1999, p. 205.

[215] Ojanen, 1994, p. 17.

[216] Sevon, 2000, p. 403.

common action by the Member States in accordance with title VI of the EU Treaty (provisions on police and judicial co-operation in criminal matters) concerning prevention, detection and investigation of crime as well as extradition intending to achieve "a high level of safety within the area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters…" (article 29, TEU). In accordance with article 46 (b) the court has jurisdiction in these matters as long as the conditions are fulfilled as provided in article 35. According to article 35, the ECJ can give preliminary rulings on the validity and interpretation of framework decisions and decisions on the interpretation of conventions established under Title VI and on the validity and interpretation of the measures implementing them.[218] In other words within the context of police and judicial cooperation in criminal matters, only the mechanism of preliminary rulings is providing for the possibility of redressing fundamental rights provided however that the Member State in question has accepted the jurisdiction of the ECJ by making a declaration as provided in article 35 (2).[219] According to article 35 (5), the Court is explicitly excluded from reviewing "the validity or proportionality" of measures carried out by the police or other law enforcement services with regard to the maintenance of law and order and the safeguarding of internal security.[220] Under Title VII, the ECJ has jurisdiction to review the operation of the provisions authorising some Member States to establish closer co-operation.[221] A further reduction in the protection

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[217] Cooper & Pillay, 2000, p. 113- 115.

[218] Member States have established a number of organisations under Title VI, but perhaps the best known is Europol. See Convention on the establishment of European Police Office (Europol), OJ C 316/1 (1995). The ECJ has no jurisdiction to review the operational activities of organisations established under Title VI, but only the convention establishing the organisation. The fear is related to possibility that the operational activities could be contrary to international human rights standards being at the same time "immune from judicial review". The ECJ has no jurisdiction to review the activities of the Europol as such. King, 2000, pp.85-87.

[219] Eicke, 2000, p. 289 and Eeckhout (b), 2000, p. 155. In other words, actions for annulment, actions for failure to act are limited in Title VI, where the court's jurisdiction is limited to the optional preliminary rulings procedure.

[220] Allain, 1999, p. 266.

[221] Article 40 (4) TEU.

of fundamental rights within the competence of the EC is article 68 (2) TEC in stating that " in any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to article 62 (1) (abolition of controls on internal borders) relating to the maintenance of law and order and the safeguarding of internal security".[222] It is to be regretted that measures and decisions taken in relation to internal security that might have significant implications with regard to fundamental rights protection within the EU are left outside the jurisdiction of the ECJ. [223]

An often recognized problem is related to access to the ECJ for natural or legal persons to whom decisions are addressed or to those whom it is of "direct and individual concern" in accordance with article 230 TEC. In advance of the 1996 IGC, 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 (now 230) of the EC Treaty.[224] In considering the discussion concerning the adoption of 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 former 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. Restrictions on the right to access to court present a real and serious obstacle to an effective enforcement of fundamental rights protection within the Union. This provision has been interpreted restrictively by

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[222] Article 2 (1) of the Schengen Protocol also states " In any event, the Court of justice shall have no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security".

[223] Concerning the question of the ECJ's jurisdiction in Title IV of the EC Treaty and Title VI TEU, see for example Arnull, 1999, pp. 115-121 and Eeckhout (b), 2000, pp. 153-166.

[224] Intergovernmental Conference, Briefing No. 22, p. 4.

the ECJ making it all the more difficult for individuals to challenge decisions by the Community institutions, which may be infringing their fundamental rights. This double test of the victim requirement imposed by article 230 (4) TEC has been seen as too restrictive. This notion of "individual and direct concern" has been interpreted as much more restrictive than the "victim requirement" in the ECHR and its article 34 in stating that " The court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one High Contracting Parties of the rights set fourth in the Convention or the Protocols thereto…". [225] Mrs Harlow on the other hand states that article 230 is not necessarily stricter than the victim requirement offered by the ECHR. She states that individual petition is confined to the victim of a violation in the meaning of someone directly affected, but that there is a difference in the attitude of the courts.[226] With regard to the ECHR, Harris & O´Boyle and Warbrick notes that there is a kind of "elasticity of the notion of victim in the Commission's case law as well as the uncertain and shifting boundaries between those directly affected by a particular measure and those remotely affected".[227] The report of the European Parliament on drafting of a European Union Charter of Fundamental Rights recognized that "article 230 TEC will need to be given a more flexible interpretation in order to improve the individual access of the EU citizen".[228] Mr. Eicke points out that the question of the victim requirement as stated and interpreted by the European Court of Human rights must be the minimum standard for the access to the ECJ regarding the Charter.[229]

In drafting the EU Charter, it was seen as important that the Charter should be applicable in all the three pillars making no distinction between EC law and EU law.

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[225] The victim requirement implies that the violation of the ECHR must affect the applicant in some way. The European Court of Human rights has held in its jurisprudence that the "victim requirement" refers to the person directly affected or a potential victim. See van Dijk & van Hoof, 1998, pp. 46-60.

[226] Harlow, 1999, p. 193.

[227] Harris & O´Boyle & Warbrick, 1995, p 633.

[228] European Parliament Report, Final A5-0064/2000, p. 14.

[229] Eicke, 2000, p. 291.

Article 51 states that the Charter applies primarily with regard to the institutions and bodies of the Union making no specific reference merely to the Community. Already in the mandate given by the Cologne European Council, there is a reference to Union as recognising that "the protection of fundamental rights is …an indispensable prerequisite for her (Union's) legitimacy". The Charter is in other words drafted in such a way as being applicable not only with regard to Community law but also to the second and third pillars of the Union, which are based on intergovernmental co-operation between Member States. However, it is also easier to adopt a merely political declaration addressed to the European Union as a whole. The crucial question is, however, whether the Charter does have any impact on the protection of fundamental rights with regard to the second and third pillars. The question of the Court's jurisdiction in Community law is not a problem. It is of course a positive thing that the EU Charter is applicable in relation to all the three pillars. Another question is, however, whether is makes any impact, having in mind that the ECJ, as noted above, has a limited jurisdiction in the second and third pillars. Whether or not, the Charter is legally binding, it would not have any impact on the question of the Court's jurisdiction.

The question of the ECJ's jurisdiction is an important one for the realisation and effective protection of individual's fundamental rights with regard to all activities of the European Union. There is certainly a need for a more explicit guarantee of protection especially in relation to provisions on police and judicial cooperation in criminal matters (title VI). The Charter in itself does not extend the jurisdiction of the ECJ to cover the second and third pillars. Article 51 (2) explicitly states that "this Charter does not establish any new powers or task for the Community or the Union, or modify powers and tasks defines by the Treaties". This is the position whether or not this Charter is incorporated into the Treaties and therefore made legally binding. The Charter in itself is not sufficient enough to give effective protection of fundamental rights with regard to the second and third pillars as long as the ECJ is lacking jurisdiction in these areas. This is a question that has to be addressed by the European

Council if and when the Charter is made legally binding. In the absence of external human rights control, it is a major deficit that the ECJ is lacking powerful tools in protecting fundamental rights in areas with potential relevance for the individual.

3.4. EU Charter against the background of the European Protection of Human Rights- A dual system of fundamental rights protection in Europe?

One of the principal concerns among certain scholars with adopting a special fundamental rights catalogue for the Union has been that Europe generally would start to move in different speed concerning fundamental rights protection. 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 human rights within the system established by the ECHR. Does the adoption of the EU Charter in practice mean establishing a dual system of human rights protection, one for the Community and one within the framework of the Council of Europe? The European model, as judge Lenaerts[230] calls it, rests on a division of human/fundamental rights protection between two supranational legal orders.[231] These represents the European Community legal order and the legal order established by the ECHR within the Council of Europe. The Community legal order is described as a distribution of law-making powers between the "central government" (the Community) and the Member States in that the dividing line between the Community/Union and its Member States is either substantive according to the subject matter or normative in the sense that the legislative function is within the Union and the executive function is left to the Member States.[232] Within the Council of Europe, the system is different in that it does not have any normative function of its own, but rather has a supervisory function as established by

[230] Koen Lenaerts is a judge of the Court of First Instance.

[231] Lenaerts, 1991, pp. 371-372.

[232] Ibid.

the ECHR. This co-existence of two supranational legal orders both being involved in fundamental/human rights issues, also having the Union member States as members in both organisations, is subject of discussion in this chapter.

As noted above, the ECJ has developed a fundamental rights doctrine through its jurisprudence over the years relating to protection of fundamental rights regarding infringements by the Community institutions or Member States acting in the field of EC law. Some proposals in the beginnings of the 1990s 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 protected by the ECJ concerning fundamental rights.[233] 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 however indicate a need for a clear recognition in the Treaties for a fundamental rights catalogue to be applicable under *all* circumstances irrespective of the subject matter involved. This model has been criticised since it 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.[234] According to Lenaerts, the best solution for the development of fundamental rights protection within the Community legal order would be to strengthen the protection afforded in the field of the application of Community law. This, for the reasons to avoid furthers confusion between the two supranational legal orders in protecting human rights within Member States concerning national matters.[235] In acting outside the scope of Community law, Member States would remain subject to the control machinery of the European Court of Human

[233] Ibid. p. 373.

[234] Ibid. p. 374.

Rights.[236] The question that arises is whether the protection of fundamental rights can be coherent within these two supranational legal orders when Member States act both within the framework of the Community legal order and also outside the scope of Community law.

The option of drawing up a separate catalogue for the EU is in the opinion of Toth a way of spitting up of the present system of a single set of human rights in Europe that would ultimately undermine the authority of the ECHR.[237] Mr. Gaja has also expressed concern against a binding catalogue of rights for the European Union in that it would undermine the authority of the ECHR in sating that

> A catalogue included in the TEU or the EC Treaty would probably be intended to apply to all Community and national measures, and thus be juxtaposed to national rules on the protection of human rights. The system for the protection of human rights existing within the Council of Europe, or even its further development, would apparently not be affected by a European Union catalogue, but- apart from the risk of conflicts – the effectiveness of the Council of Europe system would most likely be undermined, to the detriment of the protection of the same rights in the States that are not members of the European Union. Another disadvantage would be the fact of giving the decisive role in the interpretation of the catalogue to a non-specialized court, that would moreover become overburdened, unless one accepted the idea of creating a new human rights court within the European Union – a solution that would be politically difficult and would complicate the position of national courts when confronted with an issue of the validity of Community acts.[238]

How has this problem been dealt with in the EU Charter? This is even more an important question if and when the Charter will be incorporated into the Treaties sometime in the future. The question of consistency between the EU Charter and other international instruments and in particular the ECHR is an important issue with regard to the notion of legal certainty and it has to be held that fundamental rights are too

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[235] Ibid.

[236] Lenaerts, 1991, p. 377-381.

[237] Toth, 1997, p. 501. In drawing up a separate fundamental rights catalogue for the Union would in the opinion of Toth, be a threat to the unity of human rights protection in the whole of Europé.

important to be interpreted inconsistently. The Council of Europe observers on the EU Charter expressed their satisfaction with the EU Charter in that "the Charter draws to a significant degree on certain Council of Europe conventions, namely that European Convention on Human Rights (ECHR), the revised social Charter and the Convention on Human Rights and Biomedicine".[239] The two Council of Europe observers drew particular attention to the links between the Charter and the ECHR. This was seen as an important issue especially when the Charter is made legally binding since the Member States will therefore be bound by both the ECHR and Charter in implementing Community law. This, due to the reason that the Charter expressly relies on the ECHR and therefore constitutes "a sort of extension to it in Community law".[240]

Article 52 (3) recognises a close link between the Charter and the ECHR in stating "insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". The ECHR is recognised as the standard for the interpretation and application of the Charter. The European Court of Human rights has through its interpretation of the Convention determined the level of protection afforded by the ECHR, which is recognised as a minimum level of protection by the Charter. According to the text of explanations relating to the Charter prepared by the Presidium, article 52 (3) is intended to ensure the necessary consistency between the Charter and the ECHR by including a principle ensuring the consistency between these two instruments including the limitation clauses set out in the ECHR. The reference to the ECHR also includes the protocols to the ECHR. The scope of guaranteed rights are determined not only by the texts, but also includes the case law of the European Court of Human Rights and by the ECJ as stated in the preamble to the Charter. In other words, the drafters of

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[238] Gaja, 1999, p. 798.

[239] CHARTE 4961/00, Contrib. 356.

the Charter felt that during the whole drafting process, it was important that the ECHR should be kept as the basis for the drafting of the Charter concerning civil and political rights. This, in order to avoid diverging interpretations, of provisions similar in content in the Charter and the ECHR, between the ECJ and the European Court of Human rights. The provisions reflecting the ECHR are not written in identical terms, but article 52 (3) is a guarantee of the same content also in relation to the extensive jurisprudence interpreting the ECHR from the European Court of Human rights. One could therefore ask why the "Convention" chose not to write the provisions of the Charter in identical terms with the ECHR. Perhaps a reason was a will to kind of "update" the provisions written in the 1949, i.e. to modernise the language used in the ECHR and also perhaps to mark the Charter as a distinct project within the Union in not following word by word the ECHR. The Charter is drafted very much in the same lines as Mr. Lenaerts suggested already in 1991 in that when Community institutions or Member States act within the scope of Community law, the judicial protection offered by the ECJ must at least offer the same level of protection as guaranteed by the European Court of Human rights as stated in article 52 (3) of the Charter. The level of protection offered by the ECHR is a minimum standard. Article 52 (3) also prescribes that Union law can offer a higher level of protection if it is desired by the Union. This is in line with article 53 of the ECHR envisaging that the Contracting Parties may increase the level of protection afforded by the ECHR under domestic laws or other Treaties.[241]

It is to be regretted that a similar kind of clause as article 52 (3) represents with regard to the status of the Charter in relation to the ECHR cannot be found in the Charter concerning other human rights instruments. This is especially regrettable with regard to the European Social Charter and UN Conventions in this field. This is not to

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[240] Ibid. See also Chapter 2.4.2.

[241] Article 53 of the ECHR states that " nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party". In the same line, article 53 of the Charter for its part is intended to ensure that when there is a conflict with a national constitution or international convention, the text offering the best protection prevails. Lemmens, 2001, forthcoming.

say that the ECJ would not be able to make references to other conventions and case law from various control mechanisms established for example within the European Social Charter in interpretation those social rights included in the Charter corresponding with European Social Charter.[242]

One question that might arise in this connection is whether the Charter of fundamental rights not merely is a minimum standard but also a maximum standard. It is true that the basis for the Charter has been the ECHR also implying that the ECHR would be the standard of interpretation including the case law of the European Court of Human rights. It is the European Court of Human Rights that determines the level of protection afforded by the ECHR. The provisions that correspond to the ECHR are to be interpreted in the same way. This would imply that, in principle, the provisions of the Charter and of the ECHR would have the same scope of application and the same content and that they would be subject to the same limitation clauses under same conditions unless the Charter offers a more extensive protection. In this sense, the Charter seems to avoid a situation of creating a dual system of fundamental/human rights protection in Europe. The option of creating a system with a more extensive protection offered by the Charter might however on the other hand undermine the ECHR. This is however not the case in general terms. It is true that the Charter to some extent is offering a higher level of protection. This is however totally in line with the ECHR.

Lord Russell-Johnston[243] on the other hand feels that a legally binding Charter without accession of the EU to the ECHR would create two parallel jurisdictions, two supranational mechanisms protecting human rights.[244] According to Lord Russell-Johnston, this will weaken and undermine the Strasbourg mechanism in seeking compensation for human rights violations. He sees the EU Charter, being legally

[242] Helander, 2001, p. 65.

[243] President of the Council of Europe Parliamentary Assembly.

[244] Russell-Johnston, 2000, pp. 53-54.

binding, as a threat to the current system upheld by the Council of Europe. The ECJ would be addressing fundamental rights issues based on the ECHR as the final interpreter, which might result in conflicting jurisprudence ultimately undermining the European Court of Human rights. His scenario is that the European Court of Human rights would become a human rights court for the "rest of Europe" not being members of the European Union. The problem that he sees is that the ECJ would become the final interpreter in issues concerning fundamental rights lacking the external control element, which is the essence and the *raison d´être* for the ECHR and its enforcement mechanism. Therefore, he would welcome the EU Charter provided that this process would be followed by an accession of the Union to the ECHR.

Lord Russel-Johnston sees especially the adoption of a legally binding Charter as a clear threat to the Strasbourg system based on the fear of divergent interpretations by the European Court of Human Rights and the ECJ. However, article 52 (3) is the guarantee for establishing coherence between the ECHR and the EU Charter. The coherence established between the Charter and the ECHR enhance legal certainty is nevertheless not necessarily a guarantee for coherent interpretation of the rights embodied in both the Charter and the ECHR although the application of the Charter presupposes the determination of at least the same level of protection afforded by the European Court of Human rights as recognized in article 52 (3). This problem could easily be a source of problem however in situations where the ECJ is faced with issues that have not previously been dealt with before the European Court of Human Rights. Member States will remain under the scrutiny of the ECHR being also at the same time required to comply with Community law. Therefore, the question of accession by the EC/EU cannot be ignored or disregarded. Quite the contrary, adopting a legally binding Charter does not diminish the need of accession by the EC/EU to the ECHR.[245] However, the fear of creating a dual system of fundamental rights protection has been tackled by the "Convention" at least in regard to the relationship between the ECHR and the Charter in a way that it would be possible to avoid inconsistence between these

two systems of protection of fundamental rights in Europe. Furthermore, one should also keep in mind that the EU Charter is based on already applicable fundamental rights within the Community legal order. The Charter does not replace the present system of protection of fundamental rights within the Community legal order whether legally binding or not. The Charter will however make the present protection of fundamental rights more visible as requested by the Cologne European Council. Fundamental rights are already protected within the Community legal order.

3.5. Question of divergent interpretation between the European Court of Justice and the European Court of Human Rights

During the drafting process, the question concerning the relationship between the European Court of Human Rights and the ECJ was frequently raised. The European Court of Human Rights is currently dealing with cases brought before it by citizens of any of the Member States (43 States)[246] being party to the ECHR. The ECJ will in the future most likely rule on a case of a human rights violation by a EU institution in accordance with the EU Charter. As the Community law stands now, the ECJ is under the obligation to respect the ECHR as a condition for the lawfulness of acts of the Community institutions. The current problem often raised is the possible divergence between the case law of the ECJ and the European Court of Human Rights in applying the ECHR. Under current Community law, the ECJ is under no obligation to follow the case law of the European Court of Human rights. The EU Charter does not either include any provision stating that the ECJ is bound to follow the case law from the European Court of Human rights. Advocate general Darmon stated in the *Orkem case* that

[245] This question will be discussed further in Chapter 4.

> I must not fail to remind the Court that, according to its case law, the existence in Community law of fundamental rights drawn from the European Convention on Human Rights does not derive from the wholly straightforward application of that instrument as interpreted by the Strasbourg authorities…The most authoritative commentators on the judgement of this Court also emphasise that the Court's position regarding the European Convention on Human Rights consists in most cases in using it merely as a reference even though it goes as far as possible in that direction and that by doing so , it develops directly or indirectly its own case law interpreting the Convention. This Court may therefore adopt, with respect to provisions of the Convention, an interpretation, which does not coincide exactly with that given by the Strasbourg authorities, in particular the European Court of Human Rights. It is not bound, in so far as it does not have systematically to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities. [247]

The ECJ considers itself to be bound to draw "inspiration" from common constitutional traditions and human rights conventions offering "guidelines" in the interpretation of fundamental rights issues within an EC law context. According to Lawson, the ECJ is not applying human rights as national courts or international supervisory bodies have interpreted them but rather that they will assist the ECJ in defining fundamental rights as a special category of general principles of Community law. [248] This approach has led in some cases to a situation the ECJ jurisprudence at times may conflict with the authoritative interpretations of the European Court of Human rights on provisions of the ECHR.[249] O'Leary sees a real danger in that the ECJ is "free" to interpret the provisions of the ECHR not being coherent with the case law of the European Court of Human rights. The difference in approach between the European Court of Human rights and the ECJ "has been attributed to the fact that one court has the responsibility

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[246] Armenia and Azerbaijan are the latest *signatories* to the ECHR, 25.1. 2001.

[247] Opinion of Advocate General Darmon delivered on 18.5. 1989. Orkem v. Commission. Case 374/87. ECR 3283, para. 139-140.

[248] Lawson, 1994, p. 227.

[249] O'Leary, 1996, p. 364.

for protecting the operation of the common market, while the other is charged with protecting fundamental rights".[250]

Judge Lenaerts underlines that if the ECJ and the Court of First Instance wants to remain credible in their application of the ECHR in its case law under article 6 (2), they must be willing to include in their own judgements "precedents from the case law of the Court of Human Rights in order to explain whether those precedents are relevant to the interpretation of fundamental rights in the specific context of a review of the legality of a particular act of the Community institutions".[251] He underlines that that the ECJ and the Court of First Instance, if necessary, need to be prepared to modify its earlier case law in order to avoid divergent interpretations of the Convention given the European Court of Human Rights in cases where the European Court of Human rights is addressing an issue later than the Community case law on an similar issue. In other words, judge Lenaerts would strongly argue for Community Courts to follow the developments in the interpretation of the Convention by the European Court of Human rights. Such an approach would increase the transparency of the courts' grounds of judgement and would be crucial concerning the consistency with the ECHR when applied by the ECJ and the Court of First Instance.

Lenaerts stresses that if the Union is serious in declaring to be bound by the substantive provisions of the ECHR, the approach mentioned above is "the least it can do to ensure that the Community legal order incorporates in the interpretation of the Convention developments in the case law of the Court of Human Rights".[252] However, Lenaerts makes the point that the issue of divergence in the case law between the two courts are not always easy to detect based on the very nature of fundamental rights stating that very few of the rights are absolute in character. He also draws attention to the subject of limitation clauses as prescribed by law and is necessary in a democratic

[250] Ibid., p. 366.

[251] Lenaerts, 2000, p. 580.

[252] Ibid.

society as specified in the ECHR.[253] The general interest in a democratic society justifying restrictions in accordance with law may vary in different contexts as to the precise grounds that might be invoked.[254] The question of limitation clauses included in the ECHR will be a challenge for the ECJ in reviewing the legality of a Community act in which certain restrictions imposed on fundamental rights based on general interest. This is certainly an area were it will be difficult for the ECJ to determine whether or not the assessment would be in line with the case law of the European Court of Human Rights.

The question of divergence has been tackled by the drafters of the Charter in stating, as noted above, that insofar as the Charter is containing rights corresponding to the ECHR, they shall have the same meaning and scope as in the ECHR. This, in order to the greatest extent possible avoid a situation of having two supranational courts interpreting the same Convention in different ways. However, it must be remembered that whether or not the Charter is legally binding, the ECJ is still not legally bound to follow the case law of the European Court of Human rights. Indeed, different interpretation from the two courts on similar cases would give rise to confusion and legal uncertainty. Another problem connected to this is that there is a real risk of the authority of either the European Court on Human Rights or the ECJ being undermined. The Council of Europe's Parliamentary Assembly is of the opinion that the authority of the European Court of Human rights could be undermined by conflicting

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[253] The relevant provisions in the ECHR are article 8 (respect for private and family life), article 9 (freedom of thought, conscience and religion), article 10 (freedom of expression), article 11 (freedom of assembly and association), article 1 of Protocol 1 (protection of property), article 2 of Protocol 4 (freedom of movement) and article 1 of Protocol 7 (procedural safeguards relating to expulsions of aliens).

[254] Lenaerts, 2000, p. 582. Striking the balance between respect for fundamental rights and the general interest may vary in different societies depending in which the assessment is made. The ECHR is constructed so that this assessment is to be made by the national legislator provided that the restrictions of fundamental rights are reasonable. The interpretation of national legislation is a matter for the national courts. This does not however mean that the European Court of Human Rights cannot test national legislation for their conformity with the ECHR. It is the notion "prescribed by law" that can be interpreted by the court and not the law itself. However, the European Court of justice has left a wide margin of appreciation to the national authorities. On this point, see van Dijk & van Hoof, 1998, pp. 765-773.

interpretations on similar issues. For example, in the *Hoechst case*[255], the ECJ in determining whether the right to privacy extended to business premises, argued that the European Court of Human rights had not dealt with a similar issue, but nevertheless concluded that the protective scope of article 8 of the ECHR "is concerned with the development of man's personal freedom and may not therefore be extended to business premises". The European Court of Human rights have however later in *Niemietz case* held that article 8 of the ECHR did extend to business premises.[256] These two cases illustrate the difficulties caused by two courts dealing independently with human rights issues with reference to the same provisions of the ECHR. This problem is particularly difficult in cases where the ECJ has to deal with issues that haven't been dealt by the European Court of Human rights.[257]

3.6.The implications for the EU as an integration project

The process of European integration could also be understood as a process of growing importance of human rights within the European Union. As Bogdandy states, human rights could be seen as ever more important for the ever closer union.[258] The adoption of the EU Charter of fundamental rights is an important attempt to put human rights on the same level as that of free-market liberal principles around which the Community was originally constructed. The European Union has been criticised for the lack of a coherent human rights policy. According to the Alston and Weiler, this is true both in relation to its internal policies and also to a lesser extent with regard to Unions' external policies.[259] However, the Charter of Fundamental Rights has the potential to push for a

[255] Hoechst v. Commission, joined cases 46/87 and 227/88, judgement of 21.9. 1989, ECR 2859.

[256] See Niemetz v. Germany, judgement of 16.12. 1992. Series A No. 251-B.

[257] For a more thorough review, see Spielmann, 1999, pp. 764-770.

[258] Bogdandy, 2000, p. 1307.

[259] Alston and Weiler, 1998, p. 22. See also Clapham, 1999, pp. 627-683.

more coherent human rights policy for the Union in that the Charter could form the yardstick of general human rights assessment by the Union institutions to determinate the existence of a serious and persistent breach by a Member State of human rights in accordance with article 7 TEU. Furthermore, membership of the EU is directly linked with respect of fundamental rights in accordance with article 49 TEU in providing that "any European State which respects the principles set out in article 6 (1) TEU may apply to become a member of the Union".[260] One could say that reference to human rights and fundamental freedoms are rather vague. Therefore, the Charter might have an important role in making the references to human rights more explicit in terms of what the accession criteria might be.

The Nice European Council did not make any decision concerning the incorporation of the Charter into the treaties. The Treaty of Nice included however a declaration on the future of the Union calling for a debate of the future development of the European Union. The European Council agreed in Nice to discuss the future development of the Union at its meeting in December 2001 concerning appropriate initiatives for the continuation of the further integration among other things involving the status of the Charter of fundamental rights of the European Union proclaimed in Nice.[261] The European Council called for a deeper and wider debate in co-operation with the Commission and the European Parliament involving representatives of national parliaments, representatives of civil society etc. The question that has gained attention is whether this model for a drafting body could be used in perhaps drawing

[260] The Copenhagen European Council adopted in 1993 requirements for membership stating that "membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for the protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union". Presidency conclusions, Copenhagen European Council, June 1993.

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

up a constitution for the European Union.[262] This is a question, which is not easy to answer at this point. The composition of the "Convention" could perhaps have a certain impact when the Union is preparing for the future having in mind the idea of reorganising the treaties into a constitution for the European Union. The idea of reorganising the existing treaties into a constitution is supported by the Commission.[263] This exercise would supplement the Charter of Fundamental Rights prepared by the "Convention". However, it is very difficult to make any kind of estimate whether this composition could have any future role to play in for example elaborate a draft constitution for the EU. It is of course also an entirely different task to reorganise the treaties of the Union or drafting a Treaty than merely adopt yet another soft-law instrument within the Union. Certainly, it is worth learning from this experience in involving democratically elected representatives of members of national parliaments and from the European Parliament forming the parliamentary predominance. At this stage, one cannot however make any estimate of the impact of this exercise might have on future preparation or on the decision-making structure. It is important to keep in mind that if changes are going to be made in the treaties establishing the European Community/Union, this has to be done by way of an Intergovernmental Conference. The general procedure concerning treaty amendments is that it must be adopted by Member States in a diplomatic conference and come into force once all Member States have ratified the new treaty in accordance with their respective constitutional requirements.[264]. The question is if a similar kind of a composition could be an

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[262] Lately, the discussion concerning the EU Charter has been connected with the reorganisation of the treaties into a constitution for the EU where this fundamental rights project would very well fit together.

[263] The Commission entrusted the Robert Schuman Centre at the European University Institute in Florence to study a reorganisation of the treaties based on the Report of the wise men of 18 October 1999 "The Institutional Implications of Enlargement-Report to the European Commission on 20th October 1999, Document No. 2159. See A Study of the reorganisation of the Treaties: A Basic Treaty for the European Union, Report submitted on 15 May 2000 to Mr Romano Prodi, President of the European Commission.

[264] However, the treaties do contain a number of special amendment procedures differing from the general procedure. These amendment procedures are of an "autonomous" and "quasi-autonomous" nature. The "autonomous amendment procedure" is characterised by the Union institutions being involved in the amendment procedure. The "quasi-amendment procedure" is characterised by the fact that Council acting unanimously have the power to adopt provisions "which it shall recommend to the

alternative to the present IGC.[265] With regard to the composition of the "Convention", this could be interpreted as perhaps a will to reorganize the present ICG towards a more "democratic" and at the same time a more transparent way of structuring the future of the European Union. Certainly, the composition of the drafting body was reflecting the need to create a legitimate process. The drafting procedure of the Charter did reflect a certain degree of openness and transparency and also to a certain extent the element of inclusiveness, which have been lacking from the ICG model. The critiques raised concerning the ICG model are precisely related to the lack of openness and inclusiveness. However, it seems to be unlikely in the near future that a similar kind of a "Convention" could replace the IGC altogether. Another question is whether the current way of preparation for an ICG could be done by way of using the "Convention" model as advocated by many government representatives lately. The Robert Schuman Centre group drew attention to the "Convention" model or to an establishment of such a formula alongside the present IGC procedure. Adopting a similar kind of composition for the reorganising the European Union Treaties would enhance legitimacy of the procedure and would also involve and give a role to the civil society in reforming the Union. This could be initiated by the European Council or perhaps by a joint decision of the Commission, the European Parliament and the Council. The "Convention" would draft amendments and the amendments would have to be approved by the European Council and the European Parliament. However, attention was drawn to the fact that if such a formula was to be used, the rules of procedure ought to be formalised to avoid

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Member States for adoption in accordance with their respective constitutional requirements". For example, on a proposal from the Commission and consulting with the European Parliament, the Council may adopt provisions to strengthen or to add to the rights laid down concerning the citizenship of the Union (art. 22 TEC). See, Reforming the Treaties, Amendment Procedures. Second report on the reorganisation of the European Union Treaties. European University Institute, 31.7. 2000, pp. 5-11.

[265] In accordance with article 48 TEU, "The Government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded. If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties…".

the problems of recourse to a consensus rule.[266] The European Parliament has argued that it should become more involved in the ICG by being granted the formal right to approve all revisions of the Treaties.[267] The Robert Schuman Centre group saw the model used for drafting the Charter of fundamental rights as a useful model for drawing up a European Constitution. If the Charter of fundamental rights is to be included in the process of reorganising the treaties, account of the procedures used for the drafting and adoption of the Charter should most certainly be taken into account. The proposal made by the Schuman Centre draws attention to the democratic nature of the future amendment procedure, in particular with closer involvement of the national parliaments and the European Parliament without forgetting the active participation of the civil society.

This form of developing "EU Law" is certainly a strong contrast to the Intergovernmental way used in the IGCs for reforming Treaty law.[268] It has been interpreted as an indication of change with regard the traditional procedures of reforming the EU by taking into account to a greater extent the interests of the EU citizens as being represented by parliamentarians and also by giving the opportunity for the civil society to give their direct input to the elaboration of the Charter. The European Parliament adopted a resolution on the constitutionalisation where it considered that the Charter of fundamental rights provides the underpinnings for a common constitutional platform. The European Parliament proposed that the driving

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[266] Reforming the Treaties, Amendment Procedures. Second report on the reorganisation of the European Union Treaties. European University Institute, 31.7. 2000, p. 24.

[267] With regard to an IGC, "preparatory work shall be carried out by a Group composed of a representative of each Member State's Government. The representative of the Commission shall participate at the political and preparatory level….The European Parliament will be closely associated and involved in the work of the Conference. Two observers may attend meetings of the preparatory Group from the European Parliament. Each session of the Conference at ministerial level will be preceded by an exchange of views with the President of the European Parliament, assisted by two representatives of the European Parliament. Meetings at the level of Head of State or Government dealing with the IGC will be preceded by an exchange of views with the President of the European Parliament. Presidency Conclusions based upon the Helsinki European Council 10-11 December 1999, p. 5.

force behind the constitutionalisation process should be the Parliament and the Commission by staring the necessary preparatory work taking into account contributions from national parliaments and the public to a large extent, i.e. that the same formula should be used, however improving the discussion and decision making procedures in the "new Convention", in order to draw up a future constitution of the Union.[269] The European Parliament proposed that the constitutionalisation process would be initiated at the Nice European Council with the adoption of a declaration laying down the mandate, procedures and a timetable for the drafting of a constitution for Europe.[270] The European Parliament has been active in promoting the constitutionalisation of the EU for several years. Already in 1984, the European Parliament adopted a resolution on the Draft Treaty Establishing the European Union.[271] In 1994, the European Parliament adopted its second resolution on the Constitution of the European Union based on the "need to provide the European Union with a democratic constitution to enable the process of European integration to continue…taking into account the contributions from national parliaments and members of the public in the Member States and applicant countries…proposing that a European Convention bringing together the Members of the European Parliament and the parliaments of the Member States of the Union should be held prior to the Intergovernmental Conference in order to adopt a draft Constitution".[272] Here, one can see the embryo to a similar kind of a "Convention" that was created for the drafting of the EU Charter of fundamental rights, i.e. the parliamentary predominance of the

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[268] The question of efficiency of the present structure of the IGC proved to be a problem already in 1997 with the agreement of the Amsterdam Treaty. This problem became apparent also in Nice 2000, where heads of state of Government were forced to decide on the spot on texts amending the treaties.

[269] EU Doc. A5-0289/2000.

[270] In accordance with the resolution adopted by the European parliament, the future constitution should clearly state the common values of the EU, fundamental rights of the European Citizens, the principle of separation of powers and the rule of law, the composition, role and functioning of the institutions of the Union, the allocation of powers and responsibilities, the subsidiarity principle, the role of the European political parties and finally the objectives of the European integration. Ibid.

[271] OJ C 77/33 (1984).

members of the "Convention". The federalist movement in Europe is arguing for a model where a constitution would be adopted in accordance with the Community procedures so that a draft constitution would be drawn up by the Commission and jointly examined by the Council and the European Parliament. The national parliaments and the civil society would also be involved in the examination of the draft constitution, which would be submitted to the ICG, and ultimately be subject to a referendum in all the Member States.[273] The idea would be that the European citizens would legitimise the constitution. In other words, the drafting of the constitution should be as transparent and democratic process as possible. This model would require that the citizens would somehow be involved in the drafting process of the constitution. The problem in this model would however be the definition of the involvement of "citizen" in the drafting process.[274] Naturally, one could think of a model where a similar composition could be used in drawing up a preliminary draft for a "constitution" which could be elaborated during an IGC. The European Parliament has been in favour of using the "Convention" model for the preparation of the next IGC.[275] The European Council has not yet adopted a position concerning the "Convention" model to be used for the preparation for the next ICG. The formula of a broad and open preparatory forum has however gained support among present and future Member States. However, one could think that this model is to a certain extent problematic for the European Council in that the Council would no longer be in a position to change the

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[272] OJ C 61/155 (1994).

[273] Manifesto Europe 2002, Brussels 23. March 1998. The European Movement is created after the Second World War to unify the States of Europe in a democratic, federal system. The European Movement consists of two groups of organisations: the national councils, which are active in all EU member states and in most member countries of the Council of Europe, and non-governmental organisations which are active local organisations which support and promote the cause of European unity, as well as individual proponents of and centres for research on Europe. http://www.eurplace.org/orga/european.movement-/manifesto99-en.html, 14.3.-01.

[274] See further in Antola, 2000, p. 35-45 concerning the different strategies on the constitutionalisation process.

[275] The European parliament recommends the establishment of a Convention (to start at the beginning of 2002) similar to the "Convention" which drew up the Charter of Fundamental Rights comprising of members of national parliaments, the European Parliament, the Commission and Governments. Resolution A5-0168/2001, para. 39.

content of a constitution drafted by a similar body as the "Convention". One of the advantages of the "Convention" model is certainly the promotion of transparency and broad commitment by various institutions. However, one has to keep in mind that the issues to be discussed are of a different nature likely to be more complicated and more diverse and to a lesser extent based upon existing instruments as in the case of drafting the Charter. The mandate for the "Convention" drafting the Charter was to codify existing fundamental rights. As noted above, the IGC 2000 called for a deeper and wider debate about the future development of the European Union. The Swedish and Belgian presidencies has been given the task of "encouraging wide-ranging discussions" involving the European Parliament, national parliaments, the Commission including the civil society and other interested parties aiming at agreeing on a declaration in Laeken/Brussels in December 2001 on continuing the process of developing the Union "containing appropriate initiatives for the continuation of this process". This process should address, *inter alia,* the followings questions, namely;

- Future competencies between the European Union and the Member States
- Status of the Charter of fundamental rights,
- Simplification of the treaties and
- Future role of national Parliaments in the future construction of the Union. [276]

This is a clear mandate from the IGC 2000 that it time to start thinking about the future in reorganising the whole structure of the Union. It remains to be seen what will happen during the Belgian Presidency in advance for the European Council meeting in December 2001. This declaration on the future of the Union included in the final act of the Nice treaty is certainly a starting point for rethinking the present structure of the Union. The solemn declaration of a EU Charter of fundamental rights is part of an ongoing process that could transform the European Union and its legal systems. This discussion has begun during the Swedish Presidency in 2001 in accordance with the

[276] O. J. 2001/C 80/01, Declaration No. 23 to the Final Act of the Treaty of Nice, para. 5.

above-mentioned declaration of the Treaty of Nice. [277] The Swedish Prime Minister also representing the European Council during the Swedish presidency, Mr. Göran Persson, opened the debate of the future on the Europe in the beginning of March 2001.[278] This discussion is closely linked to the legal status of the Charter, i.e. to incorporate the Charter into the Treaties. The Laeken European Council will adopt a declaration that establishes the above-mentioned objectives and the process by which they are to be achieved. One way of achieving this objective would be to use the formula used in drafting the Charter of fundamental rights to prepare for the next ICG in 2004. The declaration on the future of the European Union clearly requested to encourage in cooperation with the Commission, and the European Parliament a wide-ranging discussion with all interested parties, i.e. representatives of the national parliaments, candidate countries, representatives of the civil society etc. The EU Charter of fundamental rights, proclaimed as a political declaration in Nice, is a project of clarifying the rights of the citizens. The next step will be, among other things, to consider the legal status of the Charter. The declaration on the Future of the Union adopted in Nice involves long-term political goals on constitutional issues, discussion about federalism and the relationship between the deepening of integration and enlargement. The discussion about the future of the European Union is only at its starting point in preparation for the next ICG scheduled for 2004. This is clearly a different task to elaborate the future of the European Union altogether. The report presented by the Swedish presidency on the debate on the future of the European Union recognised important aspects with regard to a possible preparatory forum to the next ICG. These involve the choice of participants to a future "Convention", the time frame for the work, the formulation of the task, how candidate countries could participate in the work and the internal management of such a composition similar to

[277] The Swedish Presidency drew up a Report on the Debate on the Future of the European Union for the Göteborg European Council in June 2001. See Report 9520/01, POLGEN 14 of 8 June 2001.

[278] The Future of Europe debate: http://europa.eu.int/futurum/flash/flash_002persson_en.htm

the "Convention" drafting the EU Charter of Fundamental Rights.[279] There seems overall to a broad support for an open transparent preparatory forum composed of representatives of national governments, national parliaments, the European Parliament and the Commission. One should however not forget the role and involvement of the civil society in the process in the discussion about the future of the European Union.

3.7. EU Charter of fundamental Rights- a step forward?

The EU Charter of Fundamental Rights has been adopted in a form a political declaration without any legal force. Certain Member States opposed the idea of incorporating the Charter into the Treaties. The legal status of the Charter is however, as noted above, one of the issues to be discussed in connection with the future-debate of the Union, a discussion, which started during the Swedish presidency. The intention here is however to discuss whether the adoption of the Charter in Nice as a political declaration is to be considered as a step forward concerning the protection of fundamental rights within the European Union. It is true that the Cologne European Council did state that the future status of the Charter is to be considered at a later stage and that the mandate given to the "Convention" did not include the task of deciding upon the legal status of the Charter. It was more or less clear from the beginning of the process that the Charter was not going to be included into the treaties in Nice. NGOs were strongly opting for the incorporation of the Charter into the treaties already in Nice. A majority of Member States including the European Parliament and the Commission were in favour of incorporating the Charter into the treaties giving it mandatory effect. However, due to the reason that certain Member States were not ready to agree upon a legally binding fundamental rights catalogue for the Union, it

[279] Report by the Swedish Presidency on the debate on the Future of the European Union, 9520/01, POLGEN 14, para. 56.

was adopted as a political declaration. In other words, there exist a variety of views and expectations as to the legal status of the Charter. The European Parliament proposed that the Charter of Fundamental Rights should at least be referred to in article 6 (2) TEU.[280] This call by the Parliament was supported by nine (9) Member States including the Commission, but was not discussed at the preparatory meetings in Nice. The Charter was drafted on the presumption that it would be legally binding upon the EU institutions and their agencies. The question to be discussed is whether this Charter of fundamental rights is a step forward in the protection of fundamental rights within the Union. The mandate given by the Cologne European Council was to draft a Charter of fundamental rights applicable at Union level and thereby to be made more evident. If the political goal was to add more visibility of fundamental rights within the European Union, one must agree that this political objective has been achieved. This, without making any comment whether the Charter itself can be seen as having fulfilled the objectives set out by the drafters.

The question of visibility and legal certainty was among the most important issues raised by the independent group of experts report "Affirming fundamental rights in the European Union. Time to act" in 1999. It is naturally a key issue for the European citizen to be aware of his /her existing fundamental rights. Another political goal in making rights more visible by adopting the Charter of fundamental rights for the EU was, by codifying applicable rights, to strengthen the political legitimacy of the Union and also in bring the European Union closer to its citizens.[281] The reference by the Cologne European Council to the "need, at the present stage of the Union's development to establish a Charter of fundamental rights" is often referred to the question of enlargement and also the deepening of the integration process. An important issue is that the EU is covering new areas within its competence leading to a situation where there is a need to develop fundamental rights protection. As already noted above, the adoption of the Charter also fits very well into the future

[280] CONFER 4804/00.

constitutionalisation process or the discussion concerning federalism. Seen from a federalist point of view, the adoption of the EU Charter is certainly a step forward. The EU Charter is part of that constitutionalisation process. Another thing is what is meant by federalism itself.[282] By adopting an EU Charter of fundamental rights in a form of a declaration, one could ask whether this actually is a step forward in protecting fundamental rights within the Union or whether this is a project serving some other ultimate political goal. It is one thing to be aware about one's fundamental rights and another thing to able to enforce these rights. One must however not forget that the Charter is reflecting already applicable rights giving concrete content to article 6 (2) TEU. Despite of fact that the Charter was adopted as a political declaration in Nice in December 2000, it must be concluded that it is a strong statement of the values and principles of the European Union by the European Council, the European parliament and the Commission. Mr. Lenaerts has stated that the "Charter contains a potential for growth of the material scope of protection of fundamental rights beyond the sources of those rights mentioned on article 6 (2) TEU".[283]

What would be the advantages of incorporating the Charter into the treaties? First and foremost, The Charter would provide greater legitimacy in protecting fundamental rights protected by the ECJ. As it stands now, the ECJ is deemed to protect fundamental rights as general principles of law seeking inspiration from various international human rights instruments and common constitutional traditions of the Member States that it protects. The ECJ would be able to rely directly on legally binding fundamental rights in its interpretation of Community law. It is clear that a fully enforceable Charter would offer a more reliable system of fundamental rights protection by providing a clear set of fundamental rights standards. Therefore, there

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[281] Helander, 2001, p.59

[282] With a classical definition of federalism is meant a structure of political governance between the federal centre and the peripheries or member states concerning the distribution of powers. The most common characteristic is that of a constitutional arrangement between the parties, i.e. the central government and the member states. See Wakonen, 2000, pp. 7-13.

[283] Lenaerts, 2000, p. 600.

would no longer be a need for the ECJ to rely on the concept of "general principles of law" as developed by the court on a case-by–case basis.[284] The ECJ would have full jurisdiction over the interpretation and application of the Charter. Mr. Lenaerts has stated that the main function with the incorporation of the Charter into the Treaties would be to strengthen the visibility and also hopefully will lead to an increased level of protection through the formulation of rights not yet recognised by the ECJ. However, he points out that the Charter even if included into the treaties would not replace the present system of protection of fundamental rights within EU law.[285] The potential of the Charter is to lay a foundation for the fundamental rights protection within the European Union. Seen it from a European citizens point of view, this potential lies in the fact that the Charter for the first time gives a concrete content to the already applicable fundamental rights within the Community legal order. The fact that the Charter was adopted by a "Convention" formed by representatives both from the European Parliament and National Parliaments together with Member States representatives and from the Commission reflects the political commitment made by the Union and its Member States. However, the fact remains that the Charter is no more than a political declaration with great potential. In the long run, adopting a political declaration for the Union is not enough. In the words of prof. Eeckhout, it is in the very essence of fundamental rights that they are legally binding.[286] Adopting a political declaration written with the view to be legally binding and therefore enforceable is not sufficient enough in the long run to strengthen the human rights doctrine within the European Union. With regard to the EU Charter, the next step would be to strengthen the human rights doctrine by incorporating the Charter into the Treaties. The question of accession by the EC/EU to the ECHR has also lately been discussed in connection with drafting of the EU Charter. The necessity of an accession will be discussed in chapter 4.

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[284] Curtin, 2000, p. 313.

[285] Lenaerts, 2000 p. 600.

[286] Eeckhout, 2000, p. 101.

4. Accession by the EC/EU to the European Convention on Human Rights-still an option and a necessity?

The question of accession by the European Community/Union to the ECHR has been discussed within the Community ever since the 1970s. The idea of an accession of the EC/EU has gained support among Community institutions, notably the European Parliament, the Commission and the Economic and Social Committee. In 1979, the Commission discussed the possibility of accession of the EC to the ECHR in its memorandum on Accession of the Communities to the European Convention for Protection of Human Rights and Fundamental Freedoms. [287] In its memorandum, the Commission stated 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 decisive factor in favour of an accession was the fact that the ECHR and the ECJ 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 fundamental rights catalogue 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. 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".[288] An accession would clarify that the Community does not *only adopt political declarations*, but is rather determined to improve the protection of fundamental rights by binding itself to a written catalogue of fundamental freedoms.

[287] Bulletin of the EC – S 2/1979.

[288] Ibid.

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.[289] 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".

According to the Commission, this gap can be filled by an accession of the Community to the ECHR. This idea of accession to the ECHR was the response to a long-felt need to ensure the respect for human rights within the Community legal order. The Commission stated in its communication in 1990 that accession to the ECHR did not rule out the option of adopting a fundamental rights catalogue specific to the Community. This statement by the Commission can also be turned around, so that the adoption of the EU Charter does not exclude the option of accession by the Community/Union to the ECHR. In 1990, the arguments in favour for an accession were based on the importance of the element of external control. The Commission drew also attention to possible problems when Member States implement Community law.[290] Under article 1 of the ECHR, Member States are responsible for all acts and omissions of domestic organs allegedly violating the ECHR regardless whether such acts or omissions are a consequence of international obligations or domestic law.[291] In other words, as the Community is not a party to the ECHR, the Community is consequently not subject to the review mechanism of the Convention authorities, which is "to be held

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[289] Commission Communication SEC (90) 2087 of 19.11. 1990.

[290] Ibid.

[291] M & Co. v. Federal Republic of Germany. Decision on admissibility by the European Commission of Human Rights, delivered on 9.2. 1990. 64 DR, vol. 64, p. 144.

responsible" for adopting acts to be enforced by Community Member States allegedly violating Member State obligations under the ECHR.

In 1994, 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. In its famous opinion 2/94[292] of the European Court of Justice, the attention on the relationship between the European Community and the ECHR was one again raised. 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 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. Opinion 2/94 did not in other words rule out the possibility of accession in the future. The ECJ did not however address the question whether an accession would be compatible with article 220 TEC stating "the Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed". Furthermore, article 292 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 opinion 1/91[293], 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.[294] As a result, O'Leary finds that "it is difficult to contend that

[292] ECR I – 1759 (1996).

[293] ECR I – 6079 (1991).

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

accession to the ECHR is impossible due to the potential threat which it might pose to the Court's jurisdictional autonomy".[295]

There are divergent opinions whether an accession would be compatible with the present articles entrusting the ECJ to be the final interpreter of Community law. According to Toth, it seems almost inevitable that the European Court of Human Rights would get involved with the interpretation of Community law, if only to establish whether Community legislation or practice is compatible with the ECHR. This might be incompatible with the present rules entrusting the ECJ alone to be the final interpreter of Community law.[296] Accession would mean subjecting the ECJ to the control machinery established under the ECHR. According to Toth, this would also mean that the European Court of Human Rights would interpret Community law concerning human rights in accordance with the objectives of the ECHR. In other words, the European Court of Human Rights would give priority to the objectives of the ECHR over Community law.[297] 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".[298]

The question of accession was frequently raised within the "Convention" during the drafting process of the EU Charter despite of the fact that the "Convention" did not have the mandate to deal with the question. In accordance with the famous opinion 2/94 of the ECJ, the question of accession is a matter for the IGC. The question of accession was previously held as the "best way forward" in strengthening the

[295] O'Leary, 1996, p. 370.

[296] Toth, 1997, p. 503.

[297] Ibid.

[298] Opinion 2/94, para. 20.

fundamental rights protection within the Community legal order. Accession by the Community to the ECHR was seen not only as being symbolically important, but also with due regard of ensuring external control. The drafting of the EU Charter has once again brought up the debate of accession. The Finnish government raised the question of accession during the ICG 2000.[299] The proposal by the Finnish government was however not successful due to lack of political will among certain Member States.[300] The Finnish government held that the process of adopting a Charter of fundamental rights and the question of accession does not exclude one another but quite the contrary complement each other. This is a position, which is supported by the European parliament[301], the Commission and also by several Member States of the EU. The European Commission issued a Communication on the Charter of Fundamental Rights in September 2000 stating that the existence of a Charter neither requires nor precludes accession to the ECHR. Furthermore, "the existence of a Charter does not diminish the interest in joining, as accession would effectively establish external supervision of fundamental rights at Union level".[302] The argument is that the adoption of the Charter and accession would complement each other similarly as Member States have their own constitutions and constitutional traditions including a catalogue of fundamental rights, but at the same time accept external control by being contracting parties to the ECHR.[303] The fact that fundamental rights are being protected in national constitutions has not

[299] CONFER 4775/00.

[300] The Finnish Government considered already before the 1996 ICG that the protection of fundamental rights within the European Union could be strengthened by preparing a list of fundamental rights to be included into the Amsterdam Treaty or through accession of the EC to the ECHR. The Finnish Government considered that these two alternatives are not exclusive of each other. The parliamentary Foreign Affairs Committee drew attention to potential problems arising from constructing a fundamental rights catalogue for the Union. In other words, a fear of creating a dual system of fundamental rights protection in Europe. This was also pointed out by the Grand Committee and the Constitutional Committee of the Finnish Parliament. See statements by UaVM 7/1996, SuVL 2/96 and PeVL 6/96.

[301] The European parliament stated once again in its resolution of 16. 3. 2000 in which it invited the IGC 2000 to "enable the Union to become a party to the ECHR so as to establish close co-operation with the Council of Europe, whilst ensuring that appropriate action is taken to avoid possible conflicts or overlapping between the Court of Justice of the European Communities and the European Court of Human Rights". C5-0058/1999 -1999/2064(COS).

[302] Commission Communication, COM (2000) 559, p. 5.

diminished the need of external control. The adoption of a EU Charter of fundamental rights, either as a political declaration or a legally binding instrument, does not exclude the option of accession. The adoption of the EU Charter is seen as being part of the constitutionalisation process of the treaties. Indeed, as noted already above, the future declaration annexed to the Treaty of Nice called for a "deeper and wider debate about the future of the European Union involving, *inter alia*, the legal status of the Charter and reorganisation of the treaties or a simplification of the treaties. In this sense, the EU Charter is more to be compared with national constitutional fundamental rights rather than with international human rights conventions.

All EU Member States have ratified the ECHR and have subjected themselves to the control of the European Court of Human Rights. Why should not also the Community/Union subject itself to external control of its institutions and acts of Community law? Accession by the Community/Union would render the European Community/Union to the same degree of supervision as Member States are being subject to the control of the European Court of Human Rights. As a result of accession, Community acts could be challenged before the European Court of Human Rights. Community institutions including the ECJ would be subject for review of an independent and impartial human rights court. Accession to the ECHR would have the advantage of ensuring a watertight consistency in the protection of fundamental rights in Europe as a whole. By accession, the ECJ would be bound by the jurisprudence of the European Court of Human Rights. An accession would eliminate the risk of a divided interpretation of human rights jurisprudence in Europe.[304] An important issue in this respect would be that an accession would ensure that the primary mechanism of human rights protection, or the epicentre of human rights protection, in Europe is within the Council of Europe.

The question of accession has also become topical also for another reason related to the transfer of competences from sovereign States to international organisations. As

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[303] Carrasco Macía, 2001, p. 195.

noted above, the Commission drew attention to this problem already in 1990 by stating that "the fact that the Community has not acceded to the Convention raises a special problem when a Member State enforces a Community legal act".[305] The transfer of competences from Member States to the EU has meant that matters falling within that competence are vested in the Union being at the same time contracting parties to the ECHR. The question therefore is under which conditions are Member States of the European Union responsible for complying with the ECHR in matters falling within the competence vested upon the European Union? The former European Commission of Human Rights has concluded in its case law that it is not possible to hold Member States responsible for infringements of the ECHR by Community institutions. The Community is a separate legal person.[306] Applications directed against the European Community are inadmissible *ratione personae* due to the simple reason that the Community is not a contracting party to the ECHR.[307] Can Member States however be held responsible under the ECHR for implementing rules enacted by Community institutions violating the ECHR? In the *M & co. case v. Germany*[308], the former Commission on Human Rights was faced with this question. The Commission noted that under article 1 ECHR, the contracting parties "are responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with the states international obligations". The Commission held that

> The Convention does not prohibit a member State from transferring powers to international organisations. Nonetheless, the Commission recalls that if a State contracts treaty obligations and subsequently concludes another international

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[304] Kokott & Hoffmeister, 1996, p. 667.

[305] Commission Communication SEC (90) 2087 of 19 November 1990, p. 2.

[306] Schermers, 1999, p. 679.

[307] According to article 34 of the ECHR, only complaints brought against High Contracting Parties are admissible. This excludes complaints against the European Union. Canor, 2000, p. 9.

[308] M & Co. v. Federal Republic of Germany. Decision on admissibility by the European Commission of Human Rights, delivered on 9.2. 1990. 64 DR, vol. 64.

> agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty…The Commission considers that a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers… the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection. The Commission notes that the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance.[309]

The Commission took into consideration that it would be contrary to the very idea of transferring powers to international organisations to hold member States responsible for examining, in each individual case, whether the acts of the Community are in compliance with the ECHR. The Commission held that Member States were allowed to implement acts of Community institutions without any further need of investigation by the Commission of Human Rights whether these acts would be in compliance with the ECHR. This, mainly due to the reason that the Commission noted that fundamental rights are being protected within the legal system of the European Communities by the ECJ. The application was declared inadmissible *ratione materiae* as Member States of the Community bore no responsibility. In other words, the former Commission held that Member States could not be held responsible for implementing rules enacted by international organisations to which they has transferred powers too, under the conditions that within these international organisations sufficient judicial control had been established for the protection of human rights.[310] The Commission noted that the Community legal order not only secures fundamental rights but also provides for judicial review of their observance. In other words, the Commission concluded that the transfer of powers to international organisations is not contradictory to the ECHR as long as equivalent protection of human rights can be ensured within that international organisation.

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[309] Ibid, p. 145.

[310] Schermers, 1999, p. 674.

The (new) European Court of Human rights[311] had recently in the *Matthews case*[312] to consider whether the United Kingdom could be held responsible under article 3 of the First Protocol to the ECHR for the lack of elections to the European Parliament in Gibraltar. Article 3 of protocol I to the ECHR provides that the High Contracting parties undertake to hold free elections in the choice of the legislature. Mrs Matthews is a British citizen resident in Gibraltar. Mrs Matthews complained that the fact that she was not allowed to vote in the European Parliament election was a violation of article 3 of protocol I to the ECHR. The alleged violation of the ECHR was connected to Council decision 76/787.[313] The Council decision, signed by the president of the Council and by foreign ministers of the Member States, required to lay down appropriate election provisions, which it recommended to Member States for adoption. The specific provisions were set out in an Act concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20. 9 1976, which was attached to the Council decision. Annex II of the 1976 Act stated, "the United Kingdom will apply the provisions of this Act only in respect of the United Kingdom". In other words, the United Kingdom shall apply the 1976 Act only with regard to the territory defined as "The United Kingdom" in accordance with its domestic law.[314] In accordance with article 138 (3) (now article 190 (4)), the act was required to be ratified by all Member States.[315] Therefore, neither the Council decision nor the 1976 Act could be challenged before the ECJ. The ECJ does not have jurisdiction to review the legality of primary Community law. The ECJ only guarantees the protection of fundamental rights with regard to Community secondary legislation.[316] In the *case Roujansky v. Council*,[317] the

[311] The former Commission of Human Rights and the Court of Human Rights was replaced by a permanent European Court of Human Rights in accordance with protocol 11 to the ECHR.

[312] Matthews v. United Kingdom, judgement of 18.2. 1999.

[313] OJ L 278/1 (1976).

[314] Olivier, 2000, p. 332.

[315] Ibid.

[316] Canor, 2000, p. 6.

[317] Case T-584/93, order of the Court of 14 July 1994, ECR (1994) 585, para. 15.

Court of First Instance stated " that Treaty (Treaty on European Union) is not an act of a Community institution within the meaning of Articles 4 and 173 of the Treaty, and consequently, this Court has no jurisdiction to examine the legality of its provisions". The Court stated among other things that

> The Court observes that acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer.
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> In the present case, the alleged violation of the Convention flows from an annex to the 1976 Act, entered into by the United Kingdom, together with the extension to the European Parliaments competences brought about the Maastricht Treaty. The Council Decision and the 1976 Act… and the Maastricht Treaty… all constituted international instruments which were freely entered into by the United Kingdom. Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a "normal" act of the Community, but is a treaty within the Community legal order. The Maastricht Treaty too is not an act of the Community, but a treaty by which a revision of the EEC treaty was brought about. The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible ratione materiae under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty.[318]

The Court ruled that the exclusion of Gibraltar from the scope of application of the 1976 Act of direct election of members of the European Parliament was a violation of article 3 of protocol 1 to the ECHR. The European Court of Human Rights drew attention, among other things, to the lack of a possibility to challenge the 1976 Act before the ECJ due to the reason that it was not normal legislative act but a treaty within the Community legal order and therefore not within the jurisdiction of the ECJ. Mr. Lenaerts concluded that the Court made a distinction between primary and secondary Community law in the sense that the criterion for distinction is the possibility to challenge acts of Community institutions before the ECJ.[319] In this regard, the important statement by the European Court of Human Rights is that the 1976 act cannot be challenged before the ECJ for "the very reason that it is not a normal act of the

[318] Matthews v. United Kingdom, judgement of 18.2. 1999, para. 32-33.

[319] Lenaerts, 2000, p. 584.

Community, but it is a treaty within the Community legal order". It is implied that the Court considers judicial control by the ECJ as an important element. Therefore, the lack of judicial control by the ECJ was one of the arguments making the United and Kingdom together with all Member States liable for a violation of article 3 of protocol 1 of the ECHR.[320] In this respect, one could implicitly say that the European Court of Human Rights is following the case law of the former Commission as expressed in the *M & Co. v. Germany* saying that Member States of the European Union cannot be held responsible for acts of the Community under the Convention due to the reason that the Community itself is upholding its own effective system of judicial review offering "equivalent protection". In other words, if a Community act constituting a "normal act" can be challenged before the ECJ, Member States of the European Union bear no responsibility under the ECHR due to the reason that the legal system of the Community can offer "equivalent protection" of fundamental rights. According to Lenaerts, "the only thing which the Community legal order has to do, to remain worthy of the credit it enjoys at present in this matter, is to continue to make it clear that indeed it possesses a system of judicial review offering an "equivalent protection" against the acts or failure to act of Community institutions said to be incompatible with the fundamental rights guaranteed by the Convention.[321] The conclusion of this case is that European Union Member State *may* be held responsible under the ECHR for a violation of the ECHR in the absence of a possibility of judicial review within the Community legal order. This line of case law from the European Court of Human Rights might very well trigger the debate concerning the question of accession of the Community/Union to the ECHR. This case might very well also bring the organisations and their activities established under Title VI (judicial and police cooperation in criminal matters) within the jurisdiction of the Court of Human Rights alleged to be violating the ECHR where

[320] Schermers, 1999, p. 680.

[321] Lenaerts, 2000, p. 585.

the no other court is competent to review the operational activities of such organisations created by the Member States of the EU.[322]

The *Matthews case* is certainly an important case in marking the development in the relationship between the Community legal order and the ECHR. Member States cannot by way of transferring powers to international organisations diminish their obligations under the ECHR.[323] The *Matthews case* has indeed subjected primary Community law to the jurisdiction of the Court of Human Rights. The European Court of Human Rights has recently received new applications against all the fifteen Member States relating to matters falling within the competence of the Union. In other words, the Member States are brought before the European Court of Human Rights to defend measures taken by Community institutions. Community institutions are not in a position to defend themselves before the Court, but have to rely upon Member States to present arguments on behalf of Community institutions. However, according to article 36 (2) of the ECHR, the President of the Court may, in the interest of the proper administration of justice, "invite… any person concerned who is not the applicant to submit written comments or take part in hearings". According to Olivier, this could be applied also with regard to the Community.[324] This would however not solve the problem. The European Court of Human Rights might be willing to further develop the conditions under which Member States of the European Union can be held responsible for violations of the ECHR committed by Community institutions. The *Matthews case* makes it clear that in the event of the absence of the possibility to challenge acts of Community institutions before the ECJ, Member States of the European Union may be held liable for violating the ECHR as a result of transfer of competences from Member

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[322] King, 2000, p. 87.

[323] In the case Waite and Kennedy v. Germany, the European Court of Human Rights held that "where states establish international organisations in order to pursue or strengthen their co-operation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose of the Convention, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such an attribution". Waite and Kennedy v. Germany, judgement of 18. February 1999, para. 67.

States to the European Union. Judge Lenaerts sees a relevant point with accession in stating that "only such accession can indeed give the European Union Member States, as contracting parties to that Convention, the watertight guarantee that they will in no circumstances be held responsible…for the infringement of fundamental rights by the European Union institutions". [325] This is a way of looking into the future development of the case law of the European Court of Human Rights with regard to the question under which conditions Member States can be held responsible for any infringements committed by the European Union institutions. According to Judge Lenaerts, even if the EU Charter, which is primarily addressed to the institutions of the Union, is incorporated into the treaties and becomes legally binding, the importance of accession should not be forgotten.

The adoption of the EU Charter of fundamental rights is to be considered as the first step in the right direction. Regardless of the legal nature of the EU Charter, which is now adopted in a form of a form of a declaration, the question of accession by the Community/Union cannot be disregarded.

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[324] Olivier, 2000, p. 334.

[325] Lenaerts, 2000, p. 600.

5. Summary and conclusion

The idea to elaborate a fundamental rights catalogue for the European Community/Union is not a new one. Ever since the 1970s a discussion on how to strengthen the protection of fundamental rights within the Community legal order has focused on either adopting a legally binding fundamental rights catalogue or an accession by the Community to the ECHR. Neither of these two options has seen daylight yet. The European Union has not committed itself to a legally binding fundamental rights catalogue by adopting a Charter of Fundamental Rights. There are a number of reasons for strengthening the protection fundamental rights within the European Union context. An argument often used in favour of strengthening the protection of fundamental rights is connected to the expansion Union competences into new areas, for example in growing competence and cooperation in policy and security matters which is not followed by an adequate human rights safeguards. In other words, the transformation of powers from Member States to the European Union need to be followed by equally adequate protection of fundamental rights. Furthermore, there has been a need of clarification of the current protection of fundamental rights within the Community legal order. This is related to the way fundamental rights have been protected within the Community legal order, i.e. on case-by case basis. In other words, it is lacking the element of certainty and predictability.

The idea to elaborate a Charter of Fundamental Rights emerged during the German presidency in 1999. This idea was supported across the party lines in Germany as being the best way of guaranteeing fundamental rights protection within the EU in order to ensure clear, transparent and enforceable rights for the citizens of the European Union. The aim and goal for Germany was to elaborate a Charter of Fundamental Rights that would be incorporated into the treaties. In June 1999, the Cologne European Council stated that there is a need to establish a Charter of Fundamental Rights "in order to make their overriding importance and relevance more visible to the Union's

citizens". The mandate given by the Cologne European Council was clearly intended to be an exercise in making fundamental rights more visible for the European citizen. The idea was to clarify which rights are being protected within the Community legal order. The idea is simply based on the fact that fundamental rights can only fulfil their function if citizens are aware of their existence. The drafting body had the task to consolidate already applicable fundamental rights rather than to be creative or innovative. In other words, it was not intended to create anything new of substance, but rather to increase the visibility of what was considered as already existing rights. The "Convention" had the task to elaborate a Charter of fundamental rights based on the ECHR and constitutional traditions common to the Member States. Furthermore, the "Convention" should take into account economic and social rights as contained in the European Social Charter and the Community Charter of Fundamental Social Rights of workers insofar as they would not merely establish objectives for Union action.

The composition of the "Convention" entrusted to draft the Charter was outlined in the Cologne decision. In accordance with the decision taken, the drafting body was composed of one representative of head of State or Government from each Member State, sixteen members of the European Parliament, thirty members of national parliaments and one representative from the European Commission. In addition, observer status was given to two representatives of the ECJ and two of the Council of Europe. The drafting body was working outside the normal framework of the decision/legislation-making structure and was not part of the ICG 2000. Never before had such a composition being used within the context of the European Union. The working methods of the drafting body was intended to reflect the political nature of the representation chosen bearing in mind the predominant place reserved for parliamentary representation. The composition of the drafting body is to be considered as innovative. Especially the involvement of national parliamentarians in the process could open new ways of participation of national parliaments in the future. Indeed, the European Council called for a deeper and wider debate in the declaration on the future of the Union (annex to the treaty of Nice) containing initiatives, *inter alia*, concerning the

role of national parliaments in the European architecture. The solution chosen by the European Council can be said to reflect the idea of bringing the European Union closer to its citizens in a field that has great relevance for the individual vis-à-vis the Union. The European Council had certainly in mind the question of legitimacy of introducing such a composition in the eyes of the citizen. This aspect was underlined by Commissioner Vitorino in stating that " this wise combination of the Community national sides and, above all, the parliamentary predominance help bolster the draft Charter's legitimacy in the eyes of a public which is often critical of the complex decision making machinery at European level". The "Convention" model was also discussed by the Robert Schuman Centre in its second report on the reorganisation of the European Union Treaties. The "Convention" formula was considered as the most appropriate model for establishing a European Constitution or starting the process of a reorganisation of the treaties. The drafting procedure of the Charter did reflect a certain degree of openness and transparency and also to a certain extent the element of inclusiveness, which have been lacking from the ICG model. The critiques raised concerning the ICG model are precisely the lack of openness and inclusiveness. Adopting a similar kind of composition for the reorganising the European Union Treaties would enhance legitimacy of the procedure and would also involve and give a role to the civil society in reforming the Union.

The procedure in the drafting process was to a great extent transparent giving the possibilities for civil society to comment on the draft during the whole drafting procedure. However, critique has been raised that the drafting procedure was not genuinely a participative process in nature but rather composed of only institutional representatives from national and European level. Another critique raised is related to the prefixed timeframe within which the "Convention" had to submit a draft to the European Council in December 2000. Elaborating a Charter of Fundamental Rights in such a short time was a very demanding task. A problem raised was that the prefixed timeframe did not allow for effective consultation of independent experts and representatives of civil society. However, this has also been seen as the "secret of

success". The actual drafting process and the composition of the drafting body has gained at least as much attention as the actual outcome of the process, i.e. the EU Charter of fundamental rights. In the words of Gráinne de Burca, " the process of drafting the Charter was always going to be at least as important- if indeed not more so- than the substantive document which eventually emerged".[326] The European Council had certainly the question of legitimacy in mind in introducing such a composition of the drafting body in the eyes of the European citizens having the task of drawing up a EU Charter of fundamental rights. Especially the participation of national parliamentarians could open new ways of participation of national parliaments in the building the future of the European Union. Lately, the discussion concerning the very need for adopting a Charter of fundamental rights has been connected to the political discussion about the future of the European Union. The idea of adopting a Community catalogue of fundamental rights for the EU has by many been seen as a symbol for the development of the Union into a federal state. There can be no doubt that the project of drafting a catalogue of fundamental rights does have an important political dimension. The elaboration of the EU Charter could be seen as the first step towards adopting a EU Constitution. This is especially evident within the so-called "federalist movement", where the elaboration of a fundamental rights Charter is seen as an exercise of a prominently constitutional nature. Among the "federalist movement", the elaboration of the EU Charter is seen as an important step or as an instrument to achieve certain political goals, namely the adoption of a true "European federal constitution".

The Charter has not been designed to be of general application within the Member States of the EU, whether made legally binding or not. The provisions of the Charter are primarily addressed to the institutions and bodies of the Union and to Member States when implementing Union law. As long as the formal link between the fundamental rights protected in the Charter and Union law in itself is missing, the rights protected in the Charter are not applicable. With regard to the scope of

[326] Burca, 2001, p. 131.

application of the Charter in relation to Member States, the problem recognised is when a Member State is acting in a Union law context and therefore also acting within the EU system of fundamental rights protection and when that is not the case. This is due to the reason that it is in practice many times difficult to separate the national legal system from Union law. Another problem recognised is connected to the scope of application of the Charter, which is not restricted merely to Community law, but is also applicable in Title V (common foreign and security policy) and Title VI (justice and home affairs). The Charter is in other words drafted as being applicable not only with regard to Community law but also to the second and third pillars of the Union, which are based on intergovernmental co-operation between Member States. It was important not to make any distinction between EC law and EU law. The jurisdiction of the ECJ is however limited in Title VI and lacking with regard to Title V. The question of the ECJ's jurisdiction is an important one for the realisation and effective protection of individual's fundamental rights with regard to all activities of the European Union. There is certainly a need for a more explicit guarantee of protection especially in relation to provisions on police and judicial cooperation in criminal matters (title VI). The Charter in itself does not extend the jurisdiction of the ECJ to cover the second and third pillars. Article 51 (2) explicitly states that "this Charter does not establish any new powers or task for the Community or the Union, or modify powers and tasks defined by the Treaties". This is the position whether or not this Charter is incorporated into the Treaties and therefore made legally binding. The Charter in itself is not sufficient enough to give effective protection of fundamental rights with regard to the second and third pillars as long as the ECJ is lacking jurisdiction in these areas.

During the whole drafting process, the question concerning the relationship between the Charter and the ECHR gained much attention. This discussion is also closely related to the question of divergent interpretation by the two courts, namely the ECJ and European Court of Human Rights. It was seen as important to avoid a situation of having two existing human rights instruments setting different standards. The observers of the Council of Europe have expressed their satisfaction with the EU

Charter as being coherent with the ECHR. This coherence is expressed in articles 52 (3) and 53. The ECHR is the standard of interpretation of the Charter as far as civil and political rights are concerned without preventing Union law from affording wider protection than provided under the ECHR. In other words, the provisions of the Charter have the same scope of application and the same content and are subject to the same limitation clauses under the same conditions as provided for under the ECHR. Furthermore, in the explanatory statement given by the "Convention" relating to the specific provisions of the Charter, it is recognised that the reference to the ECHR also includes both the convention and its protocols. The scope of guaranteed rights are also determined not only be the ECHR, but also by the case law of the European Court of Human Rights and by the ECJ. The coherence established between the Charter and the ECHR enhance legal certainty is nevertheless not necessarily a guarantee for coherent interpretation of the rights embodied in both the Charter and the ECHR although the application of the Charter presupposes the determination of at least the same level of protection afforded by the European Court of Human rights as recognized in article 52 (3). The fear of creating a dual system of fundamental rights protection has been tackled by the "Convention" at least in regard to the relationship between the ECHR and the Charter in a way that it would be possible to avoid inconsistence between these two systems of protection of fundamental rights in Europe. Whether or not the relation between the ECHR and the Charter is satisfactory will much depend on the actual application of the Charter and the ECHR. The EU Charter does not include any provision stating that the ECJ is bound to follow the case law from the European Court of Human Rights. This could easily be a source of problem especially in situations where the ECJ is faced with issues that have not previously been dealt with before the European Court of Human Rights. Judge Lenaerts underlines that if the ECJ and the Court of First Instance want to remain credible in their application of the ECHR in its case law under article 6 (2), they must be willing to include in their own judgements "precedents from the case law of the Court of Human Rights in order to explain whether those precedents are relevant to the interpretation of fundamental rights in the

specific context of a review of the legality of a particular act of the Community institutions". In other words, he would strongly argue for Community Courts to follow the developments in the interpretation of the Convention by the European Court of Human rights. Such an approach would increase the transparency of the courts' grounds of judgement and would be crucial concerning the consistency with the ECHR when applied by the ECJ and the Court of First Instance.

An important issue discussed before and during the drafting process is related to the legal status of the Charter. It is clear that there exists a wide range of opinions and expectations concerning the legal status of the Charter. The representatives from the civil society were to a large extent in favour of adopting a legally binding EU Charter. The NGOs argued that the expectations raised among the general public by the decision to adopt a Charter of fundamental rights couldn't be met by merely a proclamation of fundamental rights without having any legal effect. There is a clear risk that in principle a non-enforceable declaration might create tension between the expectations and the actual effect of the Charter. There seems to a broad consensus and discussion among parliamentarians in national parliaments, European Parliament, Commission, scholars and also within the civil society that the Charter is going to be included into the treaties in one way or the other and therefore formally also have legally binding force. In other words, it is felt that adopting a non-legally binding instrument is not enough. The European Council decided to address the question of the legal status in two stages, namely that the Charter should be proclaimed solemnly by the Commission, the European Parliament and the European Council and after that it will have to be considered whether or not the Charter should be integrated into the treaties. The drafting body did not have the mandate to determine the legal status of the Charter. The Charter was adopted in Nice in December 2000 in a form of a political declaration. Does this mean that the Charter is merely to be considered as yet another declaration adopted by the Community institutes lacking any legal effect? The Charter is a codification of article 6 (2) TEU stating that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from common constitutional guarantees

common to the Member States as general principles of law. As already noted, the mandate given by the Cologne European Council was to codify already applicable fundamental rights taking into account economic and social rights insofar as they could be drafted in form of proper individual rights. In other words, the "Convention" had to elaborate a Charter based on already protected fundamental rights within the Community legal order. In this sense, the Charter is to be seen as an authoritative codification of existing fundamental rights, which have been adopted by the European Parliament, the Commission and the Council. The idea to elaborate a Charter has been strongly supported by the institutions of the Union and especially by the European Parliament and the Commission.

The European Parliament and the Commission have been arguing for adopting a legally binding Charter. The European Council has however not been able to agree on the legal status of the Charter. However, having in mind the broad composition of the drafting body together with the support from the civil society and the institutions of Union, one must conclude that the Charter is of high political and symbolic value. Another question is whether the Charter adopted in a form of a political declaration is to be considered as giving added value to the present protection of fundamental rights provided by the ECJ. The Charter is to be considered as an authoritative codification of the fundamental rights protected within the Community legal order. It could be said that the Charter offers great potential but cannot be considered as replacing the present Union law concerning the protection of fundamental rights whether or not it is incorporated into the treaties. The Charter would however provide greater legitimacy in protecting fundamental rights protected by the ECJ. As it stands now, the ECJ is deemed to protect fundamental rights as general principles of law seeking inspiration from various international human rights instruments and common constitutional traditions of the Member States that it protects. The ECJ would be able to rely directly on legally binding fundamental rights in its interpretation of Community law. It is clear that a fully enforceable Charter would offer a more reliable system of fundamental rights protection by providing a clear set of fundamental rights standards. Therefore,

there would no longer be a need for the ECJ to rely on the concept of "general principles of law" as developed by the court on a case-by–case basis. The main function with the Charter would be to strengthen the visibility hopefully leading to an increased level of protection through the formulation of rights not yet recognised by the ECJ. The potential of the Charter is to lay a foundation for the fundamental rights protection within the European Union. Seen it from a European citizens point of view, this potential lies in the fact that the Charter for the first time gives a concrete content to the already applicable fundamental rights within the Community legal order. However, the fact remains that the Charter is no more than a political declaration with great potential. A political declaration written with the view to be legally binding and therefore enforceable is not sufficient enough in the long run to strengthen the human rights doctrine within the European Union. The next step would be to strengthen the human rights doctrine by incorporating the Charter into the Treaties including accession by the EC/EU to the ECHR. These two questions should be dealt with simultaneously during the next IGC.

It has been advocated that it is less interesting to have a discussion about the actual legal status of the Charter in that the Charter reflects the content of article 6 (2) TEU. The Union is already under the obligation to respect fundamental rights as general principles of law. The role of the Charter is certainly to make the present fundamental rights more visible as requested by the Cologne European Council. Prof. Eeckhout has stated that in terms of legal practice, it would not make much difference whether the Charter is legally binding or not. According to him, it would be difficult for the courts to disregard the Charter merely on ground that the Charter is not a legally binding instrument. It is clear that the ECJ cannot use the Charter as a legal source of law in protecting fundamental rights. However, in the words of Advocate general Tizzano, "the EU Charter of Fundamental Rights of the European Union has not been recognized as having genuine legislative scope in the strict sense…the fact remains that it includes statements which appear in large measures to reaffirm rights which are enshrined in other instruments…I think therefore that, in proceedings concerned with

the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved-Member States, institutions, natural and legal persons – in the Community context". It remains to be seen how the ECJ will take notice of the Charter. The Commission has stated that it can reasonably be expected that the Charter will become mandatory through the case law of the ECJ as belonging to the general principles of Community law. However, the Commission further notes that it is to be preferred that for the sake of visibility and certainty as to the law that the Charter should be incorporated into the treaties rather than just through its judicial interpretation.

The question of accession by the European Union/Community to the ECHR has not been set aside as a result of the elaboration and adoption of the EU Charter of Fundamental Rights. The development of the Charter has once again brought up the discussion of accession. This question was raised once again during the ICG 2000. However, the political will to make a change in treaties, seen as a necessary condition by the ECJ in its opinion 2/94, in order to give competence to accede to the ECHR was lacking. Accession is seen as complementary to the adoption of a fundamental rights catalogue. Accession by the ECHR would not only be symbolically important, but would also secure the element of external control. The adoption of the Charter and accession by the EC/EU would supplement each other similarly as Member States have their own constitutional fundamental rights and have subjected themselves to the external control by the European Court of Human Rights. The fact that fundamental rights are being protected in national constitutions has not diminished the need of external control. Accession to the ECHR would have the advantage of ensuring a watertight consistency in the protection of fundamental rights in Europe in that the ECJ would be bound by the jurisprudence of the European Court of Human Rights. An accession would eliminate the risk of a divided interpretation of human rights jurisprudence in Europe as well as it would ensure that the primary mechanism of

human rights protection, or the epicentre of human rights protection, in Europe is within the Council of Europe.

The question of accession has become topical also for another reason related to the transfer of competences from States to international organisations being at the same time contracting parties to the ECHR. According to the case law of the European Court of Human Rights, it would be incompatible with the ECHR if Contracting Parties would not remain responsible under the convention when transferring powers to an international organisation. The Contracting Parties to the ECHR must ensure that the organisation can afford fundamental rights protection of an equivalent standard to that ensured by the European Court of Human Rights. In the Matthews case, the European Court of Human Rights concluded that it has competence to review acts adopted under the Treaty on European Union, which cannot be reviewed by the ECJ. The Matthews case subjected primary Community law to the jurisdiction of the Court of Human Rights. According to Mr. Lenaerts, the Court made a distinction between primary and secondary Community law with regard to the possibility of Member States of the EU to be held responsible under the ECHR for violating fundamental rights committed by the Union institutions.

This line of case law might very well also bring the organisations and their activities established under Title VI (judicial and police cooperation in criminal matters) within the jurisdiction of the Court of Human Rights if alleged to be violating the ECHR where the no other court is competent to review the operational activities of such organisations created by the Member States of the EU. The next question is whether the European Court of Human Rights would be willing to extend its jurisdiction also to cover secondary legislation of the European Union and thereby possibly hold Member States responsible for acts of the European Community implemented into national legal systems. An accession by the Community/Union would ensure that that Member States could under no circumstances be held responsible for any violation of fundamental rights by the European Union institutions. As is stands now, Union institutions cannot

be held directly responsible for any infringements of fundamental rights before the European Court of Human Rights simply due to the reason that the Community/Union is not a contracting party to the ECHR. The adoption of the EU Charter does not exclude the option of the accession by the Community/Union to the ECHR. In fact, the drafting of the EU Charter has once again brought up the debate concerning accession by the Community/Union to the ECHR. Accession is still very much a necessity that could help to strengthen the protection of fundamental rights even in case the Charter were to be incorporated into the treaties.

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