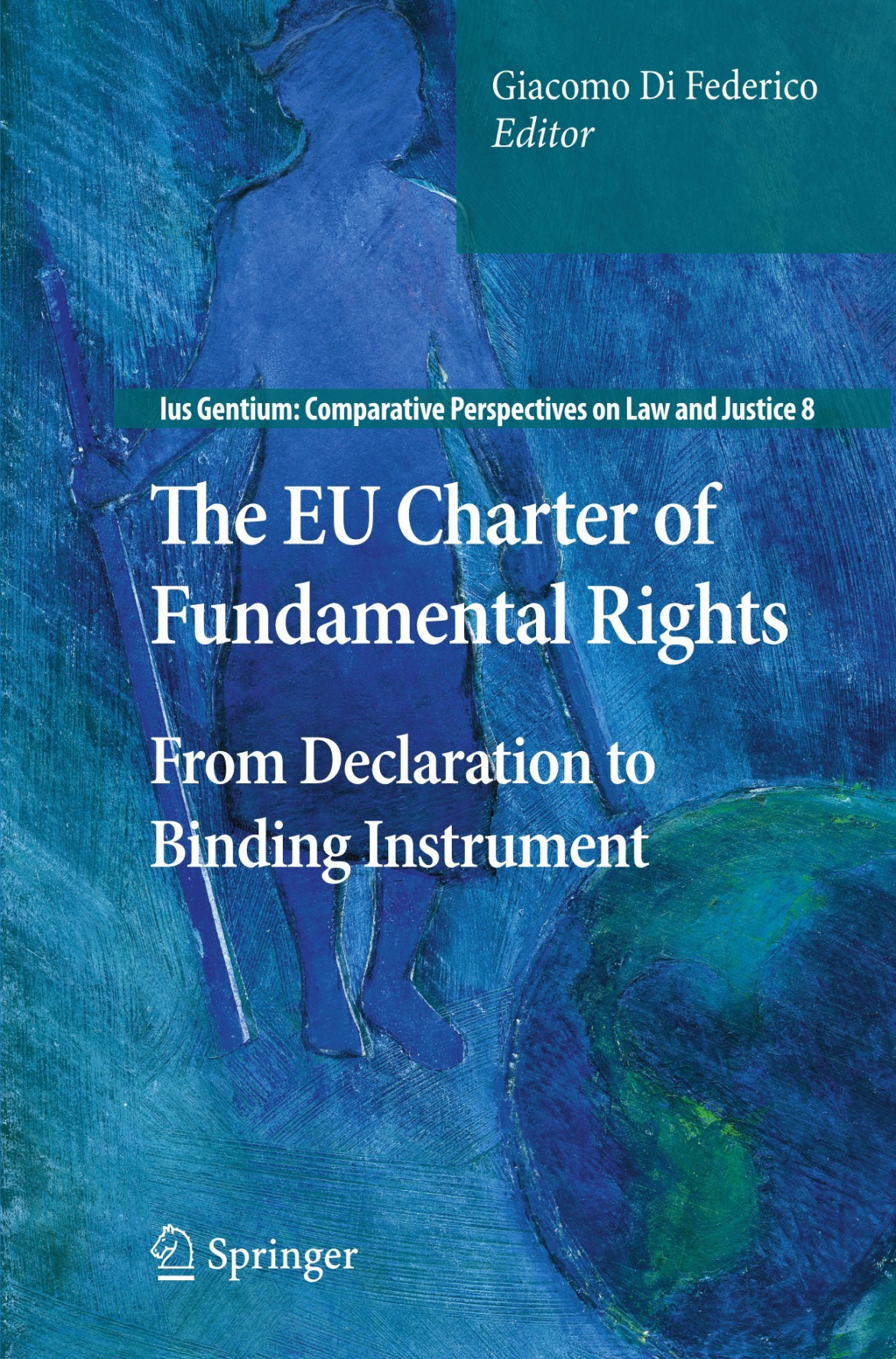
Giacomo Di Federico
Editor
Ius Gentium: Comparative Perspectives on Law and Justice 8
The EU Charter of Fundamental Rights
From Declaration to Binding Instrument
Springer

THE EU CHARTER OF FUNDAMENTAL RIGHTS

IUS GENTIUM

COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE

VOLUME 8

THE EU CHARTER OF FUNDAMENTAL RIGHTS

FROM DECLARATION TO BINDING INSTRUMENT

Edited by

GIACOMO DI FEDERICO

Springer

Editor
Giacomo Di Federico
Interdepartmental Research Centre
on European Law (CIRDE)
University of Bologna
Viale Filopanti 9
40100 Bologna
Italy
gdifederico@cirdce.unibo.it

ISBN 978-94-007-0155-7 e-ISBN 978-94-007-0156-4
DOI 10.1007/978-94-007-0156-4
Springer Dordrecht Heidelberg London New York

Library of Congress Control Number: applied for PCN

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Preface

The fact that fundamental rights are an essential component of the European Union is today a consolidated state of affairs. In this sense, the EU seems to have undergone a true genetic transformation, evolving from a sui generis international organisation, mainly focused on market integration, to an autonomous legal order protecting and promoting the rule of law within and outside its boundaries.

It is well known that the failure of the ambitious constitutional project did not stop the reform process undertaken with the 2001 Declaration on the Future of Europe. The reflection period which followed the French and Dutch referenda on the Treaty Establishing a Constitution for Europe ended with the Berlin Summit in March 2007. The resulting Intergovernmental Conference promptly returned a Treaty purged of all constitutional elements, but deeply rooted in the work of the Giscard d'Estaing Convention.

The final text, signed in Lisbon on 13 December 2007, provides that the European Union shall replace and succeed to the European Community. The former will be founded on the Treaty on European Union and on the Treaty on the Functioning of the European Union, with the same legal value. The repeal of the Pillar architecture, a profoundly modified institutional framework designed to ensure effectiveness and coherence, the enhanced judicial protection bestowed to individuals, the primary law status assigned to the Charter and the envisaged accession to the European Convention on Human Rights are all decisive elements in the affirmation of the European Union as a legal order based on the rule of law, and a credible actor on the international scene.

Although the specificities preserved in the Common Foreign and Security Policy (including the Common Defence Policy) still betray strong national resistances in relation to further integration in this area – sometimes linked to well consolidated constitutional traditions – the new provisions enhance the overall capacity of the EU to effectively respond to external threats while concomitantly promoting and defending its internal values outside its borders.

Despite the lack of a specific competence on fundamental rights, the EU has increasingly been involved in their protection, mainly to uphold the legitimacy of the system, and most notably to ensure the effectiveness of pivotal principles for European integration, such as direct effect and supremacy, vis à vis national (constitutional) prerogatives and international obligations. Since the implementation of EC/EU law was (and still is) to a large extent left to the Member States, adherence to the standard of protection ensured under the European Convention on Human Rights increasingly became an unfailing necessity for the deepening of European integration. Until the Lisbon Treaty this was achieved mainly through a "wise" judicial control over EC/EU law, as well as domestic legislation and practice falling within the scope of application of the treaties, and by virtue of a certain self-restraint on the part of the EU institutions.

On the other hand, being invariably connected to the legal traditions of the Member States and to the development of a higher international standard of protection, the respect of fundamental rights has become a priority in itself, a way to affirm the autonomous nature of the EU legal order. The elaboration of a document codifying the rights and principles guaranteed under Union law and its solemn proclamation by the three main institutions is an outstanding illustration of this resolution. Making it binding and legally enforceable means providing the Union with a true *Bill of Rights* and thus contributes to the creation of "an ever closer Union among the peoples of Europe".

For EU countries, this assimilating role has until now been played by the European Convention on Human Rights. It is suggested that the centralising effect once performed by the Strasbourg Court will now be played by the Court of Justice of the European Union. Indeed, if the Charter is a more than welcome *tertium genus* in the multilevel system of fundamental rights protection in Europe, accession to the ECHR should not distract national courts, especially Supreme and Constitutional Courts, from respecting EU law. Having "the same value as the Treaties", the Charter is now the main parameter of legality for the institutions and bodies of the Union as well as for the Member States when they apply, implement or derogate from EU law. Moreover, it acts as a compass for the development of important policies such as, for instance, Heath, Environmental and Consumer protection, once again underscoring the high prioritization of fundamental rights within the Union.

But the Charter does not extend the competences of the EU. National distrust led to an overabundance of provisions excluding this possibility (see Art. 51 (2) of the Charter and Art. 6 (1) TEU), including a Declaration by the Czech Republic and Protocol No 30 on the application of the Charter in the United Kingdom and Poland. Nevertheless, it could be argued that by exercising their renewed competences the institutions will increasingly bring domestic legislation and practice within the scope of application of EU law and thus indirectly extend the scope of the Charter.

With the rejection of the Constitutional Treaty, the emperor might have lost his robes but still rules, and integration will proceed in a renewed institutional framework where normative and judicial action must build upon and comply with the Charter. On the other hand, accession to the ECHR shall provide the system with more coherence allowing individuals to contest the compatibility of EU law and practice before the Strasbourg Court. As will be seen, although the reasons for accession are mostly political in nature, the practical consequences of membership could be quite significant. Indeed, this external supervision should be understood as complementary to the newly binding Charter, which sets the minimum standard of protection by and within the Union. By contrast, the protection offered under the Convention will remain the lowest applicable standard for Member States, when acting outside the scope of application of the treaties, and for the EU when operating within its competences.

This volume brings together a number of contributions by researchers working within the Interdepartmental Research Centre on European Law (CIRDE) of the University of Bologna and under the direction of Professor Lucia Serena Rossi. It is the result of a coordinated investigation which began within the EU CONSENT Network of Excellence (VI Framework Programme) "Wider Europe, Deeper Integration?" and was subsequently carried out in the context of the Jean Monnet Centre of Excellence "Rule of Law and Fundamental Rights: The EU Model". In light of the process which finally led to the adoption of the Lisbon Treaty it appeared useful to assess whether and to what extent the binding force attributed to the EU Charter of Fundamental Rights and the envisaged accession to the European Convention on Human Rights would impact the functioning of the EU legal order.

Since its first proclamation on 7 December 2000, the nature, value and scope of the Charter have been thoroughly investigated in legal literature, together with its use by the EU courts and national judges. Taking as a frame of reference the new Treaties, this book firstly addresses the consequences of a legally binding *Bill of Rights* in a broader perspective, taking into account its legal and political relevance, its contribution to the multilevel system of fundamental rights protection in Europe, the influence it has so far exercised on domestic and EU case law, as well as the possible repercussions on the role of the European Parliament, on judicial protection and on human rights conditionality in the EU's enlargement policy. The second part focuses on the consequences of a binding Charter in certain specific areas of law: from citizens' rights to internal market derogations; from judicial cooperation in civil and criminal matters to social rights and environmental policy making; from the common commercial policy to the common foreign and security policy.

A comprehensive analysis of the multiple consequences, legal and political, stemming from the Reform Treaty falls beyond the scope of the present volume. More sensibly, this volume is directed at offering a first

assessment of possible future developments in what are believed to be some crucial domains of EU law, both in terms of legislative action and judicial practice.

Bologna, Italy
1 December 2009

Giacomo Di Federico

Acknowledgments

I would like to thank Professor Lucia Serena Rossi for her unconditioned support and encouragement in the preparation and drafting of this book. The School she created in Bologna as Director of the Interdepartmental Research Centre on European Law (CIRDE) is strongly devoted to European Integration studies, with a particular focus on fundamental rights protection. This volume is a small tribute to her commitment as a researcher and scholar in this field.

I am very grateful to Professor Jean-Paul Jacqué, for his learned suggestions on how to tackle the topic under investigation and cover the many areas which are addressed herein; to Professor Andrea Biondi for his valuable feedback and to Professor Louann Haarman for her invaluable assistance and linguistic review.

I would also like to thank all the authors for their efforts in respecting deadlines and constantly updating their chapters in the process of completing this work. To them my gratitude for believing in a project which started more then two years before the entry into force of the Lisbon Treaty.

Contents

Contributors

Valentina Bazzocchi CIRDE (Interdepartmental Research Centre on European Law), University of Bologna, Bologna, Italy, vbazzocchi@cirdce.unibo.it

Valeria Bonavita University of Bologna, Bologna, Italy, valeria.bonavita@unibo.it

Marco Borraccetti Faculty of Political Science, Forlì Campus, University of Bologna, Bologna, Italy, marco.borraccetti@unibo.it

Federico Camporesi Free Lance, Bologna, Italy; Free Lance, Brussels, Belgium, federicocamporesi@me.com

Serena Coppola University of Bologna, Bologna, Italy, serena.coppola@studio.unibo.it

Stephen J. Curzon University of Bologna, Bologna, Italy, scurzon@cirdce.unibo.it

Giacomo Di Federico CIRDE (Interdepartmental Research Centre on European Law), University of Bologna, Bologna, Italy, gdifederico@cirdce.unibo.it

Luisa Ficchi Faculty of Political Science, Forlì Campus, University of Bologna, Bologna, Italy, luisa.ficchi@gmail.com

Federico Forni University of Bologna, Bologna, Italy, fedeforni@libero.it

Marco Lombardo CIRDE (Interdepartmental Research Centre on European Law), University of Bologna, Bologna, Italy, mlombardo@cirdce.unibo.it

Luca Paladini Robert Schuman Centre for Advanced Studies, European University Institute, Florence, Italy, luca.paladini@eui.eu

Giangiuseppe Sanna Studio Legale Sutti, London, UK, giangiuseppe.sanna@sutti.com

Ola Zetterquist Department of Law, University of Gothenburg, Gothenburg, Sweden, Ola.Zetterquist@law.gu.se

About the Contributors

Valentina Bazzocchi holds a joint PhD in EU Law from the University of Bologna and the University of Strasbourg. She is Research Fellow at the Interdepartmental Research Centre on European Law (CIRDE) of the University of Bologna and member of the Editorial Staff of the Observatory on Fundamental Rights in Europe (www.europeanrights.eu). Her main fields of interest are the Area of Freedom, Security and Justice and fundamental rights.

Valeria Bonavita holds an MA in International Relations and Diplomacy of the European Union from the College d'Europe (Bruge). She is currently a PhD candidate in EU law at the University of Bologna and teaching assistant for the course on the Common Commercial Policy at the China-EU Law School (Beijing – Changping, China). Her main fields of interest are international trade, common commercial policy and European foreign and security policy.

Marco Borraccetti holds a PhD in EU Law from the University of Bologna where he is Senior Researcher and Lecturer of European Union Law in the Faculty of Political Science "Roberto Ruffilli" – Forlì Campus. He is a member of the Interdepartmental Research Centre on European Law (CIRDE) of the University of Bologna. His main fields of interest are the Area of Freedom, Security and Justice, judicial protection and fundamental rights.

Federico Camporesi holds a joint PhD in EU Law from the University of Bologna and the University of Strasbourg. He currently acts as legal consultant for law firms and businesses on EU law and policies.

Serena Coppola is a PhD candidate in EU law at the University of Bologna. She collaborates with the Interdepartmental Research Centre on European Law (CIRDE) and carries out research in the field of fundamental rights with a particular focus on the protection of social rights in the EU legal order and within the Council of Europe.

Stephen J. Curzon holds a joint PhD in EU Law from the University of Bologna and the University of Strasbourg.

Giacomo Di Federico holds a PhD in EC Law from the University of Bologna, where he is Senior Researcher of International Law and Lecturer of European Union Law. He is a member of the Interdepartmental Research Centre on European Law (CIRDE) of the University of Bologna and Professor in charge of the course on the Internal Market at the China-EU School of Law (Beijing – Changping, China). His main fields of interest are EU administrative law, competition law and fundamental rights.

Luisa Ficchi holds a PhD in EC Law from the University of Bologna, where she is teaching assistant of European Union Law in the Faculty of Political Science "Roberto Ruffilli" – Forlì Campus. She currently works at the External Relations and General Affairs Department of the Banca d'Italia (Rome) on licensing of EU and non-EU banks and financial companies. Her main research interests are the external relations of the EU, the enlargement policy and fundamental rights.

Federico Forni is a PhD candidate in EU law at the University of Bologna. He currently collaborates with the Interdepartmental Research Centre on European Law (CIRDE) and is teaching assistant for the course on the Internal Market at the China-EU School of Law (Beijing – Changping, China). His main fields of interest are free circulation of goods and free movement of persons.

Marco Lombardo holds a joint PhD in EU Law from the University of Bologna and the University of Strasbourg. He is Research Fellow at the Interdepartmental Research Centre on European Law (CIRDE) and teaching assistant at the Faculty of Law of the University of Bologna. His main fields of interest are environmental and energy law, climate change, competition law and fundamental rights.

Luca Paladini holds a PhD in EU Law from the University of Bologna. He is associated with the University of Florence and is a Jean Monnet Fellow at the European University Institute – Robert Schuman Centre for Advanced Studies. His main fields of interest are international relations, with a particular focus on EU common foreign and security policy and defence policy, and fundamental rights protection.

Giangiuseppe Sanna holds a joint PhD in EU Law from the University of Bologna and the University of Strasbourg. He is currently teaching assistant at the Università Cattolica (Milan) and Senior Associate at the International Law Firm *Studio Legale Sutti* (Milan-London). His main fields of practice and research are international private law, litigation, ADR and arbitration.

Ola Zetterquist is an Associate Professor at the Faculty of Law of Lund University, Sweden. His main fields of teaching and research are European Union Law, Human Rights law and questions of legal philosophy connected to constitutional theory.

Abbreviations

AFSJ	Area of Freedom Security and Justice
AG	Advocate General
CCP	Common Commercial Policy
CFI	Court of First Instance
CFR	EU Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EP	European Parliament
EPI	Environmental Policy Integration
EU	European Union
EUCJ	Court of Justice of the European Union
GC	General Court of the European Union
ILO	International Labour Organisation
OJ	Official Journal
OMC	Open Method of Coordination
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organisation

Part I
The Charter of Fundamental Rights in a Broader Perspective

The Charter of Fundamental Rights and the European *Res Publica*

Ola Zetterquist

1 Preliminary Remarks

This contribution aims at assessing the importance of the European Charter of Fundamental Rights (hereinafter, CFR or the Charter) for the constitutional legitimacy of the European Union (hereinafter, EU). In doing so, we will proceed from the assumption that the EU is in fact a constitutional legal order of the kind alleged by the European Court of Justice (hereinafter, ECJ or EUCJ). The point of departure is the classical idea of the *res publica*, a republican understanding of the constitution of the EU.

2 The Charter: A Brief Presentation of Its Anatomy and Treaty Location

It is well known that the Charter is the first Bill of Rights developed explicitly for the European Union. It comprises a broad range of civil, political and social rights. The Charter therefore contains both what may be called 'negative' rights (i.e. rights that call for state abstention from acting in certain areas like, for example, freedom of expression) and 'positive' rights (i.e. rights that call for state action in a given field like, for example, social security). By virtue of Art. 6 (1)1 of the Treaty on the European Union (hereinafter, TEU) as amended by the Lisbon Treaty, the Charter is part of the primary law of the EU. It will thus also be subject to the jurisdiction of what is today the Court of Justice of the European Union (hereinafter, EUCJ). Art. 6 (1) is part of Title I (Common provisions) but the Charter is not in itself reproduced in the TEU, its inclusion being by point of reference.

O. Zetterquist (✉)
Department of Law, University of Gothenburg, Gothenburg, Sweden
e-mail: Ola.Zetterquist@law.gu.se

G. Di Federico, *The EU Charter of Fundamental Rights*, Ius Gentium: Comparative Perspectives on Law and Justice 8, DOI 10.1007/978-94-007-0156-4_1,

The Charter contains 54 Articles distributed on 6 substantive Chapters structured as follows: Human Dignity (Arts. 1–5), Freedoms (Arts. 6–19), Equality (Arts. 20–26), Solidarity (Arts. 27–38) and Citizenship rights (Arts. 39–50). A final chapter (Arts. 51–54) concerns general rules on its interpretation and scope, the most important ones being that it applies to the European institutions and the Member States only when they are applying EU law and not otherwise (Art. 51), and that the Charter in no way confers new competencies on the EU (Art. 52). However it should be recalled that two Member States, Poland and the UK, have been granted exception from parts of the Charter and that a specific protocol annexed to the Lisbon Treaty provides that Title IV (Solidarity) does not apply to them.

The Charter is also closely related to the older (1950) and well-established European Convention on Human Rights (ECHR), to which all Member States are signatories, covering mainly civil and political rights. The rights laid down in the Charter are, to the extent that they are the same, supposed to have the same meaning in the Charter as in the ECHR (Art. 52(3)) and the Charter is never supposed to curtail rights conferred by the ECHR (Art. 53) therefore establishing the ECHR as the minimum standard the EU must respect. A further sign of the importance of the ECHR is the fact that the EU shall, according to Art. 6(2) TEU, accede formally to the ECHR as a contracting party and consequently be subject to the jurisdiction of the European Court of Human Rights.

3 The Background to the Charter

The protection of fundamental rights holds a very prominent place in the contemporary debate on the EU. In particular, the attention for the subject-matter was prompted in 1998 by the 50th anniversary of the United Nations Universal Declaration of Human Rights, originally adopted in 1948. And yet, the issue of rights protection in the EU is far from being a recent phenomenon. Ever since the EC started to exercise state power in accordance with the competencies accorded to it in the treaties there has been concern that this exercise by the EC institutions, and the Member States when implementing EC law, might come into conflict with the rights of the individual. Hence, the inclusion in the treaties of a court with jurisdiction to review the legality of the cases where the institutions were capable of addressing decisions directly to individuals. These concerns were strengthened once the ECJ had stated, in a string of cases during the 1960s and 1970s, that EC law had *direct effect*[1] (i.e. that the effects of EC law within

[1]Case 26/62 *van Gend en Loos* [1963] ECR 1.

a Member State is determined by EC law and not by national law and that individuals may rely on it in national courts), *supremacy* over national law (however framed)[2] and that EC-law *pre-empts*[3] *national law* (both retroactively and prospectively). With these three principles the ECJ effectively transformed the operative system of the EC from public international law to constitutional law and confirmed the EC as "a new legal order" embracing both states and individuals alike. As a consequence, fundamental rights protection had to be handled on the European level if the coherence of the EC as a legal order common *within* the Member States and not only *between* them, was to be preserved.

Indeed, both the German[4] and Italian[5] constitutional courts reacted promptly to the ECJ's case law indicating that the absence of a functioning fundamental rights protection was of such significance that there could be no question of 'real' supremacy of EC law over national constitutional provisions of fundamental rights. In other words these courts claimed that they retained an ultimate say on whether EC-law would be supreme or not in a specific case, the answer depending to no small degree on the level of rights protection afforded by the Community.

The ECJ rose to the challenge. After some initial cautiousness[6] the issue of the protection of fundamental rights has been addressed by the ECJ as a question of general principles of law[7] and thus enjoyed a de facto protection in the case law of the court. The idea was clearly formulated by the Advocate General Dutheillet De Lamothe in the *Internationale Handelsgesellschaft* case in the following terms:

> [The fundamental principles of national legal systems] contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual.[8]

To paraphrase Voltaire's famous remark on the Deity, one could say that if constitutional rights protection did not exist in EC law before, one would

---

[2] Case 6/64 *F. Costa v. ENEL* [1964] ECR 585.

[3] Case 106/77 *Simmenthal* [1978] ECR 629.

[4] Cf. *Solange I* [1974] 2 CMLR 540.

[5] Cf. *Frontini* [1974] 2 CMLR 372.

[6] Cf. Case 1/58 *F. Stork & Cie v. High Authority of ECSC* [1959] ECR 17, where the ECJ rejected the claim that the Community would be bound by fundamental rights as these were guaranteed by national constitutions.

[7] Cf. Case 29/69 *Stauder* [1969] ECR 419.

[8] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

have to invent it. With the Treaty of Maastricht it was (in Art. 6 TEU) officially recognised that the EU is a Union built on the respect for fundamental rights which are common to the legal traditions of the Member States and defined in the ECHR.

Still, there was widespread belief that the EU should have its proper Bill of Rights and not be dependent on the one elaborated within the Council of Europe, as defined by Member States constitutional law or as elaborated in the case law of the ECJ. The need was not perceived as stemming from insufficient levels of protection in legal practice (de facto protection). It was rather on the political level that the desire for codification was strongest. As L. Gunvén observed, it was about infusing the EU with "a soul".[9] Consequently in 1999, by appointment of the European Council, a convention under the chairmanship of the former German president Roman Herzog was convened to deal with the issue of such Bill of Rights for Europe. On 2 October 2000 the Convention completed its task.

The CFR was solemnly declared by the European institutions (the Commission, the European Parliament and the Council) at the IGC in Nice in December 2000.[10] The Charter was explicitly mentioned in the so called Laeken declaration by the European Council of 15 December 2001. The declaration contained 60 questions on the future of the Union revolving around four main themes: the division and definition of powers, the simplification of the treaties, the institutional set-up and moving towards a Constitution for European citizens. To that end, the Laeken declaration also set up a Convention (composed of representatives of the national governments and parliaments, the European Parliament and the Commission) to tackle the above mentioned issues.

The result of the Convention was a draft Constitutional Treaty which included, in Part II, the full text of the Charter. This draft version was subsequently adopted as the Treaty Establishing a Constitution for Europe (the Constitutional Treaty). Following its rejection in the 2005 French and Dutch referenda, the idea of a Constitutional Treaty was abandoned in favor of a more traditional reform treaty amending the existing treaties. After a period of reflection, called for in June 2005 by a declaration by the European Council,[11] the EU proceeded to amend the existing treaties including in Art. 6 of the new TEU a reference to the Charter attributing to the latter (which is annexed to the Lisbon Treaty[12]) full binding force.

---

[9] L. Gunvén, 'EU:s stadga om de grundläggande rättigheterna – arbetet med att ge EU en "själ"', (2001) *Europarättslig tidskrift* 13.

[10] [2000] OJ C364/1.

[11] The declaration is available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/fr/ec/85322.pdf

[12] Protocol relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

4 The Charter – a Piece in the Larger Constitutional Picture

The Charter certainly was meant to answer the long standing problem of the uncertain status of fundamental rights protection in the EU but it was also intended to lay the foundations for a more proper constitutional legal order with respect to the one provided for by the original treaties. The 1950-ies treaties contained no Bill of rights precisely because they were not intended to enjoy a constitutional status vis à vis the Member states law. The funding treaties and the institutional design set therein are more consistent with the traditional international law instruments being devoid of any constitutional ambition. The development of both statutory and case law since then has however left it beyond doubt that it is no longer correct to characterize neither the treaties nor the European institutions as exclusively international in nature.[13]

In the Laeken declaration, the European Council recognised that this situation was no longer satisfactory and that there was a need for a "Constitution for European citizens" in the shape of a basic constitutional treaty that included the Charter. The idea was that a constitution is hardly complete without a Bill of rights. All Member States that have a written constitution (i.e. all with the exception of the UK) have a catalogue of rights in their constitution and the EU could hardly settle for less than its Member States in this regard.

The Constitutional Treaty did not only comprise a Bill of rights but also sought to resemble as much as possible to a constitution in structure, with a first part of general principles for the EU as a political entity followed by the Charter and then the more substantive provisions that are more functional than constitutional in character. Moreover, the Constitutional Treaty differed from the previous (and posterior) strategy of amending the existing treaties uniting all the treaties in one single text.

The very process (the convention) by which the Constitutional Treaty was elaborated also sought to replicate the making of a constitution rather than the adoption of a classic international law treaty. Whereas previous treaties were the result of scarcely transparent intergovernmental conferences, the Constitutional Treaty was elaborated by representatives of national parliaments and governments through a process that aimed at promoting public awareness.

The Constitutional Treaty strengthened the position of the European Parliament and also involved, for the first time, the national parliaments in the decision making process. These measures were taken in order to

[13] Cf. Case C-50/00 P *Unión de Pequeños Agricultores* v. *Council* [2002] ECR I-6677, AG Jacobs, para 78.

strengthen the democratic element of the EU and thus to alleviate the so called "democratic deficit". The measures were largely confirmed by the IGC that led to the adoption of the Lisbon Treaty.

5 The Charter as a Part of the *Res publica* of the EU

5.1 Rights Protection and Democracy

The Charter may at first glance seem not to fit into a strategy of democratization of the EU. After all, bills of rights are meant to constrain the scope of action of the democratically elected bodies. A bill of rights typically places a power of judicial review in the 'undemocratic' (i.e. non elected) bodies such as the courts. Nevertheless, it has long been argued that a bill of rights was a way to reinforce the *democratic* legitimacy of the EU. The central idea is that a democracy is not complete without a sufficiently constitutionalized system of protection of fundamental rights.[14] In addition it should be recalled that constitutions are themselves choices of the people and as such hardly 'undemocratic'.

To put it differently, democracy is not only about formulating and enforcing the will of whatever majority happens to exist at the moment being.[15] Democracy and rights protection are in this sense mutually reinforcing. This of course applies to those rights that are instrumental to the democratic process itself, like the freedom of expression. But rights also serve to underline the condition of political *equality* of the individuals that form the political community in question and the pre-condition of democracy. The constitution seeks to combine the right of the majority to shape the development of society with the right of individuals and minorities to be treated fairly and equally. Decisions taken by the majority should thus not be exclusively in their interest, at the expense of the minority, but should be compatible with the *common* good of majority and minority alike.

By preserving the equality of the members of the community it addresses, the constitution can be seen as a process of public reasoning that goes on in both political bodies and courts alike and which results in a legal order expressing a civic bond between the individuals that form part

[14] As argued by F. Mancini and D. Keeling, 'Democracy and the European Court of Justice', (1994) *The Modern Law Review* 175 and by the President of the European Court of Justice Vassilios Skouris (quoted in the House of Lords Research Paper 04/85, *The Treaty Establishing a Constitution for Europe: Part II – The Charter of Fundamental Rights* 11).

[15] For an in-depth analysis see S. Holmes *Passions & constraint – On the theory of liberal democracy* (Chicago University Press, 1995), particularly Chapter 5 (*Precommitment and the paradox of democracy*) 134.

of it. This legal order, in which common values are purported, constitutes the *res publica* of the political community in question.

The notion of *res publica*, from which the noun "republic" is derived, may need some further clarification. It is often translated as "the common good" but more properly it is what citizens hold in common and above the specific interest they share. *Res publica* departs from the conception of the legal order as a sort of moral dialogue (concerning the fundamental values of the community) based on reason thereby appealing to the rational assent of its members. Viewed as an ongoing moral dialogue striving for coherence and rationality in the law, *res publica* is better understood as a dynamic concept than as a fixed and unalterable set of values.

The connection between the law and the *res publica* is particularly prominent in theories that stress law as a reflection of public reason rather than as an expression of command and will (whether by a single ruler or an assembly). The ultimate objective is to achieve freedom understood as *non domination* of the individuals making up the legal order thereby confirming them as political equals. Non domination means that no one should be the subject of arbitrary will and command, to be freely exploited in pursuance of somebody else's benefit. It follows that the Law must be in accordance with reason (*ratio*),[16] i.e. the legal order construe a coherent structure that treats all of its subjects as political equals. Law therefore reflects the civic (moral) bond between the individuals belonging to the legal order. Locke famously argued that law expresses a civic morality among the citizens in their horizontal relation:

> [. . .]'tis in their *Legislative*, that the Members of a Commonwealth are united, and combined together into one coherent living Body. This *is the Soul that gives Form, Life and Unity* to the Commonwealth: From hence the several Members have their mutual Influence, Sympathy and Connexion.[17]

According to this view, which flowed into practically all modern democratic theories, the deliberative function of the parliamentary body holds a position of paramount importance for the legitimacy of the legal order. It corresponds in the first instance to the parliament to identify and elaborate, i.e. to reason upon, the fundamental values that unite the members of the political community because it is the body that represents more opinions and interests than any other institution. Such diversity in the reasoning is particularly pertinent in relation to rights regulation. Most rights are by nature more akin to principles than to rules in the sense that a right often needs to be balanced against other rights like, for example, the right of freedom to expression needs to be weighed against the right to privacy. It is

---

[16] As previously argued by Cicero in 'The Republic', in *The Republic and The Laws* (Oxford University Press, 1998) 68.

[17] J. Locke, *Two treatises of government* [1689] (Cambridge University Press, 1988) 407.

possible to come to different conclusions regarding the scope of the respective right and still respect them both as valid principles whereas rules are either followed or not. For these reasons it may seem more appropriate for a legislative body to elaborate on the more precise scope of rights and for a court of law to apply rules.

On the other hand, there are limits to what the elected assembly can decide and the power held by a democratic assembly can never be thought to be arbitrary, i.e. unreasonable, in kind.[18] A republican understanding of the nature of power and law as the instrument for securing freedom obviously calls for a check even on the democratically elected legislative. Checks on the latter are in modern constitutional law most often entrusted to the judicial power, i.e. to a court of one kind or another. However, a court will not often, apart from rather extreme cases where the most basic rights are at stake, be in a position to represent a morally superior body with respect to the elected legislator. A court that bluntly insists on imposing its own values over those of the democratically elected bodies will in the end most likely be either isolated or abolished.

Still, a judicial remedy remains essential for securing non-domination since blind trust in majority rule is not empirically sound. The approach taken in the US and Canadian supreme courts is instructive regarding the striking of balance between judicial review and majority decision-making in political bodies. According to this view it corresponds to the political bodies to identify the material values and policies to be pursued by the public authorities while the courts are charged with the duty to ensure that these values are 'universal' and applied equally to all without any (conscious or unconscious) bias with respect to minorities.[19] The underlying idea is to secure *integrity* in the law meaning that a proposition of law is true if it figures in or follows from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the legal practice of the legal order in question, i.e. that the proposition follows not only from (narrow) single statutory provisions and cases but rather from the broad scheme of principles necessary to justify it.[20]

5.2 Is There a Need for the Charter?

As has been pointed out, the constitutional character, and, with it, the constitutional problems of the EU stem largely from the case law of the ECJ. The latter has, through its constitutional case law, no doubt contributed in

[18] Ibid. 357.

[19] This theory is developed in J. Hart Ely, *Democracy and distrust – A theory of judicial review* (Harvard University Press, 1980).

[20] R. Dworkin, *Law's empire* (Harvard University Press, 1986) 225 ff.

laying the foundations for a European *res publica*. By virtue of the doctrine of direct effect,[21] the effects of EC law follow directly from the treaties (and secondary law adopted in accordance with the treaties) rather than mediated through the national constitution, meaning that EC law is a common law *within* the Member States and not only between them (as is the case with ordinary treaties under public international law). In this sense, the EU functions as an important source of genuine rights for European individuals, thereby making them equals under EU law. It is indeed striking that all the constitutionalising cases concerned the effective protection of the rights of individual citizens under EC law.

Transforming the treaties from public international law into constitutional law is in itself arguably both a democratic and revolution in the field of rights protection: as Federico Mancini – former judge at the Court of Luxembourg – observed, it took EC law out of the hands of governments and bureaucrats and placed it in the hands of the European individuals.[22] It could indeed be argued that this constitutionalisation process (together with the de facto protection afforded by the ECJ) is sufficient as far as the protection of rights is concerned and you should not fix something that is not broken.

In the same vein one of the American founding fathers, Alexander Hamilton, argued (in 1787) that bills of rights are not only unnecessary but even dangerous since they imply that the people hold their rights by concession from the State rather than as original proprietors thereof. He concluded this argument by stating that:

> [. . .] the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.[23]

For these very reasons the U.S. Constitution originally contained no bill of rights. However, the Americans soon changed their minds and introduced a Bill of rights in 1791. By then, it was commonly accepted that there was a need for express protection against possible abuse of State power, however popularly framed. This seems to be the generally accepted view today as we witness a proliferation of international instruments for the protection of human rights (like, amongst others, the ECHR and the U.N. conventions) and appreciate the practically universal existence of bills of rights in national constitutions. It is therefore not an unreasonable suggestion that the EU is in need of bill of rights of its own if the ambition to strengthen its constitutional characteristics is to be taken seriously even though the present form of the Charter presents some problems which are presented below.

---

[21] Laid down in the seminal Case 26/62, *van Gend en Loos*, n. 1 above.

[22] F. Mancini and D. Keeling, n. 14 above, at 183.

[23] A. Hamilton, 'The Federalist no. 84', in A. Hamilton, J. Jay and J. Madison, *The Federalist* (Everymans Library, 1992) 444.

5.3 Problems Presented by the Charter

A problem of the Charter is that it provides rights that are in some sense redundant. The Charter applies only when the situation at stake falls into the field of application of EU Law. It is well known that the EU (and its institutions) operates on the principle of conferral of competences whereby the Union can only act within the limits of the competences conferred on it to achieve the objectives set out in the Treaties.[24] It may under these circumstances seem paradoxical to prescribe that the EU shall not engage in torture, slavery or capital punishment, actions which are not even allowed to the Member States themselves.

Another problem is that the Charter includes rights that are (at present) impossible for the EU to fully protect. The Charter contains, as previously mentioned, not only the 'negative' rights that courts in general and the ECJ in particular have been traditionally engaged with within the framework of judicial review and which represent the core rights of, for example, the ECHR. Bills of rights are not normally associated with legislative competence but rather, on the contrary, with legislative incompetence. However, 'positive' rights are richly represented in the Charter. Taken seriously this existence means that European individuals could go to court and claim various benefits like education, social security and employment agencies basing their claims directly on the Charter. Moreover, since EU law prevails over national law, the Member States can do little to avoid these effects should the EUCJ take them in earnest.

There may be a general understanding that these rights are not to be taken literally but, rather, they should be understood as proclamations of politically desirable objectives. It is, on the other hand, most likely these 'positive' rights that raise the concern of competence expansion of the EU through the Charter and which are the main reasons for the UK and Polish reservations to the Charter, even though it seems quite bizarre to ask for an opt-out from a bill of rights. These exceptions also risk undermining the status of the positive rights as common fundamental values of the EU.

Precisely to avoid this type of concerns, the Charter explicitly states that it is applicable only when EU law is called into question and that it does not confer any new competences to the EU. The provision illustrates that the inclusion of positive rights in the CFR is problematic. The enforcement of these rights – for example, the right to employment agencies and social security in general (including pensions) – will require a substantive competence expansion if the EU intends to ensure their full effectiveness. Indeed, in order to attain such an objective, the EU would need to be entrusted with taxation powers.

[24] Cf. Arts. 5.1 TEU and 5.1 and 7.1. TEC.

From a legal perspective it would be highly unsatisfactory if the inclusion of positive rights led to a 'devaluation' of the other rights contained in the Charter. In spite of these problems, however, the Charter provides a useful point of departure for the process of public reasoning that lies at the heart of the republican model. The Charter spells out, in more detail than the programmatic previous treaty provisions, the fundamental values that form the civic bond between the members of the community. The rights laid down in the Charter need to be balanced against each other. Rights are much like principles in the sense that they are not, like rules, applicable in an all-or-nothing fashion. It is possible to in some cases restrict, say, the right of freedom of expression in the interest of the right to privacy and to still say that one respects both rights. The rights are potentially in conflict with each other but must both be guaranteed to a reasonable degree. In accordance with the republican ideal it primarily corresponds to the political bodies of the EU to reason on the more precise meanings of these rights and their interrelation, thereby striking the proper balance.

Should the political bodies shun the issue of deliberation on fundamental values found in the Charter, this does not mean that the conflict between these various values goes away. It most likely means that they will instead end up in more or less willing courts for dispute resolution and the political fall-out from such a judgment can be quite severe. Judicial pro-activeness has played a decisive role in the making of the EC/EU, as the process of constitutionalisation shows, but the issues dealt with today are no longer only the shape of cucumbers, tariffs on chemicals or milk quotas. Today the competences of the EU stretch into the domain of criminal law and the core notions of public power. There is therefore a need for a politicization of the EU that matches the previous process of legalization. Once such a process has taken place the EUCJ can take one step back in its judicial law-making but will still have the paramount function of assessing whether these rights have been respected in the sense that any restriction must be able to pass the test of reference to the common good, the *res publica*, of the EU.

6 Final Remarks

The corollary of the idea of the EU as a genuine and independent source of rights is that these rights also require protection against the European institutions. It is indispensable to secure rights protection at the EU level if one is not to have recourse to protection through the national constitutions thereby breaking up the unity of the European legal order. Even though these have de facto been protected to a sufficient degree there can be no doubt that it is more proper for the EU to have a codified bill of rights rather than an unwritten one even though the fact that the Charter contains both rights that are redundant and rights that are impossible to protect is rather problematic.