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The Charter of Fundamental Rights of the European Union between Political Symbolism and Legal Realism

Keywords

Comparative Law, European Union, Politics, Human Rights Law, Treaties

The Charter of Fundamental Rights of the European Union between Political Symbolism and Legal Realism[†]

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I. INTRODUCTION

The idea to adopt a Charter of Fundamental Rights (Charter) for the European Union (EU) is a long standing demand raised over and over again since the early nineteen seventies by national constitutional courts, governments and community institutions, most notably the European Parliament and many European law scholars¹. But the fate

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1. Günter Hirsch, *EG: Kein Staat, aber eine Verfassung?*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 46, 47 (2000); Udo Di Fabio, *Eine europäische Charta*, JURISTEN ZEITUNG (JZ) 737, 740 (2000); Klaus Ritgen, *Grundrechtsschutz in der Europäischen Union*, ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 371, 373 (2000); Ingolf Pernice, *Eine Grundrechte-Charta für die Europäische Union*, DEUTSCHES VERWALTUNGSBLATT (DVBL) 847, 848-851 (2000); Susanne Baer, *Grundrechtecharta ante portas*, ZRP 361, 362-363 (2000); Albrecht Weber, *Die Europäische Grundrechtecharta – auf dem Weg zu einer europäischen Verfassung*, NJW 537, 538, 542 (2000); Gerald Häfner, Christoph Strawe & Robert Zuegg, *In der Auseinandersetzung um eine Charta der Grundrechte der Europäischen Union*, ZRP 365 (2000); Norbert Reich, *Zur Notwendigkeit einer Europäischen Grundrechtsbeschwerde*, ZRP 375 (2000); Josef F. Lindner, *EG-Grundrechtecharta und gemeinschaftsrechtlicher Kompetenzvorbehalt*, DIE ÖFFENTLICHE VERWALTUNG (DÖV) 543, 545 (2000); Erhard Denninger, *Anmerkungen zur Diskussion um Europäische Grundrechte*, KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (KRITV) 145 (2000); Karl A. Schachtschneider, *Ein Oktroi, nicht die gemeinsame Erkenntnis freier Menschen von ihrem Recht*, 206 FRANKFURTER ALLGEMEINE ZEITUNG (FAZ), Sept. 5, 2000, at 9; Peter J. Tettinger, *Mehr als eine fleißige Sammlung zum Schutz vor Eurokraten?*, 198 FAZ, Aug. 26, 2000, at 6; Albrecht Weber, *Eine einmalige Chance für eine europäische Verfassungsgebung*, 198 FAZ, Aug. 26, 2000, at 6; Christian Tomuschat, *Manche Rechte bedürfen der Konkretisierung*, 181 FAZ, Aug. 7, 2000, at 13; Karl Schwimmer, *Einheit – auch in den Menschenrechten*, 62 FAZ, Mar. 14,

of the failed projects striving for a European Constitution issued by the European Parliament in 1984,² 1989³ and 1994⁴, each including a significant Human Rights chapter,⁵ might already hint at the considerable difficulties that the elaboration of a Charter of Fundamental Rights will face. However at the same time it explains the important symbolism inherent in this project.

It is indeed a breathtaking endeavor in which the EU engaged itself following the decision of the Cologne summit in June 1999.⁶ The EU called for a Convention charged with the elaboration of a Fundamental Rights Charter to be solemnly proclaimed by the Nice summit at the end of 1999 and eventually given full legal force thereafter by inclusion in the treaties.⁷ Significant difficulties will have to be overcome to find a consensus on the role fundamental rights should play as constitutional limitations to legislative and executive powers, on their inherent balance between individual and general interests and on their judicial protection. In this respect, the legal traditions of the member states of the EU differ considerably. In the constitutional order of the United Kingdom, the sovereignty of Parliament is still going strong as we have quite recently been able to witness by the way the Human Rights of the European Convention of Fundamental Rights and Basic Freedoms have been incorporated into British law.⁸ In direct opposition to the British tradition, Germany, Austria, Italy and Spain have fully embraced the concept of Constitutional jurisdiction⁹ and have established Constitutional Courts as intermediate bodies between the

2000, at 12; Herta Däubler-Gmelin, *Vom Marktbürger zum EU-Bürger*, 7 FAZ, Jan. 10, 2000, at 11; Herta Däubler-Gmelin, *Eine europäische Charta der Grundrechte – Beitrag zur gemeinsamen Identität*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW) 1 (2000); Bernhard Losch & Wiltrud C. Radau, *Grundrechtskatalog für die Europäische Union*, ZRP 84, 85 (2000).

2. See JÜRGEN SCHWARZ AND ROLAND BIEBER, *EINE VERFASSUNG FÜR EUROPA*, 317 ff. (1984) [hereinafter *Parliament Resolution 1*].

3. Parliament Resolution Adopting the Declaration of Fundamental Rights and Freedoms, 1989 O.J. (C 120) 51 [hereinafter *Parliament Resolution 2*].

4. Parliament Resolution on the Constitution of the European Union, 1994 O.J. (C 61) 155 [hereinafter *Parliament Resolution 3*].

5. See Parliament Resolution 1 *supra* note 2; Parliament Resolution 2 *supra* note 3; Parliament Resolution 3 *supra* note 4.

6. European Council Conclusion of June 4, 1999, EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT (EUGRZ), 364 (1999); see also European Council Conclusion of Oct. 15, 1999, available at http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm.

7. European Council Conclusion of June 4, 1999 *supra* note 6, at 364.

8. Human Rights Act, 1998, c. 42, §4 (2)(4)(6), §10 (2), §19 (Eng.).

9. Ernst Benda, *Die Verfassungsgerichtsbarkeit in der Bundesrepublik Deutschland*, in VERFASSUNGSGERICHTSBARKEIT IN WESTEUROPA 124-5 (Christian Starck & Albrecht Weber eds., 1986) [hereinafter *VGBK IN WE*]; Karl Korinek, *Die Verfassungsgerichtsbarkeit in Österreich*, in *VGBK IN WE* 155-9; Theo Ritterspach, *Die Verfassungsgerichtsbarkeit in Italien*, in *VGBK IN WE* 225-7; Francisco R. Llorente, *Die Verfassungsgerichtsbarkeit in Spanien*, in *VGBK IN WE* 251-4.

legislative branch of government and the people in the way it has already been designed in Alexander Hamilton's Federalist papers.¹⁰ But this concept is far from meeting consensus on the European continent. Denmark, Sweden and the Netherlands do not operate a system of constitutional jurisdiction¹¹ and even under the French concept of preventive constitutional control, statutory laws are still largely conceived as *volonté général*, an expression which has become famous after Rousseau.¹² Therefore the *Conseil constitutionnel* is generally tempted to a significant extent to uphold parliamentary statutes against Fundamental Right claims.¹³

The difficulties of finding a common language on the adequate degree of fundamental rights protection against statutory law-making in Europe can nicely be illustrated by referring to a joke about our practical experience with the linguistic difficulties occurring in the melting pot of European legal traditions, the European Court of Justice (ECJ). One advantage of the multi-lingual character of proceedings before the ECJ is that it sometimes provides moments of light relief. Visitors to the Court always enjoy watching the gesticulations of the interpreters. Something that causes interpreters particular difficulty is jokes, since these often only make sense in the language in which they are told. One quick-witted interpreter got round this problem by saying "Counsel is in the process of telling a joke. It is completely impossible to translate. However, I think it would be polite to laugh . . . now!" The judges dutifully chuckled at the appropriate moment and Counsel could be seen preening himself on his wit.¹⁴

II. CAUSES AND OBJECTIVES OF THE PROJECT

In the diplomatic language of the Cologne summit¹⁵ the Charter is designed to express the overall importance of fundamental rights for the EU's citizens by rendering them more visible in the solemnly

10. THE FEDERALIST NO. 78, at 229 (Alexander Hamilton) (Roy P. Fairfield ed., 1966).

11. Author's opinion.

12. JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL 69 (François Bouchardy ed., Egloff Paris 1946) (1762).

13. Cons. const. 83-162 of July 20, 1983, J.O., July 22, 1983, p. 2267; A.L.D., p. 63; Cons. const. 86-207 of June 26, 1986, J.O., June 27, 1986, p. 7978; A.L.D., p. 71; Cons. const. 98-401 of June 10, 1998, J.O., June 14, 1998, p. 9036; A.L.D., p. 258; Marie-Pauline Deswarte, *L'intérêt général dans la jurisprudence du Conseil Constitutionnel*, REVUE FRANCAISE DE DROIT CONSTITUTIONNEL (R.F.D.C.) 23, 36 (1993); Laurent Habib, *La notion d'erreur manifeste d'appréciation dans la jurisprudence du Conseil Constitutionnel*, RDP 695, 709 (1986).

14. This wit is purely fictional and not attributable to a particular incident at the ECJ.

15. See Draft Charter of Fundamental Rights of the European Union, pmbl. para. 4; see also Däubler-Gmelin, *Vom Marktbürger zum EU-Bürger*, *supra* note 1 at 11.

declared Charter.¹⁶ Starting off from this basis it has been argued that a Charter of Fundamental Rights will enhance the citizen's identification with the EU and will therefore – similar to the idea of constitutional patriotism – form the nucleus for a future European identity.¹⁷ Without denouncing the value of a written Human Rights Charter for the citizen's consciousness, let me express my reserves on this point. Technically we don't need a constitutional Charter for the EU – the treaties serve this purpose perfectly well.¹⁸ The nature of the treaties as a constitutional statute has already been recognized by the European Court of Justice some fifteen years ago¹⁹ and has not been called into question ever since. Nonetheless there is an ongoing debate about the making of a European Constitution these days.²⁰ It is easy to understand the political appeal inherent in that symbolism, but it is difficult to grasp the substantial change of European constitution building in a strictly legal sense. There is of course the long-standing demand for a clear-cut catalogue of respective competences and their division between the European institutions and the member states.²¹ But this undertaking can easily be realized within the existing frame of the treaties and does not require their re-labeling as a European constitution. Given the fact that a definite transfer of ultimate sovereignty of the member states to the EU is politically excluded for the foreseeable future,²² a European constitution could in any case only be considered a complementary constitutional order concluded amongst the member states in order to assure a joint exercise of sovereignty rights. In that respect again there is little difference to the current situation, in which member states have agreed to form an ever-closer union without setting a time limit.²³ Under both constructions the member states keep the theoretical option to leave the EU while practically continuing to create a common political identity that makes it realistically impossible to terminate membership unilaterally. Aside from the semantic appeal of this project, legally there seems to be little new in the idea of a European constitution. Politically we don't need all

16. Draft Charter of Fundamental Rights of the European Union, *supra* note 15.

17. Weber, *Eine einmalige Chance für eine europäische Verfassungsgebung*, *supra* note 1 at 6; see also Weber, *Die Europäische Grundrechtscharta – auf dem Weg zu einer europäischen Verfassung*, *supra* note 1 at 537.

18. Jean-Claude Piris, *L'Union européenne a-t-elle une constitution? Lui en faut-il une?* 35 (4) RTDE 599-635 (1999).

19. See Case 294/83, *Les Verts v. Parliament*, 1986 E.C.R. 1339, 1365; see also Opinion 1/91, 1991 E.C.R. I-6079, 6102, para. 21.

20. See di Fabio, *supra* note 1, at 740, 743; see also Piris, *supra* note 18, at 599-635.

21. THOMAS VON DANWITZ, *VERWALTUNGSRECHTLICHES SYSTEM UND EUROPÄISCHE INTEGRATION* 427 (1996).

22. British Prime Minister Tony Blair, Speech in Warsaw (Oct. 6, 2000); see also French President Jacques Chirac, Speech in the German Bundestag (June 27, 2000).

23. Treaty on European Union, Feb. 7, 1992, pmbl., 1997 O.J. (C340) 145, available at <http://europa.eu.int>.

the difficulties that would undoubtedly occur in the course of a realization or even of a possible failure of such a project. Finally, I think the fascination for fundamental rights protection should not lead us to an unrealistic assessment of the impact that such a Charter would have on the hearts and minds of the average European citizen. We should praise ourselves lucky if a significant portion of the population will be aware of its existence once it has been adopted.

In legal reality the principal reason for elaborating a Charter of Fundamental Rights of the EU is the widespread concern, if not skepticism, of whether the level of human rights protection assured by the ECJ is really meeting the importance attached to them on the national level and the legitimate expectations of the citizens of the EU. In spite of the lacking textual basis in the original treaties, the ECJ has – after overcoming some early reserves²⁴ – devoted much of its jurisprudence to recognize and develop fundamental rights.²⁵ The ECJ certainly deserves credit for this judge made protection of fundamental rights, even when we have to bear in mind that its motivation was certainly not exclusively the desire to protect human rights for their own sake. A second motivation for the ECJ certainly was the need for European fundamental rights protection in order to ensure the supremacy of European law over national constitutional law, which was challenged by fundamental rights claims put forward against European legislation.²⁶

Despite a rich fundamental rights' jurisprudence of the ECJ, the level of protection has always remained a principal reason for doubtful assessments by fundamental rights scholars, particularly from Italy and Germany.²⁷ For the academic community, particularly in these

24. See e.g. Case 1/58, *Stork v. High Authority*, 1959 E.C.R. 17, 26-7; Joined Cases 36, 37, 38 & 40/59, *Geitling v. High Authority*, 1960 E.C.R. 423.

25. See e.g. Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle*, 1970 E.C.R. 1125; Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491; Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727, 3745; Case 5/88, *Wachauf v. Federal Republic of Germany*, 1989 E.C.R. 2609; see also ELLEN CHWOLIK-LANFERMANN, *GRUNDRECHTSSCHUTZ IN DER EUROPÄISCHEN UNION*, 47 (1994).

26. Compare Jason Coppel & Aidan O'Neill, *The European Court of Justice: Taking Rights Seriously?*, 29 COMMON MARKET LAW REVIEW (CMLREV) 669, 682 (1992); with Joseph H. H. Weiler & Nicolas J.S. Lockhart, *"Taking Rights Seriously" Seriously: The European Court and its Fundamental Rights Jurisprudence*, 32 CMLREV 51, 52-3 (1995).

27. Antonio La Pergola and Patrick Del Duca, *New International Law in National Systems: Community Law and the Italian Constitution*, 79 AM. J. INT'L L. 598, 609 (1985); Giovanni Pau, *Il diritto della Comunità economica europea nell'ordinamento italiano*, 67 RIV. DIR. INT. 512 (1987); Adelina Adinolfi, *The Judicial Application of Community Law in Italy (1981-1997)*, 35 CMLREV 1313, 1323 (1998); RUDOLF STREINZ, *BUNDESVERFASSUNGSGERICHTLICHER GRUNDRECHTSSCHUTZ UND EUROPÄISCHES GEMEINSCHAFTSRECHT* 309 (1989); HANS-WERNER RENGELING, *GRUNDRECHTSSCHUTZ IN DER EUROPÄISCHEN GEMEINSCHAFT* 209 (1992); Albert Bleckmann, *Die Rechtsquellen des Europäischen Gemeinschaftsrechts*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVWZ)

countries used to strict human rights scrutiny, it remains a striking statistical fact that fundamental rights claims against EU legislation concerning property and professional liberty have not been successful over the past 30 years in one single case before the ECJ.²⁸ Compared to the high number of verdicts from national constitutional courts over national legislation regulating property rights and professional liberty, this practice raised doubts over the effectiveness of judicial review exercised by the ECJ.²⁹ At the same time it has to be acknowledged that the ECJ apparently tends to favor other legal grounds than fundamental rights for review of European legislation.³⁰ Therefore, in the end it appears unjustified to criticize the court for a complete lack of fundamental rights protection in such decisive fields as professional liberties and property rights, but it explains at the same time the well-founded skepticism on the level of fundamental rights protection exercised by the ECJ. In both countries the constitutional courts have explicitly reserved themselves the right to exercise a final review, but only under the condition that the constitutionally prescribed level of fundamental rights protection for their national citizens would generally not be attained by the ECJ.³¹ Since the respective constitutions do not contain any provision on the required level of protection, it becomes quite apparent that a written Fundamental Rights Charter can do little about the level of protection that is practically ensured by any jurisdiction. But there is a real influence the Fundamental Rights Charter can exercise. By convincing the ECJ of the overall importance of the protection of fundamental rights it can lead the ECJ to accept that this is the principal mission it has to

824, 827 (1993); Martin Nettesheim, *Grundrechtliche Prüfdichte durch den EuGH*, EUZW 106, 107 (1995); Ulrich Everling, *Will Europe slip on Bananas? The Bananas Judgement of the Court of Justice and National Courts*, 33 CMLREV 401, 413 (1996); Torsten Stein, *Bananen-Split? Entzweien sich BVerfG und EuGH über den Bananenstreit?*, EUZW 261 (1998); Ritgen, *supra* note 1 at 372; Gerald G. Sander, *Europäischer Gerichtshof und nationale Verfassungsgerichtsbarkeit*, DÖV 588, 589-592 (2000).

28. See Thorsten Kingreen, *art. 6 EUV*, in KOMMENTAR DES VERTRAGES ÜBER DIE EUROPÄISCHE UNION UND DES VERTRAGES ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT 78 (Christian Calliess & Matthias Ruffert eds., 1999); Ritgen, *supra* note 1 at 372.

29. See Nettesheim, *supra* note 27, at 106; see also Everling, *supra* note 27, at 401, 413; Stein, *supra* note 27, at 261, 262; Stefan Storr, *Zur Bonität des Grundrechtsschutzes in der Europäischen Union*, 36 DER STAAT 547, 552 (1997).

30. It should not be concealed that the European Court of Justice stated a breach of the protection of confidence which is – whereas independently guaranteed by European Community law – tied with the property right in German Constitutional law. See e.g. Case 170/86, Deetzen v. Hauptzollamt Hamburg-Jonas, 1988 E.C.R. 2368, 2373; Theodor Schilling, *Eigentum und Marktordnung nach Gemeinschafts- und nach deutschem Recht*, EuGRZ 177, 184 (1998); Ritgen, *supra* note 1, at 372; Case C-376/98, Federal Republic of Germany v. Parliament, 2000 E.C.R. I-8419, para. 50.

31. See BVerfGE 73 339 (*Solange II*), 387; see also BVerfGE 89 155 (*Maastricht*), 175; Corte cost., Dec. 27, 1973, EUR 1974, 255, 261; Riv. dir. internaz. [1989], p. 104; Riv. it. dir. pubbl. com. [1996], p. 764.

accomplish.³² Hopefully this will indirectly lead to an enhanced level of fundamental rights protection in the EU.³³

It is particularly important to convince the ECJ that fundamental rights need to be protected in a more efficient way in the future, since the ECJ denied the European Communities' power to enter into the system of human rights protection established by the European Convention of Human Rights and Basic Freedoms some years ago.³⁴ Thereby it left the political institutions of the European Communities without a legal option for an enhanced protection of fundamental rights. Interestingly enough the central motivation for the ECJ's reluctance to enter into the protection offered by the system of the Convention was the Court's desire to safeguard its jurisdictional autonomy towards the European Court of Human Rights.³⁵ This attitude is not without delicacy since the ECJ is required to surrender a lot of this procedural autonomy and to fully participate in the system of preliminary ruling proceedings established by article 234 ECT from the national constitutional courts.³⁶

III. THE CONTENTS OF THE PROPOSED CHARTER

A close look at the Charter as it has been drafted by the Convention reveals an impressive compilation of fundamental rights already recognized in a variety of national constitutions and international human rights charters.³⁷ Given the multitude of inspiring sources for the Charter it is remarkable to see the slim product of the Convention's deliberations: 54 short cut articles are considered sufficient legislative out-put to accomplish the Charter's mission. In that respect the Charter sticks to the conventional wisdom of continental tradition that

32. In order to promote this objective, additional modifications of the Court's procedural law might appear helpful. For example, the Advocate general could be required to give a comparative overview over the level of protection in all Member states. Furthermore an additional Advocate general exclusively treating cases of significant importance to Fundamental Rights might give this new mission an institutional backing.

33. See Ritgen, *supra* note 1, at 372.

34. See Giorgio Gaja, *Annotation: Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Given on 28 March 1996, Not Yet Reported*, 33 CMLREV 973, 983 (1996) (discussing ECJ Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, E.C.R. I-1759 at 1789, para. 36) and PATRICK WACHSMANN, *LES DROITS DE L'HOMME* 175 (3d ed. 1997).

35. See Giorgio Gaja, *Id.*

36. See Gil Carlos Rodríguez Iglesias, *Der EuGH und die Gerichte der Mitgliedstaaten – Komponenten der richterlichen Gewalt in der Europäischen Union*, 27 NEUE JURISTISCHE WOCHENSCHRIFT 1889 (2000).

37. See Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, 8, Preamble, para. 5, http://www.europarl.eu.int/charter/pdf/text_en.pdf [hereinafter Charter].

constitutions have to be short and obscure, as already *Abbé Sieyès*³⁸ has put it. This rule was of course established to ensure the utmost flexibility for the political institutions acting under a constitution.³⁹ In the EU's system of constitutional jurisdiction, it is certain that the ECJ is perfectly aware of how to take advantage of this drafting technique. It matches perfectly well with the flexibility seeking judicial strategy, in which the ECJ's judgments are essentially phrased.⁴⁰

1. *Contents and Particularities of the Charter*

In general, the granted rights do not contain much of a surprise. The Charter is based upon the traditional concept of fundamental rights as a tool to protect citizens against public authority interventions. The Charter is divided into seven chapters on dignity, freedoms, equality, solidarity, citizenship, justice and general provisions.⁴¹ After starting out with fundamental values such as human dignity,⁴² the right to life⁴³ and personal integrity⁴⁴ in the first chapter, the chapter on freedoms contains the rights to liberty and security,⁴⁵ the freedom of thought, conscience, religion,⁴⁶ expression and information.⁴⁷ The economic freedoms to choose an occupation,⁴⁸ to conduct business⁴⁹ and the right to education⁵⁰ and property⁵¹ are also laid down in this chapter. This chapter of the Charter contains also guarantees for the respect of private life,⁵² the protection of personal data⁵³ and against removal, expulsion and extradition.⁵⁴ In contrast to this general

38. See EMMANUEL JOSEPH SIEYÈS, *POLITISCHE SCHRIFTEN 1788-1790* 166, n.28 (Eberhard Schmitt & Rolf Reichardt trans. & eds.) (1975). The claim for "obscurity" is ascribed to tradition, compare Jacques Godechot, *L'histoire constitutionnelle de la France de 1789 à nos jours*, 38 JÖR N.F. 45, 54 (1989), and even doubted by THOMAS HAFEN VON WITTENBACH, *STAAT, GESELLSCHAFT UND BÜRGER IM DENKEN VON EMMANUEL JOSEPH SIEYES* 102 n.51 (1994).

39. THOMAS HAFEN VON WITTENBACH, *Id.*

40. See THOMAS VON DANWITZ, *VERWALTUNGSRECHTLICHES SYSTEM UND EUROPÄISCHE INTEGRATION* 150 *et seq.* (1996) (providing details of the *imperatoria brevis* of the Court's judgments and a critical assessment).

41. Ch. I: arts. 1-5, ch. II: arts. 6-19, ch. III: arts. 20-26, ch. IV: arts. 27-38, ch. V: arts. 39-46, ch. VI: arts. 47-50, ch. VII: arts. 51-54. Charter, *supra* note 37, at 9 *et seq.*

42. *Id.* at 9, art. 1.

43. *Id.* at 9, art. 2.

44. *Id.* at 9, art. 3.

45. *Id.* at 10, art. 6.

46. *Id.* at 10, art. 10.

47. *Id.* at 11, art. 11.

48. *Id.* at 11, art. 15.

49. *Id.* at 12, art. 16.

50. *Id.* at 11, art. 14.

51. *Id.* at 12, art. 17.

52. *Id.* at 10, art. 7.

53. *Id.* at 10, art. 8.

54. *Id.* at 12, art. 19.

approach of the Charter some far-reaching rights are granted in chapter IV on "solidarity".⁵⁵ They include not only the right to collective bargaining and action⁵⁶ and legal protection against unfair dismissal,⁵⁷ but also the right to reconcile family and professional life⁵⁸ and the access to services of general economic interest.⁵⁹ With the latter guarantee, the Charter joins the French concept of the constitutional value of the so-called *service public*.⁶⁰ A most recent development is reflected in the principles set out with respect to the fields of medicine and biology, such as the prohibition of any reproductive cloning of human beings.⁶¹ Finally, the individually granted right to an effective remedy before a court is worth noting. In article 47 paragraph 1 of the Charter, the concept to protect individual rights by independent courts clearly prevails over the idea to objectively ensure the rule of law by forms of inner-administrative control, as they subsist in British and, though to a lesser extent, in French administrative law.⁶²

In comparison to the richness of values embodied in the human rights chapters of national constitutions, the Charter has too few, too indefinite and too neutral notions to offer.⁶³ This is certainly not a weakness of the Charter itself, but it reflects directly the unique nature of the EU as a compound of national states with a great variety of distinct societies, each of them representing a quite different set of values. The mutual respect for their diversity in culture, tradition and identity, as it is underlined in paragraph 3 of the Charter's preamble,⁶⁴ requires a somewhat minimalist understanding of common European

55. Art. 27 (Workers' right to information and consultation within the undertaking), art. 28 (Right of collective bargaining and action), art. 29 (Right of access to placement services), art. 30 (Protection in the event of unjustified dismissal), art. 31 (Fair and just working conditions), art. 32 (Prohibition of child labour and protection of young people at work), art. 33 (Family and professional life), art. 34 (Social security and social assistance), art. 35 (Health care), art. 36 (Access to services of general economic interest), art. 37 (Environmental protection), art. 38 (Consumer protection). See *id.* at 15-17.

56. *Id.* at 15, art. 28.

57. *Id.* at 15, art. 30.

58. *Id.* at 16, art. 33.

59. *Id.* at 17, art. 36.

60. For details see Patrick Delvolvé, *Service public et libertés publiques*, R.F.D.A., 1 (1985); Louis Favoreu, *Service public et Constitution*, A.J., June 1997 at 16, note special.

61. See Charter, *supra* note 37 at 9, art. 3, para. 3.

62. For the different concepts in German and French administrative law and their respective influence on EC-law, see Thomas von Danwitz, *Zur Grundlegung einer Theorie der subjektiv-offentlichen Gemeinschaftsrechte*, DIE ÖFFENTLICHE VERWALTUNG 481 (1996); Jean-Marie Woehrling, *Die französische Verwaltungsgerichtsbarkeit im Vergleich mit der deutschen*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 21, 23, 25 (1985); Jean-Marie Woehrling, *Die deutsche und französische Verwaltungsgerichtsbarkeit an der Schwelle zum 21. Jahrhundert*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 462, 464 (1998).

63. See Charter, *supra* note 37 at 8, Preamble.

64. See *id.* at 8, Preamble, para. 3.

values embodied in the guaranteed fundamental rights of the Charter, even at the price of a certain meaninglessness. For sure, this dilemma directly raises doubts as to whether an entity such as the EU deserves a Fundamental Rights Charter. Furthermore it hints, once again, at the questions about the final objective of the European integration process between uniformity and diversity.

2. *Remaining Problems*

Beyond this structural problem of the entire project, the draft version of the Charter contains quite a number of obvious weaknesses, contradictions and unanswered questions both of technical and political nature. For example, it remains undecided whether only the institutions of the EU and the member states are subject to the Charter's guarantees while implementing EU law, as article 51 paragraph 1 suggests,⁶⁵ or whether the Charter will produce horizontal effects, thus binding private enterprises and citizens, as most of the social rights of the Charter presuppose.⁶⁶

a) The Rule on Limitations of Fundamental Rights

A point of essential importance for the evaluation of the Charter is the scope of the granted rights. For the practical importance of an effective fundamental rights protection, it is not so much the statutory guarantee that matters, but the extend to which limitations of these fundamental rights, as they are inherent in any kind of legislation, are constitutionally permitted. Both the democratic principle and the rule of law require in a long-standing constitutional tradition in parliamentary systems that such a limitation can only result from a legislative act passed by parliament.⁶⁷ Only parliamentary legislation can provide the required democratic legitimacy for any limitation of

65. *See id.* at 21, art. 51.

66. Article 51 paragraph 1 provides: "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 the 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," (*see id.* at 21, art. 51); Article 32: "The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education," (*see id.* at 16, art. 32); Matthias Mahlmann, *Die Grundrechtscharta der Europäischen Union*, ZEITSCHRIFT FÜR EUROPÄISCHE STUDIEN, 419 at 438 (2000).

67. *See* DIMITRIS TRIANTAFYLLOU, VOM VERTRAGS- ZUM GESETZESVORBEHALT 158 *et seq.* (1996).

fundamental rights.⁶⁸ Contrary to that tradition, the provision foreseen in article 52 paragraph 1, only requiring a legal provision by the competent legislative authority for any kind of fundamental rights limitation,⁶⁹ hardly addresses the problem at all. With this provision the Charter falsely pretends that any legislative act of EU institutions could produce sufficient democratic legitimacy to limit fundamental rights. This is particularly doubtful for the regulating power of the European Commission under article 86 paragraph 3 ECT.⁷⁰ Instead of making an effort to reduce the democratic deficit of the European Communities, the Charter merely denies its existence.⁷¹ Even without addressing the unsolved question of the democratic insufficiencies of the European Parliament, it would have been the least to require a legislative act jointly passed by Council and Parliament according to the procedure foreseen in article 251 ECT⁷² for any limitation of fundamental rights. But since this would have opened such important fields as the common agricultural policy and the regulation of public enterprises to the Parliament's consent, basic requirements of the democratic principle were, once again, sacrificed on the altar of European integrationist pragmatism.

b) The Provision on Proportionality

I have already noted that there is a widespread skepticism among European law scholars about the level of fundamental rights protection ensured by the ECJ. It is particularly the way in which the ECJ has employed the principle of proportionality in conceding a wide margin of discretion to the law-making institutions that has aroused this

68. For details see 49 BUNDESVERFASSUNGSGERICHT (BVerfGE) 89, 126 *et seq.* (1978); 53 BVerfGE 30, 56 (1979); 61 BVerfGE 260, 275; 88 BVerfGE 103, 116 (1993). Concerning Article 34 of the French constitution, "la loi fixe les règles concernant les droits civiques et les garanties fondamentales accordées aux citoyens pour l'exercice des libertés publiques" (CONST. DE 1958 art. 34 (Fr.)), <http://www.conseil-constitutionnel.fr/textes/constit.pdf> see Conseil Constitutionnel, 27.11.1959, R.A.T.P., Rec. 67, and Cons. Const. 82-143 DC, July 30, 1982 Blocage des Prix et des Revenus, Rec. 57. The prerequisite is explicitly laid down in the constitution of the Swiss Confederation set in force on Apr. 18, 1999 (CONST. art. 36, para. 1 (Switz.)), <http://www.admin.ch/ch/v/rs/101/a36.html>), as well as the Spanish Constitution set in force on Dec. 29, 1978 (CONST. ESPANOLA art. 53, para. 1 (Spain)), <http://www.valencianet.com/constitucion/constt1.htm>). See *supra* note 31.

69. See Charter, *supra* note 37 at 21, art. 52, para 1.

70. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3, art. 86, para. 3 (1997), http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf [hereinafter EC TREATY].

71. Even the requirement foreseen in an earlier draft of the Charter that a limitation of fundamental rights could not result from a provision issued for mere implementation purposes, was abandoned.

72. See EC Treaty, *supra* note 70 at art. 251.

concern.⁷³ Though the principle of proportionality is particularly mentioned in article 52 paragraph 1,⁷⁴ this provision does not take the conventional doctrine into account that limitations of fundamental rights can only pass the proportionality test, if the legitimate interest pursued by a statutory act can out-weight the particular importance of the fundamental right specifically concerned. Therefore we might continue to see the unspecified and unsubstantiated reference to the proportionality of statutory law-making by EU institutions, as it has marked the rulings of the ECJ so far.⁷⁵ By supposing that any legitimate objective pursued by legislation must be genuinely met, this provision at least gives the ECJ the mandate to verify in its own competence whether the objectives pursued by EU legislation are virtually given.⁷⁶ This diagnosis shows that the Charter's provision on proportionality is far from providing satisfactory results, if you consider a strict application of the proportionality test desirable. To the contrary it seems that the Charter's provision concedes a wide margin of discretion to the legislative institutions of the EU. In sum, the provision on proportionality cannot be considered sufficient to calm the widespread criticism of the ECJ's current practice.

c) The Level of Protection

The provisions in article 52 paragraph 3⁷⁷ and article 53⁷⁸ designed to ensure an adequate level of fundamental rights protection reflect

73. See Everling *supra* note 27 at 419; ANGELIKA EMMERICH-FRITSCHKE, DER GRUNDSATZ DER VERHÄLTNISSMÄßIGKEIT ALS DIREKTIVE UND SCHRANKE DER EG-RECHTSETZUNG 365 (2000); PETER SELMER, DIE GEWÄHRLEISTUNG DER UNABHÄNGIGEN GRUNDRECHTSSTANDARDS DURCH DEN EUGH 108 (1998); Nettesheim, *supra* note 27 at 106.

74. "Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." Charter, *supra* note 37 at 21, art. 52, para. 1.

75. Walter Pauly, *Strukturfragen des unionsrechtlichen Grundrechtsschutzes*, EUROPA-RECHT 242, 259 *et seq.* (1998); Georg M. Berrisch, *Zum „Bananen“ – Urteil des EuGH vom 5.10.1994 – Rs. C-280/93, Deutschland ./. Rat der Europäischen Union*, EUROPA-RECHT 461, 465 *et seq.* (1994); Nettesheim, *supra* note 27 at 106 *et seq.*

76. Author's opinion.

77. 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. Charter, *supra* note 37 at 21, art. 52, para. 3.

78. 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 all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions. *Id.* at 21, art. 53.

more of an indefinite political symbolism than of a reliable normative answer to the problem. Article 53 is nothing more than a general guideline for the ECJ not to stay behind the protection granted by international law, international agreements signed by the EU or its member states and their respective constitutions. Since the level of protection offered under these different declarations is far from being homogenous, this guideline still leaves it open to the ECJ to choose the specific level of protection, which it considers adequate for the EU. More precisely than article 53, article 52 paragraph 3 directly links the fundamental rights of the EU to the corresponding guarantees of the European Convention of Human Rights and Basic Freedoms.⁷⁹ In view of the current jurisprudence of the ECJ, this provision should lead to a significant rise of the fundamental rights protection in the EU that may not be neglected.⁸⁰ Nonetheless it has to be noted that a procedural link from the ECJ to the European Court of Human Rights is still missing. Given the identity of substantial standards, as the Charter requires them, the lack of any procedural link between the two jurisdictions is particularly regrettable. Therefore a preliminary ruling procedure designed after art. 234 ECT, as it has already been proposed,⁸¹ would be an adequate way to fully ensure an overall accordance of fundamental rights protection between both Courts.

If the standard of the European Convention would generally become the fundamental rights standard for the EU, this development would, without any doubt, constitute a significant improvement and reassurance for the protection of fundamental rights in the European Union in general. Nonetheless the disparities between the constitutionally granted rights within the member states and the protection level of their corresponding rights on the European scale would still persist. For the foreseeable future there is little hope in sight that the reserves expressed by the constitutional courts of Italy and Germany on the protection of fundamental rights by the ECJ will be lifted. At the bottom line, these differences seem to reflect quite distinct historical experiences in the 20th century. After national socialism, war and communism in one part of the country, Germany,

79. *Id.* at 21, art. 52, para. 3.

80. For different levels of protection. *see, e.g.*, Joined Cases 46/87 & 227/88, *Hoechst AG v. Commission*, 1989 E.C.R. 2859, 2924, para. 17; *Niemietz v. Germany*, App. No. 13710/88, 16 Eur. H.R. Rep. 97, para. 31 (1993); Case 374/87, *Orkem SA v. Commission*, 1989 E.C.R. 3283, 3350, para. 30; *Funke v. France*, App. No. 10828/84, 16 Eur. H.R. Rep. 297, para. 44 (1993); Case C-260/89, *Elliniki Radiofonia Tileorassi Anonimi Etairia v. Dimotiki Etairia Pliroforissis*, 1991 E.C.R. I-2925, 2963, para. 41 *et seq.*; *Lentia v. Austria*, App. No. 13914/88, 17 Eur. H.R. Rep. 93, para. 39 *et seq.* (1994); Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd. v. Grogan*, 1991 E.C.R. I-4685, 4741, para. 28 *et seq.*; *Open Door and Dublin Well Woman v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 53, para. 70 *et seq.* (1992).

81. *See* Walter Schwimmer, *Einheit – auch in den Menschenrechten*, FRANKFURTER ALLGEMEINE ZEITUNG, Mar. 14, 2000, at 12.

Italy, Spain and Portugal have considered an extended protection of fundamental rights as a master plan to safeguard their happily acquired democracy.⁸² As *Roman Herzog*, who presided over the Convention charged with the elaboration of the Fundamental Rights Charter, put it while he was still serving as President of the German Constitutional Court: "I have - despite the impressive jurisprudence of the European Court of Justice on Fundamental Rights - never withheld that my colleagues of the second Senate appear to me like the evil parents of Haensel and Gretel, who abandon their innocent children quite unexpectedly in a forest of restricted protection of fundamental rights, particularly because the high standard of fundamental rights protection is not one of the typical German exaggerations, but a lesson from bitter days."⁸³ On the contrary, the historical record of the United Kingdom and partly of France show that an elaborated system of judicial protection for individually granted fundamental rights is not the only possible way to individual freedom and to stable social conditions for a successful democracy.⁸⁴ The principal difference between the two approaches is nothing less fundamental than the necessity of constitutional jurisdiction. While the British conception resides on trust in the traditional, but legally unenforceable respect of fundamental rights by political institutions as safeguard of fundamental rights, the mainstream perception on the European continent favors the need for jurisdictional control as an ultimate safeguard of an effective human rights protection.⁸⁵ It seems that the convincing results achieved by constitutional jurisdictions around the world seem to mark the way for the future development. With the steadily growing heritage of common experiences in the collective memory of the European peoples, these different perceptions will only step by step be replaced by a joint understanding for an adequate level of fundamental rights protection.

82. See Konrad Hesse, *Bestand und Bedeutung der Grundrechte in der Bundesrepublik Deutschland*, EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 427, 430 (1978); KLAUS STERN, DAS STAATSRRECHT DER BUNDESREPUBLIK DEUTSCHLAND III/1 § 60 (1988); JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 42 *et seq.* (1951).

83. See Roman Herzog, *Verfassungsrechtliche Rahmenbedingungen des Binnenmarktes aus deutscher Sicht*, in BITBURGER GESPRÄCHE JAHRBUCH 1990 1, 2 (Gesellschaft für Rechtspolitik Trier ed., 1990).

84. See Dieter Feger, *Die Grundrechte in den übrigen Mitgliedstaaten der EG einschließlich der Rechte der Europäischen Menschenrechtskonvention*, JURISTISCHE AUSBILDUNG 6, 8 *et seq.*, 12 *et seq.* (1987).

85. See Hesse, *supra* note 85 at 429; Paula Kingston & Colin Imrie, *Vereinigtes Königreich*, in GRUNDRECHTE IN EUROPA UND USA, 715, 787 *et seq.* (Eberhard Grabitz ed., 1986).

IV. THE ROLE OF THE CHARTER IN THE FUTURE COURSE OF EUROPEAN INTEGRATION

The most intriguing aspect of the Charter is without any doubt treated in article 51 paragraph 2.⁸⁶ According to this provision, the Charter does not establish any new power or task for the European Community or the EU and does not modify powers and tasks defined by the treaties.⁸⁷ The political message of subsidiarity is quite easy to catch, but the substantial problem that it is designed to address merits closer study.

This provision reflects the identical experience of such different countries as the United States, Canada, Switzerland and Germany that the installation of a strong fundamental rights jurisdiction on the federal level will necessarily create uniform legal standards⁸⁸ and thereby over time bear significant harmonization effects. This is as well and particularly true for the jurisprudence of the ECJ, using fundamental rights to review national legislation of the member states even in fields where the Community has no powers. Quite recently the ECJ has moreover proceeded the same way⁸⁹ despite an explicit limitation of the fundamental right in question to the tasks of the Communities outlined in article 3 paragraph 2 ECT.⁹⁰ In addition to this general experience in federal states and to the particular heritage of the ECJ's jurisprudence, the extent to which the ECJ is able to apply European fundamental rights in order to review legislation of the member states is far from being precisely defined. According to the ECJ's constant jurisprudence, national legislation is up for review, if it is situated within the frame of the EC law.⁹¹ This notion, of course, is

86. "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties." Charter, *supra* note 37 at 21, art. 51, para. 2.

87. *Id.*

88. Concerning Canada see Ludwig Weber, *Grundrechtsschutz in Kanada – Ungeschriebene Grundrechte und die kanadische Bill of Rights*, 40 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 727, 746 (1980), concerning the United States see William Joseph Wagner, *The Role of Basic Values in the Contemporary Constitutional Hermeneutics of Germany and the United States*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 178, 189 *et seq.* (1996), and, though euphemistically pronounced, see Weber, *supra* note 1.

89. See Case C-285/98, Tanja Kreil v. Bundesrepublik Deutschland, 2000 E.C.R. I-69, para. 17 [2000]; Case C-273/97, Angela Maria Sirdar v. The Army Board, 1999 E.C.R. I-7403 at 7440, para. 17 [1999].

90. "In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women." EC TREATY, *supra* note 70 at art. 3, para. 2.

91. See Joined Cases 201 & 202/85 Klensch v. Secrétaire d'État à l'Agriculture et à la Viticulture, 1986 E.C.R. 3477, 3507, para. 8; Case 5/88 Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, 1989 E.C.R. 2609, 2639, para. 19; Case C-260/89, *supra* note 83 at 2964, para. 42; Florence Zampini, *La Cour de justice des Communautés*

designed to give the ECJ a maximum of flexibility and to avoid any precision on the field of application for European fundamental rights. Therefore it seems well suited for further use under the Charter's applicability rule in article 51 paragraph 1.⁹² In the end, we might see things completely unchanged left to the discretion of the ECJ.

The doubts cast over the sincerity of the subsidiarity approach of article 51 paragraph 1 and 2 are even multiplied by the simple fact that it is contradicted by quite a number of specifically granted rights. The prohibition of death penalty and the principles governing criminal procedures as well as the right to collective bargaining are undoubtedly important guarantees. But as long as the EU and the member Communities have no power in these fields, such guarantees make no sense under the subsidiarity approach. They seem to be designed for powers to be acquired by the European Communities in these fields in the future. But since powers need to be formally transferred to the EU,⁹³ it seems no more than logical to link the grant of the corresponding fundamental rights to the transfer of new powers. Therefore the precipitated grant of fundamental rights seems to serve only one purpose: to provide the frame of EU law that the ECJ requires in order to exercise judicial review over national legislation in these fields.

V. CONCLUSION

Summing up all different aspects for a conclusion, the Charter certainly deserves the solemn declaration foreseen by the heads of state for the Nice summit, but it is quite clearly not ready to enter into legal force.⁹⁴ Given the fundamental importance of the legal status of the Charter, it appears quite evident that the entire project is closely linked to the elaboration of a precisely defined catalogue of legislative and executive powers and their division between the European institutions and the member states. As long as this principal dispute has not been settled, it would be legally misleading and politically unwise to enforce harmonization effects by formally adopting a Fundamental Rights Charter and thereby aggravate the dispute over a suitable competence structure for the enlarged European Union.⁹⁵

européennes, gardienne des droits fondamentaux „dans le cadre du droit communautaire”, 35 R.T.D.E. 659 (1999).

92. See Charter, *supra* note 37 at 21, art. 51, para. 1.

93. See *id.* at 21, art. 51.

94. For this judgment, see Tomuschat, *supra* note 1.

95. See Hirsch, *supra* note 1; Tettinger, *supra* note 1.