A New Regime of Human Rights in the EU?

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A. The European Community (EC) Regime of Human Rights

In the three first decades of its existence the EC recognized human rights only as part of the general principles of law that the Community was bound to respect. There was no written legal text dealing with human rights. The Treaty of Rome, 1957, creating the European Economic Community (EEC) contained only a few scattered provisions relating to social and economic rights. For instance, express reference was made to equal pay for equal work of men and women. This equality principle was enshrined in Article 119, which later on became Article 141. Freedom of movement of Community workers was recognized in Article 48 and a few more rights were given legal force, but there is no systematic recognition of human rights in this basic Treaty.

It was the European Court of Justice (ECJ or the Luxembourg Court) in *a jurisprudence constante* that protected human rights inspired by international treaties ratified by the Member States and rights enshrined in their constitutions. The Court developed a common law human rights. Some of the leading precedents may be recalled here:

In 1970 the Court had to deal with the complex case of *Internationale Handelsgesellschaft*, in which the principle of '*Verhältnissmässigkeit*', borrowed from German Constitutional Law, re-baptised as the Principle of Proportionality, was debated in the context of Community Law. The Court ruled as follows:

> ... respect for fundamental rights forms an integral part of the general principles of law of which the Court of Justice ensures respect[1]

The Court repeated its recognition of fundamental rights in a line of cases involving the protection of economic and social rights, such as the right to property and the

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[1] Judgment of 17 December 1970 in *Case 11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel.* [1970] ECR 1125.

European Journal of Law Reform, Vol. X, no. 4, pp 557-575.

freedom to conduct a business. In the case of *Nold v. Commission* (1974),[2] the Court stated that besides the constitutions of the Member States international conventions for the protection of human rights can supply guidelines which would be followed within the framework of Community law. These two sources of general principles of law – constitutions and international conventions, in particular the European Convention of Human Rights, 1950 (ECHR), have been reconfirmed in the case of *Hauer v. Land Rheinland Pfalz* (1979) in which the Court consolidated the concept of the inherent limitations of fundamental rights and found that there was in fact no violation of fundamental rights.[3]

In the domain of freedom of movement of persons, one of the leading cases is that of *Rutili* (1975). In this case, which was decided a few months after France had ratified the ECHR, one finds express reference to certain provisions of Protocol No. 4 to the Convention on freedom of movement.[4]

In 1976 the Court was asked to safeguard the fundamental right of freedom of religion in a staff case of *Prais v. Council*.[5] Although the ECJ found that there was no discrimination on grounds of religion in this case, the Court considered itself bound by freedom of religion even in the absence of written community law protecting civil and political rights.

These precedents show that the creativity of the Court helps fill gaps in the written law. Fundamental rights became part of the general principles of Community law that the Court respects and applies. The Treaty of Rome creating an Economic Community was not intended to introduce human rights in its basic text. It was some thirty years later in the Single European Act, 1986, that reference to human rights is to be found in its Preamble. As of 1986 all basic treaties, the Treaty of Maastricht (1992), the Treaty of Amsterdam (1997) as well as the Treaty of Nice (2000) contain a commitment to protect human rights. The Treaty of Nice contained for the first time a catalogue of rights in the EU Charter of Fundamental Rights, annexed in a Protocol. Although the Nice Treaty entered into force, the Protocol did not.

The original Article F(2) of the Treaty of Maastricht, reproducing the idea of the Preamble of the Single European Act, provided that :

> The Union Shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and of Fundamental Freedoms, signed in Rome on 4 November 1950 and as they result from the Constitutional traditions common to the Member States as general principles of Community Law.

This brief review shows that the ECJ coped well even without a written text of a Bill of Rights. The cases that came up before the Court as from the 1970s were

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[2] Judgment of 14 May 1974 in *Case 4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, [1974] ECR 491.

[3] Judgment of 13 December 1979 in *Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz*, [1979] ECR 3727.

[4] Judgment of 28 October 1975 in *Case 36/75, Roland Rutili v Ministre de l'intérieur*, [1975] ECR 1219. *See* C. Shachor-Landau, *The Protection of Fundamental Rights and Sources of Law in the European Community Jurisprudence*, 10 Journal of World Trade Law 289 (1976).

[5] Judgment of 27 October 1976 in *Case 130/75, Vivien Prais v Council of the European Communities*, [1976] ECR 1589.

satisfactorily solved. Nevertheless as of the mid 1970s the desire for a written Bill of Rights for the Community was expressed and two options were considered. The first was to create a Community Charter containing a catalogue of fundamental rights. The second option advocated the accession of the Community as such to the European Convention of Human Rights, 1950 (The ECHR).[6]

B. The European Court of Human Rights (The Strasbourg Court)

The Strasbourg Court was created by the Council of Europe under the European Convention of Human Rights of 1950. This Convention and its Protocols contain a substantive part, namely a catalogue of civil and political rights, inspired by the UN Universal Declaration of Human Rights, 1948. The effectiveness of this Convention is in that it set up, in addition, a machinery of control and implementation, a European supervision and collective guarantee of Human Rights. In addition to rights, a procedure of enforcement is also provided by the Convention. Any individual could bring a claim against any of the States that accepted the optional individual petition to the European Commission of Human Rights. The case would be heard by the Court only if the State concerned accepted the compulsory jurisdiction of the Strasbourg Court. At a later stage all States signatories of the ECHR had to accept the compulsory jurisdiction of the Strasbourg Court. Only States can become parties to the Convention. All 27 Member States of the EU have gradually ratified the Convention. With the entry into force of Protocol No. 11 to the ECHR in 1998 the hitherto cumbersome procedure (through a Commission of Human Rights before which the individual had standing, but not before the Court) was abolished [7]. The individual can now apply directly to the Strasbourg Court, which has become a permanent Court with compulsory jurisdiction. Any person victim of a violation, not only the 800 million citizens of Europe, may rely on one of the rights included in the catalogue as against one of the ratifying states. Some 47 Member States of the Council of Europe, including the 27 EU Member States have ratified the ECHR.

C. The Opinion of the ECJ Re Accession of the EC/EU to the ECHR

Up to the end of the 20th century the two alternative projects of creating a binding EU Bill of Rights or of accession by the EU as such, as a party, to the ECHR have not been realised. The adoption of a Charter of Fundamental Rights was in

[6] *See* P. Pescatore, *The Context and Significance of Fundamental Rights in the Law of the European Communities*, 2 Human Rights Law Journal 295 (1981).

[7] As to the situation before the entry into force of Protocol No. 11 *see* C. Shachor-Landau, *Reflections on the Two European Courts of Justice*, *in* Y. Dinstein (Ed.), International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne 771 (1989).

preparation, whilst the option of accession of the EU to the ECHR was blocked by the Opinion of the ECJ rendered in 1996 in accordance with Article 300 (ex Article 228) (Opinion 2/94).[8]

The Court was of the opinion that accession at that time was incompatible with the EC Treaty. The Court's view was that under Community Law as it then stood, accession would require an amendment of the Treaty. In particular, no Treaty provision conferred on the Community Institutions "any general power to enact rules on Human Rights or to conclude international conventions in this field." There was no express or implied power for such purpose and Article 308 (ex Article 235), though empowering to fill gaps, did not permit the adoption of provisions that would amount to a Treaty amendment. Furthermore, accession would consist of the entry of the Community "into a distinct international institutional system as well as integration of all provisions of the Convention into the Community legal order" and as such, would be of "constitutional significance." The Court was simply of the opinion that accession to the ECHR was inappropriate. One may recall that the ECHR is open to ratification only to States and an amendment to the Convention would be required to allow access to the Community. From the Union's point of view certain amendments would also be required, such as to endow the EU (as distinct from the European Community) with legal personality and legal capacity to conclude agreements. Indeed Article 47 of the subsequently amended Treaty provides "The Union shall have legal personality." This amendment still requires ratification.

We shall return to the assessment of the validity of the Court's opinion to day at a later stage.

D. The Amsterdam Treaty, 1997

Since the Court's Opinion was delivered the basic texts of the Community have opened new avenues to the protection of human rights. The substantive law of the Community has been enriched by concepts, principles and new fundamental rights.

The turning point was the Amsterdam Treaty 1997 that provides that: "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." The Treaty enshrined the principles of equality (Articles 13 and 141) and gave human rights a new profile. The Treaty of Amsterdam also gave legal backing and enabled Community legislation. It was but a prelude to the drafting of the EU Charter of Fundamental Rights that was subsequently adopted in Nice in 2000. The place of human rights became at the center of the aims and tasks of the Union. The landscape of human rights has totally changed and has been updated and modernized, so much so that one may wonder whether accession to the old ECHR is still necessary or desirable? As we shall see, the

[8] Opinion of 28 March 1996, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/94 [1996] ECR I-1759.

Charter is a much more comprehensive Bill of Rights than the ECHR and the latter's catalogue of rights is much more modest.

E. From Amsterdam to Lisbon

In spite of the development of human rights within the Union and the growth of a *corpus juris* in this field through the precedents of the ECJ, the two options of adopting a Charter and accession to the ECHR are still on the Agenda. They are not alternative options today, but rather complementary. After the non-ratification of the Charter as a Protocol to the Nice Treaty and the failure of the Constitutional Treaty in 2005, in which the Charter of Fundamental Rights, occupied Part II, the Lisbon Reform Treaty (LRT), 2008,[9] has revived the focus on human rights and has amended Article 6(1) of the Treaty of European Union to give legal force to the EU Charter of Fundamental Rights (adopted already in 2000). In addition Article 6(2) of the Treaty of the European Union now prescribes the accession of the Union to the ECHR. This dual development heralds a new regime of Human Rights although one might say that the new era started already with the Treaty of Amsterdam, 1977 and the adoption in Nice of the Charter of Fundamental Rights in 2000.

As we know, the Treaty of Lisbon has not yet been ratified by all the EU Member States and its rejection by the Irish referendum in 2008 cannot be ignored. Nevertheless, the 2000 EU Charter of Fundamental Rights has opened the door for a new regime of Human Rights, regardless of whether the EU Charter becomes positive written law and regardless of whether the Lisbon Treaty enters into force. The new *soft law* of human Rights already impacts the landscape of fundamental rights in the EU. This development calls for an examination of the new regime of human rights, one that includes substantive positive rights as well as new potential procedures.

F. Why a Charter?

The Charter comes to enhance legal certainty and visibility in particular after the adoption of the second and third pillars of the Union, by the Maastricht Treaty. These new competences are likely to create new potential infringements of human rights. The passage from an Economic Community to a Political Union that extends its competences into areas of justice and criminal judicial cooperation that are sensitive to the violations of human rights renders a Charter indispensable.

In addition it was felt that the level of the existing protection of human rights conferred on the individual was not sufficient. An extension of the rights as well as better visibility would be both beneficial to the EU institutions and to the citizens. The view was expressed that at the beginning of the 21st century the

[9] Treaty of Lisbon, OJ 2007 C 306.

citizen is "entitled to see his fundamental rights set out in black and white terms that he can enforce in a Court of law."[10]

The EU Charter targets human rights with obligations imposed mainly on the EU institutions and not on the Member States. Article 51(1) of the Charter expressly provides that it applies to the EU institutions and to the States only when they apply Union law.[11] The EU institutions aspired to be bound by a Bill of Rights and have declared their commitment to uphold the Charter.

Some see the Charter as a benchmark for compliance with the common values upon which the Union was founded as well as a benchmark for determining eligibility of new States. The Charter gives a concrete form to the four values that Community Law claims to follow: Dignity, freedom, equality and solidarity.

The new regime has begun already let us examine its nature and scope:

G. Is the Charter Just a Showcase of Existing Rights?

Whilst opinions diverge as to its innovative nature *ratione materiae*, there is consensus as to its future application *ratione personae*, to the institutions of the EC, and here is where the novelty lies. Lord Goldsmith, one of the architects of the Charter, stated that its "purpose is to constrain the actions of the EU institutions, rather than any other, perhaps misunderstood purpose, such as controlling the Member States that are already bound by other instruments." He further states that the Charter "is not a mine of new human rights."[12]

However, the Charter embraces in one instrument civil, political, economic, social, cultural and other rights, as well as principles, that the Union is to recognize, respect and protect. It is composed of seven Chapters: Dignity (Chapter I), Freedoms (Chapter II), Equality (Chapter III), Solidarity (Chapter IV), Citizen's Rights (Chapter V), Justice (Chapter VI) and General Provisions (Chapter VII).

The Charter is a consolidation of fundamental rights enshrined in a variety of Conventions, such as ILO Conventions, European Social Charters, the UN Convention on the Rights of the Child and the Convention on the Status of Refugees and last, but not least, the ECHR. Upon close inspection, this 'consolidation' in 54 articles comprises not only declarative provisions but also constitutive ones. Likewise, it is not just a restatement of existing EU written law or of EU common law created by the ECJ.

As the preamble of the Charter proclaims, "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."

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[10] Professor Toth before the House of Lords Select Committee on EU, 2002-3, 6th Report. *The Future Status of the EU Charter of Fundamental Rights*, 3 February 2003 http://publications.parliament.uk/pa/Id200203/Idselect/Ideucom/48/4803.

[11] Charter of Fundamental Rights of the European Union, OJ 2007 C 303.

[12] L. Goldsmith, *The Charter of Human Rights – A Brake Not an Accelerator*, 5 European Human Rights Law Review 473 (2004).

An example of such visibility is afforded by Article 3 entitled the Right to the Integrity of the Person. Whereas the right to dignity and integrity is recognized its impact in the fields of medicine and biology is an innovation which answers the need of protection in view of scientific development of research in our times.

> 1. Everyone has the right to respect for his or her physical and mental integrity.
> 2. In the fields of medicine and biology, the following must be respected in particular:
> - the free and informed consent of the person concerned, according to the procedures laid down by law,
> - the prohibition of eugenic practices, in particular those aiming at the selection of persons,
> the prohibition on making the human body and its parts as such a source of financial gain,
> - the prohibition of the reproductive cloning of human beings.

This up-to-date provision is a legal novelty drafted in a more visible manner.

It is true that Kantian philosophy already stipulated that a human person should never be treated as a means but always as an end. The Universal Declaration of Human Rights has also enshrined the right to dignity. But Article 3 (2) addresses more specific rights that were not the object of protection before.

Although some of these rights are included in the Convention on Human Rights and Biomedicine, adopted by the Council of Europe in 1997,[13] they were not recognized and could not be included in the 58 years old ECHR, simply because science and medicine were not as yet advanced. Furthermore, the 1997 Convention has been ratified to-date by a mere nineteen out of the forty-seven Member States of the Council of Europe and only by eleven EU Member States, that is, in both cases less than half.

Bearing this data in mind it is not quite accurate to say that the right to the integrity of the person and especially Article 3 Paragraph (2) of the Charter do not mint new rights *de lege feranda.* Searching for precedents of the ECJ recognizing this right, we find the case of *Netherlands v. Council*, 2001,[14] where the issue of the legal validity of patenting of biomedical inventions arose. The Netherlands applied to the Court to annul Directive 98/44/EC that determines which inventions involving the human body may or may not be patented. The Dutch government was of the opinion that the Directive violated i.a. the human right of dignity. In his Opinion (para. 197) Advocate General F. Jacobs refers to Article 3 of the EU Charter which enshrines the right to the integrity of the person, although the Charter is not yet adopted as positive law. The Netherlands, which had not ratified the 1997 Convention on Human Rights and Biomedicine, did not invoke that Convention. The Opinion and the Judgment of the ECJ in *Netherlands v. Council* do not refer to that instrument at all, although it protects human dignity and is considered as the inspiration for the inclusion of this right in the Charter.[15]

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[13] European Treaty Series (ETS) 164 and additional Protocol ETS 168.

[14] Judgment of 9 October 2001 in *Case C-377/98, Kingdom of the Netherlands v European Parliament and Council of the European Union*, [2001] ECR I-7079.

[15] *See* legal explanation to Art. 3 in http://eucharter.org/home.

This would support the view that the right to integrity of the person in the field of medical research is firstly recognized as a fundamental right in the EU Charter.

Space does not allow to individually examine each of the fundamental rights that have become a positive obligation on the EU, such as the right to asylum enshrined in Article 18, the rights of the elderly by virtue of Article 25, the rights of persons with disabilities to integration in society, enshrined in Article 26 and the controversial unlimited right to strike, introduced as part of the right of collective bargaining in Article 28. These rights are constitutive and not merely declarative of existing rights.

The very fact of elevating certain rights to the status of a fundamental right may also be considered as an innovation. Examples of such rights are afforded by i.a. the right to protection of personal data enshrined in Article 8 and the freedom of the arts and scientific research and academic freedom, consecrated in Article 13, as well as, the right to good administration in Article 41 and others.

H. 'Rights' and 'Principles'

At this point it may be opportune to distinguish rights from principles. Unlike rights, principles are subject to judicial review only when the Union has legislated in these matters. Environmental protection and the principle of sustainable development provided for in Article 37 and consumer protection as ensured in Article 38 are examples where the rights are as yet inchoate until further Union legislation takes place and until judicial remedies accompany these rights. As the House of Lords Select Committee on the EU Charter commented: "Many of the Articles are of an aspirational character and lack precision and definition that would be expected of Articles in a Bill of Rights."[16] The Select Committee recommended a revision of the Charter in paragraph 11 of its Report and added in paragraph 17: "We doubt whether a citizen will be much impressed if access to a remedy is not available to him when he believes that his rights ... have been infringed." Rights without remedies are indeed no rights. The Charter should have been clearer and transparent on this point.

I. The Scope of the Charter and the Scope of the ECHR

If one compares the EU Charter to the ECHR one realizes immediately that the Charter provides a greater spectrum of rights. Even in the field of civil and political rights, covered by the ECHR, the Charter expands the protection. One can classify the rights into two groups: those that overlap with the ECHR and those that do not.

The rights, mainly civil and political, which overlap, include the following: the right to life, freedom from torture or degrading treatment or punishment, freedom from slavery and forced labour, the right to liberty and security of the person, the

[16] *See* para. 8 of the House of Lords Select Committee on the EU, Sixth Report, *supra* note 9.

right to marry and the right to found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and of association, the right to education, the right to property, right to an effective remedy and to a fair trial, respect for the rights of the defence and the presumption of innocence, the fundamental right to non-retroactive laws, the right not to be tried or punished twice in criminal proceedings for the same criminal offence. Some jurists attribute to these rights the qualification of "first generation human rights" or classical human rights.

These rights, which draw their inspiration from the ECHR, will be interpreted and have the same meaning and scope as those enjoyed under the ECHR by virtue of Article 52(3) of the EU Charter which provides that:

> In so far 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 text of the Charter itself indeed allows for more extensive protection of several rights enshrined in the ECHR and its Protocols. Some examples will illustrate this point:

1. Article 5 of the Charter, echoing Article 4 of the ECHR by prohibiting slavery and forced labour, adds in paragraph 3 that trafficking in human beings is prohibited. Trafficking in human beings has become a real problem in the last three decades, which could not be foreseen by the old ECHR.
2. Article 10 regarding freedom of thought, conscience and religion is based on Article 9 of the ECHR, however, it spells out for the first time the right to conscientious objection, which is as yet not recognized by all Member States.
3. Article 14 of the Charter extends the right to education found in Protocol No.1 to the ECHR Article (2). The vague provision in the Protocol does not refer to the possibility to receive free compulsory education nor a right to vocational and continuing training. These provisions are now to be found in the Charter.[17]
4. Article 17 (1) of the Charter on the right to property echoes the provision of Protocol 1 to the ECHR Article (1), but Article 17(2) adds that intellectual property shall be protected, which was not explicit under the ECHR.
5. One cannot deny that the Chapter on Equality (Chapter III) is innovative. Article 20 declares that "Everyone is equal before the law." Up to now only citizens of the Union were equal before the law and no discrimination was allowed on the basis of nationality between citizens concerning the provisions of the basic Treaties. Equality before the law of non-citizens in matters outside citizenship of the Union is a novelty. With respect, the proviso that is included in Article 21 (2) should have appeared here as well. To be quite clear "Within

[17] *See* E. C. Landau, *The Right to Education – The European Perspective*, *in* M. G. Kohen (Ed.), Liber Amicorum in Honour of Judge Lucius Caflisch (2007).

the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited."

Furthermore, Article 21 of the Charter extends the grounds and scope of the right to equality much beyond the scope of Article 14 ECHR. Article 21 enumerates the following grounds: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." Article 14 of the ECHR enumerates just over half of those grounds. It does not mention genetic features, disability, age or sexual orientation. Since the entry into force of Protocol No.12 to the ECHR in 2005 one can invoke now discrimination independently and not only in conjunction with a claim of a violation of one or more rights under the Convention.[18]

Article 21 of the Charter provides for an independent, self-standing right to non-discrimination. Regarding the newly prohibited grounds of discrimination, they were extended to cover national minorities, disability, age and sexual orientation in line with the *acquis communautaire* and the 2000, 2002 Directives on non-discrimination.[19]

The use of the words "such as" in Article 21 of the Charter makes it clear that the list of the prohibited grounds of discrimination is not exhaustive but merely illustrative. New categories of persons protected against discrimination may therefore be added to reflect social changes.

6. Article 23 on equality between men and women is declarative of the legal position as far as "employment, work and pay" are concerned in the Union. But it is constitutive and innovative as far as it dictates that "Equality between men and women must be ensured *in all areas*" (emphasis added). Up to now Community legislation and the initial provision of the Treaty of Rome, Article 119 (amended by the Treaty of Amsterdam and replaced by Article 141) addressed uniquely the principle of equality of men and women at work.[20]

Up until the Treaty of Amsterdam, the Union has not promoted human rights or equality in a substantial measure. Now, equality is to be ensured in all areas, such as education, vocational training, representation in public life and in decision-making forums. Equality has become a core fundamental right as it now figures as an 'aim' and a 'task' of the Union.

The reluctance of the ECJ to deal with the issue of 'affirmative action' and quotas when it results in reverse discrimination, was mitigated by its approach to positive action for the promotion of women, now formulated in

[18] The legal position was modified by Protocol No 12 of the ECHR, 2000, which entered into force in 2005.

[19] *E.g.* Council Directive 2000/78/EC of 27 December 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation. OJ 2000 L 303/16.; Council Directive 2000/43/EC of 29 June 2000 implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, OJ 2000 L 180/22.

[20] *See* E. C. Landau, The Rights of Working Women in the European Community (1985).

Article 141(4). The provision is in the spirit of the second paragraph of Article 23 of the Charter: "The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex."

The case-law of the ECJ has not tolerated, however, rigid advantages for women or quotas resulting in "reverse discrimination" for men, as the cases of *Kalanke* (1995),[21] *Marschall* (1997),[22] *Badeck* (1999)[23] and *Abrahamsson* (2000)[24] show. It is hard to predict how these issues would be dealt with by the European Court of Human Rights (the Strasbourg Court) under the recent Protocol No. 12 on Discrimination, now ratified by the Member States of the Council of Europe. The Strasbourg Court may perhaps find inspiration in the decisions of the Luxembourg Court.

7. Article 49 of the Charter, restating the principle of non-retroactivity of laws enshrined in Article 7 of the ECHR, adds in its first paragraph that if subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable. No such exception to the principle of non-retroactivity is to be found in the ECHR.

Judging by these examples, the Charter is an up-to-date Bill of Rights that has enlarged and modernised the scope of the ECHR in the spirit of Article 52(3) of the Charter and its Preamble. The charter opens with the right to dignity which is not expressly mentioned in the ECHR. It is for the Strasbourg Court to draw inspiration from the EU Charter of Fundamental Rights. The Charter not only introduced new rights but widened the scope of existing rights to cover new situations and needs of protection.

J. Is the Charter an Exhaustive Bill of Rights?

Should the Charter be considered as an exhaustive Bill of Rights? The answer is in the negative for more than one reason. First, the Preamble of the Charter formulates its purpose "to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments." Changes and progress are a continuing development and, to quote the famous German legal philosopher Rudolf von Jhering, "Law is perpetually in the process of becoming."[25] He pronounced this phrase in the nineteenth century, but it is even more true of our century.

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[21] Judgment of 17 October 1995 in *Case C-450/93, Eckhard Kalanke v Freie Hansestadt Bremen*, [1995] ECR I-3051.

[22] Judgment of 11 November 1997 in *Case C-409/95, Hellmut Marschall v Land Nordrhein-Westfalen*, [1997] ECR I-6363.

[23] Judgment of 28 March 2000 in *Case C-158/97, Georg Badeck and Others, interveners: Hessische Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen*, [1999] ECR I-3633.

[24] Judgment of 6 July 2000 in *Case C-407/98, Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, [2000] ECR I-5539.

[25] Free translation by the author. *Cf.* R. von Jhering, *Der Kampf um's Recht* 69 ([1874] 1992).

Secondly, the Charter provides that fundamental rights as they result, i.a., from the constitutional traditions common to the Member States shall constitute general principles of the Union's law. Consequently, the catalogue of fundamental rights enumerated in the Charter may not be considered as exhaustive or necessarily preventing the development through case law of new rights inspired by national constitutional law and traditions.[26]

K. The Charter and Derogations

Another question may arise as to the application, limitation, or suspension of fundamental civil and political rights as well as other rights in times of emergency. Should the application of the Charter follow the model of the ECHR?

We recall that the ECHR distinguishes in Article 15 between 'sacrosanct' rights that cannot be suspended in times of emergency, such as the right to life, freedom from torture, freedom from slavery and forced labour and freedom from retroactive legislation, and those fundamental rights that may be derogated from in times of emergency. There is no parallel provision to that effect in the EU Charter.

What interpretation should be given to the silence of the Charter on this point? The answer is perhaps to be found in part in Article 52(1) of the Charter, which stipulates that "Any limitation on the exercise of the rights and freedoms recognized by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others." Yet this provision does not provide for derogation on account of an emergency as does Article 15 ECHR. Naturally, the Member States can resort to Article 15 ECHR, but the fact remains that there is no similar provision for the EU institutions.

L. The Role of the ECJ

The rule that any matter concerning EU Law should be adjudicated exclusively by the ECJ is sound. It is enshrined in Article 219 of the Treaty of Rome, 1957 (now Article 292 EC). Why should human rights be resourced elsewhere? Is the EU Charter of Fundamental Rights not an integral part of Union Law? It would seem that the ECJ's competence over the application of the Charter is implicit. But the exclusive or otherwise jurisdiction should have been clearly and expressly stated in the Charter itself or in the Lisbon Treaty.

By virtue of Article III-375 of the failed Constitution, that has been rejected in 2005,[27] Member States could not submit a dispute concerning the Constitution to any method of settlement other than before the ECJ. In accordance with

[26] *See* E. Regan, What the Constitutional Treaty Means: Fundamental Eights in the EU 5 (2005).

[27] By the French and Dutch Refererendums.

Article I-5(2) the Union was likewise bound to submit any dispute with Member States to the Court. As the EU Charter of Fundamental Rights figured as Part II of the Constitution the above-mentioned provisions equally applied also to the Charter as being part of the Constitution. Now that the Charter is not part of the Lisbon Reform Treaty, a similar express provision should have been included in the Charter, giving jurisdiction or exclusive jurisdiction to the ECJ in claims by individuals against the Union's institutions for violation of their fundamental rights.

As to the justiciability of the Charter opinions vary regarding which European Court is best suited for its control and enforceability. Judge Tulkens of the Strasbourg Court maintains that an external judicial body excercising external supervision is to be preferred to the ECJ[28] She writes:

> In the interests of ensuring its credibility, the protection of fundamental rights must be achieved under the control of an international institution acting as a third party. The ECJ can not exercise this control when Community acts are concerned, as it belongs to the Community. The external control is part of the requirements of International Law.

Indeed the principle *nemo judex in sua causa* demands that the institutions of the EU, including its Court, should be controlled by a separate Court. It has been proposed to create a neutral Court for the purpose of supervision. If this solution is eventually adopted, is accession to the ECHR and to its judicial machinery still necessary?

The suitability of the Strasbourg Court is also questioned by Professor Jacqueline Dutheil de la Rochere[29] She supports the continuation of the role of the ECJ as a custodian of the Charter and maintains that the ECJ should continue to have jurisdiction. She writes:

> It should not be forgotten in this context that the European Court of Human Rights is ultimately only competent in human rights cases dealt with by ECHR; for the protection of other fundamental rights, namely those which appear in the Charter, the ECJ would continue to have jurisdiction within the limits of the treaties. The inclusion of the catalogue of fundamental rights in the EU Treaty, either through a reference in article 6.2 or in any other way, would give the Charter its full effect, allow it to bear on EU's institutions and provide citizens with an effective means of enforcing their rights either in national courts or the ECJ.

In other words, accession to the ECHR for the purpose of benefitting from its judicial machinery is not recommended. The 1996 Opinion of the ECJ implicitly rejected a judicial control outside the institutional set up of the Union. Accession to the ECHR meant entry into "a distinct international institutional system" that was not approved by the ECJ. Whilst the first part of the opinion does not reflect anymore the development of human rights today in the legislation and written norms of the Union, the second part of the Opinion may still be pertinent and accession to the ECHR should be re-considered with great caution.

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[28] F. Tulkens, *Towards a Greater Normative Coherence in Europe*, 21 Human Rights Law Journal 329, at 331 (2000).

[29] http://www.ecln.net/elements/Conferences/book-Athens/dutheil.pdf.

The Community Court has fifty years experience of reviewing actions of Community institutions via the procedures enshrined in Articles 173 and 175, now Articles 230 and 232. When dealing with human rights, it is hoped that the Court would be more generous and liberal in its interpretation of the notion of 'individual concern', required in order to establish a *locus standi* for the individual in a direct action for annulment (according to the fourth paragraph of Article 230 EC).[30] The Treaty of Lisbon now removes this requirement of 'individual concern' and allows a wider access for individual applicants.

The Community Court also has competence in infringement actions brought by the Commission against Member States to control the national implementation of EU Law, in accordance with Articles 226 and 228 EC. Moreover, the Court is empowered to impose fines on Member States for non-fulfilment of their obligations or for their disregard of the Court's judgments.

Furthermore, the ECJ is unique in that it is a supranational court competent to give preliminary rulings under Article 234 EC. It is mainly via this procedure that the ECJ developed the Community common law of Human Rights, whenever national courts referred questions to the Luxembourg Court for an authoritative interpretation.

Admittedly, the Strasbourg mechanism has been streamlined in 1998 with the entry into force of Protocol No. 11.[31] Actions by individuals are now heard by the European Court of Human Rights directly, and the two-tier cumbersome procedure through the European Committee on Human Rights was abolished. However the Strasbourg Court is overburdened by actions brought against the 47 Member States of the Council of Europe, especially against some of the new Member States, like Russia and Turkey, and justice is delayed with a backlog of some 90.000 cases pending.[32] It is said that the Strasbourg Court is asphyxiated by the massive influx of applications. This situation is more than grave even without the additional jurisdiction of review of actions against EU institutions.

Furthermore, access to the ECJ presents potential advantages to litigants over actions before the Strasbourg Court, as litigants in Luxembourg do not need to exhaust all domestic remedies, as do applicants to the Strasbourg Court.[33]

As Sir Francis Jacobs stated in his keynote address at the British Institute of International and Comparative Law Annual Conference in June 2006, the idea behind EU accession to the ECHR is to fill a gap, by allowing an individual to bring a case against the EU, as well as against Member States. A problem however exists where the ECJ has no jurisdiction in respect of matters under the

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[30] Namely, "to change the case-law on individual concern" as advocated by A-G Jacobs in his Opinion in UPA v. Council Case, C-50/00, (2002) ECR I-6677, at para. 4. The ECJ has unfortunately not followed his Opinion in this case. The Lisbon Treaty has now removed the requirement.

[31] ETS No. 155.

[32] *See* Speech of President J-P Costa on the occasion of the Opening of the Judicial Year at the Strasbourg Court, 19 January 2007.

[33] For a detailed comparison, *see* S. Douglas-Scott, *A Tale of Two Courts; Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 Common Market Law Review 629, at 661 (2006).

Second and Third Pillars (introduced by the Maastricht Treaty) that impinge on the basic human rights of individuals.

Sir Francis Jacobs adds, however, that extending the jurisdiction of the ECJ is preferable to EU accession to the ECHR. The ECJ needs to be given a greater role so as to be able to ensure respect for the rule of law in important areas requiring effective judicial review.[34] Besides can one pretend that the control mechanism of the implementation of the Charter is better served by the Strasbourg Court than by the ECJ?

Once the EU Charter of Fundamental Rights becomes positive law it is questionable whether accession to the ECHR is still necessary. At the same time so long as the Charter's ratification is in suspense, the ECJ, the master of creativity in filling gaps in the absence of written law, will find a way to apply the provisions of the Charter as *a soft law* and by resorting to the interpretation of the *effet utile*, as it did in the past. Just as the principle of supremacy of EU law over conflicting national laws was coined by the Court, as early as 1964, in the *Costa v. ENEL Case*[35] in the absence of any written norm as to the supremacy of Community Law over national law. Until the Charter becomes ratified and enters into force, it will continue to serve as a source of inspiration in the field of Human Rights. In those domains where the rights are considered as 'declarative' and a mere consolidation of existing law, the Community Court would not hesitate to apply the Charter as evidence of general principles of Community Law, which it is bound to protect. Indeed all the Advocates General, in a growing number of cases, as well as the Court of First Instance, have already cited the provisions of the Charter,[36] including Francis Jacobs, AG in *Netherlands v. Council,* discussed above. AG Mischo in his Opinion in *Booker Acquaculture Ltd Case* (2001) sums up the impact of the Charter as from its initial proclamation as follows:

> I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order.[37]

Human Rights will continue to bind the Court, and *ibi jus ubi remedium.* The granting of remedies by the Court will reinforce the rights: *ibi remedium ubi jus.* Gradually, therefore, the Charter will become part of the Union's legal order by judicial incorporation.

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[34] Sir Francis Jacobs, *The Future of the Constitutional Treaty for Europe and the ECJ* (2006), available at: http://biicl.org/files/633_report_annual_conference_speech_sir_francis_jacobs.pdf.

[35] Judgment of 15 July 1964 in *Case 6/64, Flaminio Costa v E.N.E.L,* [1964] ECR 585.

[36] A. Arnull, *From Charter to Constitution and Beyond: Fundamental Rights in the New European Union*, 2003 Public Law 774.

[37] Opinion of Mr Advocate General Mischo of 20 September 2001 in *Joint Cases C-20/00 and C-64/00, Booker Aquacultur Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers*, [2003] ECR I-7411, at para. 126.

M. Is Accession by the EU to the ECHR Desirable?

As we have seen, the new European Union Reform Treaty, adopted on 18-19 October 2007 in Lisbon, establishes in Article 6(2) the legal basis for the EU's accession to the ECHR. At the same time Protocol No. 14 to the ECHR provides for the possibility of EU accession from the point of view of the Council of Europe. The exact accession modalities, some of which will require a further protocol to the ECHR or an accession treaty, will have to be agreed upon by all Council of Europe Member States, as well as the EU. The Lisbon Treaty also contains a Protocol on Accession of the EU to the ECHR, the Protocol relating to Article 6(2) of the Treaty of European Union.

The issue of the accession of the EU to the ECHR is indeed complex. Modifications of legal texts on the part of both the EU, the Council of Europe and the parties to the ECHR are required. Judge Egbert Myjer, the Dutch Judge on the European Court of Human Rights, looked at some of the difficulties involved and questioned "Can the EU join the ECHR?" He believed that the legal and political difficulties as well as the technical ones could be overcome.[38]

However, some issues of substance have not been fully addressed. The vital issue of the competence of the Strasbourg Court *ratione materiae*, to review the implementation of the EU Charter on Fundamental Rights has not been examined. Will the catalogue of rights of the ECHR be extended and updated once the Charter becomes positive law? Are the twenty non-EU Member States of the Council of Europe ready for such a revolutionary development in their human rights agenda? They are struggling enough to adapt and to assume their commitments under the old ECHR. It does not seem a realistic project at the moment to update the ECHR and enlarge the catalogue of rights in line with the EU Charter. Europe will have to remain for the time being as it is, Europe of the EU of the 27, with a pilot development and model in the form of the EU Charter, and Europe of the 47.

To advocate accession, without extension of jurisdiction of the Strasbourg Court, would create a difficult situation in which the institutions of Europe of the 27 will have to accept to be controlled by a Court with partial jurisdiction over violations of human rights. The Strasbourg Court will have no jurisdiction to review violations, for instance, of the rights dictated by bio-ethics or claims by a victim of unfair dismissal and of other rights enshrined in the EU Charter and not in the ECHR. Accession would create an artificial situation, where practically most of the new rights under the Charter will remain outside the competence of the ECHR and only civil and political rights and a few social and economic rights would be coming within its jurisdiction. An unintended consequence may entail an ambiguous and confusing divided jurisdiction between the ECJ and the Strasbourg Court over human rights in the European Community. It is thus preferable to leave Community human rights to the control of the ECJ, as already mentioned above, when dealing with the role of the ECJ.

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[38] http://www.ecln.net/elements/conferences,book_Berlin/Myjer.pdf.

A somewhat over-simplified approach to this issue is to be found in the concluding observations of the otherwise remarkable and cogent comments on the accession of the EU/EC to the ECHR by Pieter van Dijk, Member of the Venice Commission in 2007:[39]

> 27. The text of the EU Charter of Fundamental Rights should preferably be formulated identically to the ECHR, in so far as the same rights are concerned. If the present formulation of the EU Charter of Fundamental Rights remains unchanged and the Charter becomes binding law, either by incorporation in the amending Treaty or by a provision in the Treaty to that effect, its Article 52, paragraph 3, has to be interpreted and applied by the ECtHR (the Strasbourg Court) and the ECJ in such a way that it is guaranteed that, to the extent that this formulation deviates from that of the ECHR, the latter prevails, *unless the Charter provides for a more extensive protection of the right concerned or provides for additional rights.* (emphasis added)

As two-thirds of the Charter do provide additional rights, what role can the European Court of Human Rights play, in the absence of competence *ratione materiae*? Thus the Strasbourg Court, as was already mentioned, has no power to review violations of the right relating to personal data or certain grounds of violations of equality. As far as social rights are concerned, the European Court of Human Rights may not have a say over a violation of a right to collective bargaining (Article 28) or a claim of unjustified dismissal (Article 30) and others.

The accession of the EU to the ECHR may be considered as progress from a federalist point of view. The EU is likened to a quasi federal supra-national entity subject to international control, where its Charter of Fundamental Rights is compared to the constitutions and internal law of the Member States. A Council of Europe Document in the form of Questions and Answers queries:

> After accession, what will be the relationship between the ECHR and the EU Charter of Fundamental Rights? The relationship between the ECHR and the EU Charter of Fundamental Rights (which is itself based on the ECHR and the Council of Europe Social Charter) will be similar to the one which exists between the ECHR and the constitutional provisions on human rights in countries parties to the ECHR which may, and often do, go beyond the minimal standards set by the ECHR.[40]

It would appear from the above that the EU Charter will be adjudicated for the most part by the ECJ, while the Strasbourg Court will be the final arbiter for the civil and political rights common to the EU Charter and the ECHR. Accession to the ECHR will mean that the EU and its institutions will be accountable to the European Court of Human Rights for issues concerning the ECHR and not for violations of human rights under the EU Charter. This legal dichotomy can but produce conflict and confusion.

Leaving aside the question of competence of the Strasbourg Court over violations of the EU Charter, an additional question arises as to the subjection of the ECJ to review by the Strasbourg Court for claims of violation of the rights

[39] The Venice Commission created by the Council of Europe is a Commission for Democracy through Law, http://www.venice.coe.int/docs/2003/DCL(2003)069-e.asp.

[40] http://www.coe.int/t/DC/Files/Source/SF,EUAccessiontoECHRen.doc.

enshrined in the ECHR. Can one envisage the ECJ as a respondent in a claim, for instance, of a violation of Article 6 of the ECHR on grounds of an unfair trial by the Community Court? Yet President Gil Carlos Rodriguez Iglesias of the ECJ and President Luzius Wildhaber of the Strasbourg Court have both expressed support for the idea of accession of the EU to the ECHR.[41]

A more profound study is called for before the Council of Europe and the Lisbon Treaty Protocols on Accession are ratified. The Council of Europe has realised the necessity of further discussion on the matter and the Third Council of the Europe Summit in Warsaw on May 2005 called for an in – depth study by a group of eminent and experienced national and international judges and other experts as well as a Group of Wise Persons, chaired by Gil Carlos Rodrigez Iglesias, the former President of the ECJ.[42]

The question of accession to the ECHR for the purpose of adopting a Bill of Rights will be finally solved when the EU Charter of Fundamental Rights becomes binding. The EU does not need two catalogues of human rights – one old and one modern. The Charter alone should fulfill the purpose.

Accession to the ECHR in order to benefit from its machinery of enforcement seems to create more problems than it solves. The justiciability of human rights within the EU is better served by the ECJ or by an independent Court.

The 1996 Opinion of the ECJ implicitly rejected a judicial control outside the institutional set up of the Union. Accession to the ECHR meant entry into "a distinct international institutional system" that was not approved by the ECJ. Whilst the first part of the opinion does not reflect anymore the development of human rights today in the legislation and written norms of the Union, the second part of the Opinion may still be pertinent and accession to the ECHR should be re-considered with great caution.

N. Reflections *de Lege Feranda*

The adoption of the Charter as an independent binding legal instrument would be beneficial for the Institutions of the Union as well as for individuals. It would strengthen integration and enhance democratic values, especially in a decade of enlargement. It would become a Bill of Rights for individuals and serve a benchmark for the new Member States.

Even without a legally binding Charter, the European Community regime of human rights during its first decades is incomparable to the Union regime of human rights today. As we have seen, the landscape has changed since the Treaty

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[41] *See* L. Wildhaber & G. C. Rodriguez Iglesias, *Speeches Given on the Occasion of the Opening of the Judicial Year*, Strasbourg, 31 January 2002; *See also* D. Spielmann, *Un autre regard: la Cour de Strasbourg et le droit de la communauté européenne, in* Libertés, Justice, Tolérance (Liber Amicorum Cohen-Jonathan) 1447 (2004); F. Jacobs, *Interaction of the Case-law of the European Court of Human Rights and the European Court of Justice: Recent Developments* and L. Wildhaber, *The Coordination of the Protection of Fundamental Rights in Europe, both in* European Court of Human Rights, Dialogue Between Judges (2005).

[42] www.coe.int/summit.

of Amsterdam. Our Millennium started with a new regime *de facto*, with adoption of the Charter of Fundamental Rights in 2000. This regime will gain once the Charter is given a status *de jure*. It is unfortunate that twice before, the Charter has been linked to international instruments that encumbered its legal status.

The linkage of the Charter, first as, an unratified Protocol to the Treaty of Nice, and subsequently as Part II of the failed Constitution, where both the Charter and the Constitution have not been ratified, is a warning against the linkage of the Charter to the ratification of the LRT. The Charter's destiny should be guaranteed in an independent legal instrument in the internal law of the Union. As the institutions of the Union declared their commitment to the Charter it's legitimacy is recognized. Surely the citizens of Europe will acclaim the Charter as a champion of their rights, but not if it is linked to a political document like a constitution or mini-constitution or a reform treaty.

Regardless of whether the Lisbon Treaty enters into force or not, the Charter should become positive law in one form or another.[43] The example of the U.K. is useful to show that no written Constitution was required in order to implement the ECHR in its internal law. The UK has adopted a Human Rights Act, 1998, without having a written Constitution. Ways should be found to adopt the Charter as a legally binding instrument in the EU even in the absence of a European Constitution or a Lisbon Reform Treaty.

In the last resort the model of a 'Single European Act for Human Rights', following the homonymous precedent, could successfully be adopted. This would close the circle of recognition of fundamental rights. As the Single European Act was the first legal Community instrument to refer to human rights in 1986, it is opportune that over twenty years later, a new Single European Act, to enshrine a Bill of Rights for the EU, is adopted. Little objection by the Members States is to be feared, as the Charter does not impose any new obligations on them, but rather on the EU institutions. The citizens of Europe would likewise welcome the Charter as a champion of their fundamental rights.

Failing the adoption of the Charter as a legally binding instrument, the Charter serves a subsidiary source of general principles of law. As we have seen, it is already a Union *soft law*. Gradually, the fundamental rights enshrined in it would be introduced into the EU legal system by the Luxembourg Courts, as has traditionally been done. There is no reason why European Judges should not use the Charter as a source of inspiration in the same way as they have used the ECHR.[44]

Indeed, the EU Charter has a future, either as a legally binding instrument or as a model Bill of Rights to inspire the institutions of the Union and its Courts of Justice. As we have seen, a new era and regime of human rights has already started at the beginning of our Millennium regardless of whether or not the EU accedes to the ECHR.

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[43] *See* E. C. Landau, *The Future of the EU Charter of Fundamental Rights*, *in* N. Neuwahl & S. Haack (Eds.), Unresolved Issues of the Constitution for Europe; Rethinking the Crisis 354 (2007).

[44] Editorial Comment, *The EU Charter of Fundamental Rights Still Under Discussion*, 38 Common Market Law Review 1, at 6 (2001).