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The General Provisions of the
Charter of Fundamental Rights
of the European Union

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*The General Provisions of the
Charter of Fundamental Rights
of the European Union*

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Abstract

The *Charter of Fundamental Rights of the European Union* provides the Union with a “more evident” (as the European Council of Cologne asked for) framework of protection of the individuals before the public authorities within the European context, after more than thirty years (since the *Stauder Case*) of full confidence in the leading role played by the jurisprudence of the Court of Justice of the European Communities.

This new normative catalogue of fundamental rights (included the so called “aspirational fundamental rights”) implies one more instrument of protection which has to find its own place with regard to the protection afforded by the national Constitutions and the international agreements on human rights, particularly the European Convention on Human Rights, which already are a privileged source of inspiration for Court of Justice of the European Communities.

It is the main objective of the General Provisions of the Charter to clarify which is that place and the relationship with those other levels of protection as managed by their supreme interpreters (i.e., the Constitutional –or Supreme- Courts of the Member States of the Union and the European Court of Human Rights).

The general provisions (or horizontal clauses) closing the Charter are located in Chapter VII, articles 51 to 54, and aim to settle issues regarding all the rights and liberties proclaimed therein, particularly those related to: the scope of the Charter, the limitations that may be set to the fundamental rights that are guaranteed, the relationships with other instruments for the protection of human rights, and finally on how to impede the abusive use of the Charter.

It must be noted that the following reflections are made under the Kantian imperative commitment, “as if” they made reference to a fully legally binding Charter.¹

¹ Paraphrasing A. Rodríguez Bereijo, former President of the Spanish Constitutional Court and Governmental representative in the *Convention*, when describing how the *Convention* approached the elaboration of the Charter (*La Carta de Derechos Fundamentales de la Unión Europea –Lección inaugural del Curso Académico 2000-2001*, Universidad Autónoma de Madrid, p. 12).

On the scope of the Charter while it is simply proclaimed by the European Parliament, the Council and the Commission, I will only point out that lack of legally binding force does not imply lack of legal effects. This can be proved by the role that the European Convention of Human Rights has played in the Community legal order, acting as an essential source of inspiration for the Court of Justice in shaping the community fundamental rights (a role which takes us to a *soft law* context as does the *Joint Resolution of the European Parliament, Council and Commission on fundamental rights*, 5th April, 1977: vid. my work *El soft law comunitario*, *Revista de Administración Pública*, 2001, n. 154, p. 71, 83.)

As the Commission stated in its *Communication on the legal nature of the Charter of Fundamental Rights of the European Union* (COM (2000) 644 final, 11th October, 2000), “it is reasonable to assume that the Charter will produce all its effects, legal and others, whatever its nature.” “It is clear”, it specified, “that it would be difficult for the Council and the Commission, who are to proclaim it solemnly, to ignore in the future, in their legislative function, an instrument prepared at the request of the European Council by the full range of sources and European Legitimacy acting in concert.” And “likewise,” it added “it is highly likely that the Court of Justice will seek inspiration in it, as it already does in other fundamental rights instruments,” in such a way that “*it can reasonably be expected that the Charter will become mandatory through the Court’s interpretation of it as belonging to the general principles of Community law.*” (notwithstanding, the Commission considered preferable “*for the sake of visibility and certainty as to the law, for the Charter to be made mandatory in its own right and not just through its judicial interpretation.*”).

Therefore, the criteria of action will still be determined by fundamental rights as general principles of Community Law, and not by the Charter *per se*. But in the pretorian construction of such rights, the Court of Justice can hardly ignore the Charter, considering it *crystallises* the sources of inspiration handled by the Court itself, and constitutionally imposed by the Treaty of Maastricht.

That is precisely the argument raised in the Court by Advocate General Tizzano’s Conclusions in *BECTU case*, 26 June 2001 (C-173/99), in support of the “confirmation thesis” (by the Charter, of rights provided in other legal instruments, including the Convention and the constitutional traditions of the Member States -vid. L. Burgorgue-Larsen, *La Charte des droits fondamentaux de l’Union Européen racontée au citoyen européen*, *Revue des Affaires Européennes*, 2000, n. 4, p. 406).

V. Constantinesco, for his part, considers that we lie before an interinstitutional agreement, “whose binding authority towards the Institutions that accepted it could be argued.” (*La Carta Europea de Derechos Fundamentales. Una visión desde Francia*, Anuario de Derechos Humanos. Instituto de Derechos Humanos. Universidad Complutense, Madrid, 2001, p. 179, 191).

*Scope*²

To start off with what is clarified by the Charter, Section 1 in Article 51 puts an end to the extravagant approach taken by the Maastricht Treaty and later the Treaty of Amsterdam regarding the field of application of the community fundamental rights and their judicial control.

It is well-known that respect for fundamental rights understood as general principles of Community Law shaped by the Court of Justice, was built by the Court itself more than thirty years ago as one of the foundations for the functioning of the community institutional apparatus³. And in 1992, the Court was already demanding the aforementioned respect – to a certain extent and according to the terms that we will now be analyzing- in the activity of Member States, under the ultimate control of Luxembourg.

In Maastricht, when it was decided to give constitutional formality to the Court of Justice doctrine, this was done, as I mentioned before, a little extravagantly⁴: Article F.2 TEU confirmed respect for fundamental rights by the Union (without mentioning the Member States), but surprisingly, did not include this provision among those that were submitted to the Court's jurisdiction (article L). And Amsterdam's reform limited itself to only partially correcting the extravagance by opening Article F.2 to the Court's jurisdiction, "with regard to action of the institutions" (currently Article 46 of TEU)⁵.

² Article 51: "1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to 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. 2. This Charter does not establish any new power or task for the Community of the Union, or modify powers and tasks defined by the Treaties."

³ *Stauder case*, 12 November 1969 (29/69).

⁴ Or "anomaly", as it is called by Tesauo in *Il ruolo della Corte di giustizia nell'elaborazione dei principi generali dell'ordinamento europeo e dei diritti fondamentali*, in *La costituzione europea. Atti del XIV Convegno Anuale della Associazione italiana dei costituzionalisti*, Cedam, Padova, 2000, p. 319.

⁵ Regarding the doubts that have arisen about the approach that should be taken towards the protection of the fundamental rights both in Maastricht and in Amsterdam, vid. G.C. Rodríguez Iglesias, *La protección de los derechos fundamentales en la Unión Europea*, in *Scritti in Onore di G.F. Mancini –Volume II. Diritto dell'Unione Europea*, Giuffrè, Milano, 1998, p. 845.

Just as the Maastricht Treaty should not have been interpreted as a restriction on the Court of Justice doctrine on the matter of respect for fundamental rights (in the sense that it might have excluded Member States from this respect and denied the Court of Justice control over the community political apparatus⁶) but as an intricate way of emphasizing that the Court did not have jurisdiction to intervene outside the community pillar (not even to control suspected violations of the fundamental rights)⁷, neither should the Treaty of Amsterdam, I believe, be understood as an attempt to restrict the doctrine regarding its extension to the Member States, but rather as an equally intricate way of emphasizing that the Court may only watch over the respect for fundamental rights in such fields of Union Law as it has been acknowledged jurisdiction to control the activities of the Institutions (which are not all, excluding the second pillar) and within the framework of the judicial system established in each case (which varies between the traditional community context to the special contexts of the third pillar, both in the part communitarised by Amsterdam –new Title IV TCE⁸- and in the remaining part –new Title VII TUE⁹)¹⁰.

The Charter has finally clarified that fundamental rights of the Community –or of the European Union, I should rather say¹¹- are binding under the auspices of the Court of

⁶ In this sense vid. however, *Judgement of the Superior Court of Justice of Madrid, 19 January 2000*, published in *Noticias de la Unión Europea*, 2001, n. 197, p. 123 onwards.

⁷ Vid. G. Gaja, *Identifying the Status of General Principles in European Community Law*, in *Scritti in Onore di G.F. Mancini –Volume II. Diritto dell’Unione Europea*, quoted, p. 454.

⁸ Vid. article 68 TEC.

⁹ Vid. article 35 TEU.

¹⁰ Others, such as Lenaerts (*Respect for Fundamental Rights as a Constitutional Principle of the European Union*, *Columbia Journal of European Law*, 2000, n. 1, p.21), consider that Amsterdam, without intending to alter the Court’s doctrine regarding the submission of Member States to the community fundamental rights, may have implied a warning to the Court for it to act cautiously in this regard and try not to fall into the temptation of assuming a jurisdiction of general control over the activities of Member States in the field of fundamental rights, i.e. regardless of the degree to which they are connected to Union Law (concerning the differences between the Community and the United States protection systems, with an analysis in this respect of the doctrine of the incorporation to the Fourteenth Constitutional Amendment of the *Bill of Rights* and its effects on the States, vid. by the same author, *Le juge et la Constitution aux États-Unis d’Amérique et dans l’ordre juridique européen*, Bruylant, Brussels, p. 187 onwards.).

Justice and within the framework of the remedies system established in the Treaties, both to the Union (including its institutions and “bodies”¹²) and to the Member States “only when they are implementing Union Law”. It is with this particularity connected with the Court’s doctrine, that the shadows loom up in trying to delimit its exact scope.

From the doctrine of the Court of Justice, it emerges that Member States should respect community fundamental rights not only when “implementing” Community Law¹³ but also when endeavouring to derogate from¹⁴ or claim to fall outside the remit¹⁵ of the latter according to the justifications allowed by same.

Leaving aside the doubts that subsist with respect to the activities of Member States in fields of community competences while the Community is not exercising them¹⁶, could the aforementioned doctrine of the Court of Justice be understood as restricted by the Charter, by interpreting the obligation of the Member States as “only when they are implementing Union Law” in the sense that this would exclude all national activity other than an obligation with same in terms of its strict implementation?¹⁷

¹¹ Vid. H. Labayle, *Vers un Droit des libertés fondamentales de l’Union Européenne*, in *Realité et perspectives du Droit communautaire des droits fondamentaux* (dir. F. Sudre y H. Labayle), Bruylant, Brussels, 2000, p. 465.

¹² The bodies created via secondary Community Law also: for example, regarding the protection of personal data, the independent supervisory authority foreseen in Article 286 TEC.

¹³ *Wachauf case*, 13 July 1989 (5/88).

¹⁴ *ERT case*, 18 June 1991 (C-260/89).

¹⁵ *Familiapress case*, 26 June 1997 (C-368/95).

¹⁶ Vid. J.H.H. Weiler, *Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals –A Critique*, *European Journal of International Law*, 1992, n. 1, p. 79 onwards.; K. Lenaerts, *Respect for Fundamental Rights as a Constitutional Principle of the European Union*, quoted, p. 22-23.

¹⁷ This hypothesis is considered and not cast aside by L. Besselink, *The Member States, the National Constitutions and the Scope of the Charter*, *Maastricht Journal of European and Comparative Law*, 2001, n. 1, p. 76-79; along the same lines, G. De Búrca, *The Drafting of the European Union Charter of Fundamental Rights*, *European Law Review*, 2001, n. 1, p. 136-137, and F.G. Jacobs, *Human Rights in the European Union: The Role of the Court of Justice*, *European Law Review*, 2001, n. 4, p. 338-339. On the contrary, a

The *Presidium* of the *Convention* seems to rule out this possibility, as in its *Explanations on the full text of the Charter*¹⁸, it considered that the rights acknowledged therein would be imposed on Member States when they acted “within the framework of Community Law”, a notion which certainly covers a wider spectrum than the “implementation” understood in its strict sense¹⁹.

Furthermore, if we wade through the case law of the Court, we shall encounter that the notion that is closest to that of the “framework of Community Law” is that of the “field of application of Community Law” used in a negative sense with the aim of excluding from the scope of action of the community fundamental rights, all national activity that is not included within that scope, i.e. that is not linked to any of the situations contemplated in the community legal order²⁰ (which, if interpreted *a contrario sensu*, would imply including inside the aforementioned scope of action all activities that are linked, and not necessarily in the strict terms of execution, to Community Law).

It could even be claimed that a restrictive interpretation of the degree to which Member States are committed to the fundamental rights proclaimed in the Charter would go against the philosophy that seems to inspire it, impregnated with a *vis expansiva* that Section 2 of the same Article 51²¹ –according to which the Charter “does not establish any

wider interpretation is supported by M. Cartabia, *Articolo 53*, in *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, (dir. R. Bifulco, M. Cartabia and A. Celotto), Il Mulino, Bologna, 2001, p. 349.

¹⁸ CHARTE 4473/1/00 REV 1 CONVENT 49. We should remember, as did Advocate General Jacobs in *Cases D and Sweden v. Council*, C-122/99 P and C-125/99 P, that such explanations lacked legal value and were only aimed at clarifying the provisions of the Charter in the light of the discussions that took place within the *Convention*.

¹⁹ And I say “seems” because the *Presidium* mentioned in its explanations precisely the *Wachauf case*, which refers to the commitment of Member States to the community fundamental rights inasmuch as they “apply” Community Law (like the *Karlsson case*, 13 April 2000, C-292/97, also mentioned); the *Presidium* did not however refer to the *ERT* and *Familiapress* cases which, as we have seen, referred to derogations/exceptions to/from Community Law and to that end, would better fit the notion of “the framework of Community Law”.

²⁰ Vid. *Kremzow and Annibaldi cases* 29 May 1997 (C-299/95) and 18 December 1997 (C-309/96).

²¹ According to which, the Charter “does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties”.

new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties”- is only able to blur, but not erase, and which appear to bring us, as is emphasised in the first paragraph of the Preamble to the Charter (echoing in turn the Preamble to the Treaty establishing the former European Economic Community), before the peoples of Europe that are determined to “lay the foundations of an ever closer union” and to “share a peaceful future based on common values”.

In other words, accepting that one thing is the ever wider range of sectorial competencies embraced by the Communities and the Union and in which the *in genere* protection of the fundamental rights is not included (which the Charter itself, as the recently transcribed Article 51.2 reminds us, does not intend to alter), and another very different thing is the role that the fundamental rights are called to play in the Communities and the Union, i.e. to preside over each and every one of the aforementioned sectorial competencies²², the fact is that the generosity of the range of rights, freedoms and principles²³ incorporated in the Charter²⁴ seems to herald a coexistence “based on common

²² The Court of Justice appeared not to understand this in approaching the competence issue in its *Opinion 2/94, 28 March 1996*, on the Community accession to the European Convention of Human Rights, in spite of the fact that several governments and the Commission defended the said consideration for the protection of the fundamental rights as a “horizontal principle” or “transversal objective” destined to enlightening the Community *modus operandi* towards reaching the sectorial goals (vid., for example, D. Simon, *L’avis 2/94 du 28 mars 1996 sur l’adhésion de la Communauté à la Convention européenne des droits de l’homme*, Europe, 1996, Juin, p. 3).

²³ Principles (or *aspirational fundamental rights* –vid. R. Gosalbo Bono, *Derechos humanos y Derecho comunitario*, Revista de Derecho Comunitario Europeo, 1997, n. 1, p. 65), which are very familiar to the Spanish jurist (cfr. the “principles that preside over the economic and social policies” in Chapter III of Title I of the Spanish Constitution), of an inspiring and, in case, reactive nature against legislative concretion that is contrary to them (on the possibilities of judicially actuating the said principles, vid. the contribution of the *Fédération Internationale des Ligues des Droits de l’Homme* to the work of the *Convention -CHARTRE 4101/00 CONTRIB 1*, and O. De Schutter’s speech during the Seminar on the Charter directed by F. Benoit-Rohmer and published in the *Revue Universelle des Droits de l’Homme*, 2000, n. 1/2 –*La contribution de la Charte des droits fondamentaux de la Union Européenne à la garantie des droits dans l’ordre juridique communautaire*, p. 42-43). A critique on the inclusion of these principles in a catalogue of fundamental rights, in F. Rubio Llorente, *El constitucionalismo de los Estados integrados de Europa*, in *Constituciones de los Estados de la Unión Europea*, Ariel, Barcelona, 1997, p. XVI.

²⁴ A series of clarifications are needed in this matter. First, the fact that a specific right or freedom is proclaimed in the Charter does not mean that the Community (or Union) has the power to regulate the aforementioned right or liberty, but simply that it shall be respectful with it in exercising the concrete powers of action granted by the Treaty. Thus, the fact that the Charter proclaims religious freedom (article 10), does not imply a Community (or Union’s) power to regulate worship; however, it does not exclude its compliance

values” that could, at the same time, entail a higher degree of consideration of these values as essential components in the exercise of the freedom of movement which is at the core of the internal market²⁵. Or even, in the longer term, as essential components of a stronger²⁶ European citizenship²⁷ within an area of freedom, security and justice that, as may be read in the Preamble to the Charter, “places the individual at the heart of its activities”. This could ultimately bring about a gentle and progressive amplification of the current judicial control of Member States from Luxembourg, which would not go well with a restrictive interpretation of the notion of “implementing Union Law” contained in Section 1 of Article 51.

* * *

–guaranteed by the Court of Justice- by the Community when it comes, for example, to the recruitment of its agents (*Prais v. Council*, 27 October 1976, 130/75; vid. in this regard J.P. Jacqué, *La démarche initiée par le Conseil européen de Cologne*, paper delivered in the aforementioned Seminar directed by F. Benoit – Rohmer, p. 6). It must be noted, on the other hand, how many of the Charter rights and liberties are mainly directed not only to the Community (or Union), but to the Member States, also binded to the Charter, as we have seen, when implementing Union Law (for example, when imposing criminal sanctions for breach of community rules, such sanctions –Article 4 of the Charter– in no case can suggest inhuman or degrading treatment or punishment; regarding as well that the Union already counts, in the frame of the third pillar, with powers to adopt framework decisions in criminal affairs towards fighting criminality). We must not forget, however, that even those rights apparently disconnected from the scope of Community (or Union) action, such as the ban on death penalty, constitute a basic parameter of reference in respect of articles 49 (conditions of accession to the Union) and 7 (sanctions –and preventions, after Nice- for breach of fundamental rights by any of the Members) of the TUE (it is a different matter whether the natural terrain of the mentioned rules is, from a substantial point of view, that of political evaluation, thus excluding the role of the Court of Justice beyond procedural issues). On the distinction between “human rights” and “fundamental rights” as applicable categories, respectively, to the relations between States –international sphere– and to the relations with their citizens –domestic sphere–, vid. F. Rubio Llorente, *Mostrar los derechos sin destruir la Unión*, in *La encrucijada constitucional de la Unión Europea* (dir. E. García de Enterría and R. Alonso García), Civitas, Madrid, 2002, p. 120-122.

²⁵ Which might be considered indirectly restricted in the absence of a general common framework of protection of the individual as such, further than the protection it would benefit from as an economic factor of production. In other words, the consideration of the uniform level of protection of the fundamental rights in the Member States would be consolidated as an essential aspect of the freedom of movement in the Community, so that the threat of a violation of the latter in a certain State that would cause beneficiaries of same to renounce their exercise would be considered a violation of the freedom of movement itself. Vid. along these lines, the quoted contribution of the *Fédération Internationale des Ligues des Droits de l’Homme* to the works of the *Convention*.

²⁶ Vid. *Martinez Sala case*, 12 May 1998 (C-85/96) and *Grzelczyk case*, 20 September 2001 (C-184/99).

²⁷ Vid. Opinion of Advocate General Jacobs on the *Konstantinidis case*, 30 March 1993 (C-168/91).

*Scope of guaranteed rights*²⁸

Article 52 begins by including a general clause limiting the exercise of the rights and freedoms proclaimed by the Charter²⁹, thereby discarding the method followed in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which consists in adapting the limitations to each particular right or freedom.

During the elaboration of the Charter, it soon became evident³⁰ that it meant, with respect to the rights and freedoms corresponding to those guaranteed in the Convention³¹, the risk of a reduction in the level of protection already guaranteed by the Convention itself; to which risk it might be added the risk of divergent interpretations by Luxembourg and Strasbourg³².

²⁸ Article 52: “1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. 2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty of the European Union shall be exercised under the conditions and within the limits defined by those Treaties. 3. 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.”

²⁹ Such limitations shall be established “par la loi”, understood in a material and not formal sense, having in mind that “la loi” remains foreign to the sources of law of the Communities and the Union (the latest draft of July spoke of “competent legislative authority”, national or European -CHARTRE 4422/00 CONVENT 45). Vid. T. Groppi, *Articolo 52*, in *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, quoted, p. 354-355; L. Azzena, *Le forme di rilevanza della Carta dei Diritti Fondamentali dell'Unione Europea*, in *La difficile Costituzione europea* (dir. U. De Siervo), Il Mulino, Bologna, 2001, p. 279-280.

³⁰ Especially by Krüger and Fischbach (the latter, a judge in the European Court of Human Rights), who participated in the *Convention* debates as Council of Europe observers.

³¹ Vid. P. Lemmens, *The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights –Substantive Aspects*, Maastricht Journal of European and Comparative Law, 2001, n. 1, p. 50-55.

³² A risk that as the doctrine has shown, has become a reality on more than one occasion, specifically with regard to the inviolability of the home with regard to undertakings, and the right to prevent self-incrimination in the field of Competition Law. Vid. among others, the opinions of R. Lawson, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, in *The Dynamics of the Protection of Human Rights in Europe –Essays in Honour of H.G. Schermers. Volume III*, Martinus Nijhoff, Dordrecht-Boston-London, 1994, p. 236 onwards.; L. Goffin, *Le droit de ne pas s'incriminer soi-même fait-il partie du Droit communautaire?*, in *Mélanges en Hommage à M. Waelbroeck. Volume II*, Bruylant, Brussels, 1999, p. 1009 onwards.; and D. Spielmann, *Human Rights Case law in the*

Section 3 was included precisely to avoid them,³³ as it states that the “meaning and scope” of the rights in the Charter that correspond to rights guaranteed by the Convention “shall be the same as those laid down by the said Convention”³⁴, whereas this provision “shall not prevent Union Law from providing more extensive protection”³⁵.

It is nonetheless significant that the jurisprudence of Strasbourg is never mentioned in the articles of the Charter, finally confined to the Preamble –where it is “reaffirmed”- after a debate during the course of the *Convention*³⁶ that brings to mind the debate held in the United Kingdom on the occasion of the passing of the *Human Rights Act 1998*³⁷.

Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities, in *The EU and Human Rights* (ed. P Alston with M. Bustelo and J. Heenan), Oxford University Press, 1999, p. 764 onwards. On the other hand, defending the “actual non-existence of substantial contradictions” between the doctrines of Luxembourg and Strasbourg (*Hoechst v. Chapell*, and *Niemietz and Orkem v. Funke*), vid. G.C. Rodríguez Iglesias and A. Valle Gálvez, *El Derecho Comunitario y las relaciones entre el Tribunal de Justicia de las Comunidades Europeas, el Tribunal Europeo de Derechos Humanos y los Tribunales Constitucionales nacionales*, Revista de Derecho Comunitario Europeo, 1997, n. 1, p. 341 onwards (particularly, p. 346); on the same lines, J.P. Puissochet, *La Cour Européenne des Droits de l’Homme, la Cour de Justice des Communautés Européennes et la protection des droits de l’homme*, in *Protecting Human Rights: The European Perspective. Mélanges à la mémoire de R. Ryssdal*, Carl Heymanns, Cologne-Berlin-Bonn-Munich, 2000, p. 1146-1147.

³³ A. Vittorino, *La Charte des droits fondamentaux de l’Union Européenne*, Revue du Droit de l’Union Européenne, 2001, n. 1, p. 47-48.

³⁴ Understanding “scope”, as the *Presidium* commented on the final draft (CHARTE 4423/00 CONVENT 46), as including the limitations of the Convention.

In fact, the *Presidium’s* explanations concerning several articles of the Charter (e.g. articles 6, 10 and 11), prove how legitimate restrictions shall not surpass the thresholds allowed by the Convention, according to the text of the corresponding articles of the Charter (in the aforementioned examples, vid. their Convention correlatives articles 5, 9 and 10). It is also claimed (R. Adam, *De Colonia a Nizza: la Carta dei diritti fondamentali dell’Unione europea*, in *Il Diritto dell’Unione Europea*, 2000, n. 4, p. 892) there are no legitimate restrictions of the so-called “intangibile” rights of the Convention (and so it is literally pointed out in the *Presidium’s* comments to Article 5.1, stating “no one shall be held in slavery or servitude”).

³⁵ Headed by the Charter, if it comes to be the case. Section 3 precedes, in such case, Section 2, which states: “rights recognised by this Charter which are based on the Communities Treaties or the Treaty on the European Union shall be exercised under the conditions and within the limits defined by those Treaties”. In other words, if there was to be a correspondence with guaranteed rights of the Treaties (and so it occurs with the rights included in Chapter V, on citizenship), they must be attended to. But if such rights correspond with the Convention, the sense and scope of the latter will prevail, unless the Treaty rights grant higher levels of protection, in which case these are the ones to be implemented according to Section 3 *in fine*, and not 2 (so it is deduced from article 52.3 and not 53, for the latter is not designed to resolve conflicts between Sections 2 and 3 -against the opinion of K. Lenaerts and E. De Smijter, *A “Bill of Rights” for the European Union*, Common Market Law Review, 2001, n. 2, p. 294).

And within this context, it should not be forgotten that the European Court of Human Rights has already openly shown its readiness to proceed to control Community and Union Law by means of the control exercised over the Member States³⁸, which unlike the Community and the Union, are Contracting Parties to the Convention subject to its jurisdiction.

Certainly, the nature and the level of control to be exercised by Strasbourg over Community and Union Law are at present open to debate³⁹.

³⁶ According to Fischbach, the reference or otherwise to the jurisprudence of Strasbourg was decisive, inasmuch as it implied –in the first case- submitting itself strictly to the doctrine of Strasbourg or on the other hand –in the second case- continuing to bless the Court of Justice’s leeway when shaping the rights of the Convention as rights belonging to the Community legal system (i.e. as “general principles of Community Law”). Vid. Fischbach’s speech *Le Conseil de l’Europe et la Charte des droits fondamentaux de l’Union Européenne* and his later intervention –as that of Jacqué- in the discussion on the theme *Le contexte de la Charte des droits fondamentaux* in the said Seminar on the Charter directed by F. Benoit-Rohmer, p. 8 and 13-14; and also, in the same Seminar, P. Waschmann’s speech *Les droits civiles et politiques*, p. 16-17.

The *Presidium* did not seem to harbour any doubts about the need to consider the Convention not independently but jurisprudentially interpreted by Strasbourg. In its explanation to article 52.3 (CHARTRE 4473/1/00 REV 1 CONVENT 49) it considered (after reminding that the references to the Convention in the Charter shall also include the Protocols) that “the meaning and scope of the guaranteed rights are delimited not only by the text of those instruments, but also by the case-law of the European Court of Human Rights” (“and”, it added, “of the European Court of Justice”; an addition that was absent in the last draft of the *Presidium*’s explanatory notes –CHARTRE 4423/00 CONVENT 46– and that could be understood as a confirmation of the European legal system’s autonomy when it comes to absorb the Convention’s concepts). The Court of Justice, by its part, has shown in the nineties a clear tendency to invoke in support of its interpretations of the Convention the case law of Strasbourg: vid. *Hüls v. Commission (C-199/92 P)* and *Montecatini v. Commission cases (C-235/92)*, settled by two judgements on 8 July 1999. This issue is essential, because the real debate in shaping the fundamental rights of the Union firstly *via praetoriana* and later by means of the Charter, is centred not so much in the acknowledgement of the rights and freedoms as in its particular functioning.

³⁷ During which an amendment aimed at “binding” British courts to the doctrine of Strasbourg was refused (vid. F. Klug, *The Human Rights Act 1998, Pepper v. Hart and All That*, Public Law, 1999, Summer, p. 250), opting for the gentler formula of “taking -the said doctrine- into account” (Article 2.1), which makes the issue not so much a question of “obligation” but of “persuasion” (as before the enactment of the *Human Rights Act*: vid. D. Feldman, *The Human Rights Act 1998 and Constitutional Principles*, Legal Studies, 1999, n. 2, p. 168, 192-193).

³⁸ Admonished in *Cantoni case*, 15 November 1996 and actually exercised in *Matthews case*, 18 February 1999.

³⁹ Vid. I. Canor, “*Primus inter pares*”. *Who Is the Ultimate Guardian of Fundamental Rights in Europe?*, European Law Review, 2000, n. 1, p. 17 and following.

For example, it is not clear whether Strasbourg is prepared to exercise its control over measures which are open to judicial supervision of Luxembourg (and whether to this end the determining factor would be the potentiality of this supervision, or rather its activation in each particular case)⁴⁰. Furthermore, in the case that it were to be exercised, neither is it clear to what extent the deference granted by Strasbourg to Luxembourg on the basis of “equivalent protection” to that of the Convention dispensed by the legal order of the Union⁴¹ would be liable to revision⁴².

Nevertheless, it does seem clear that there are real possibilities of indirect control over the Communities and the Union that the Charter, *per se*, does not make disappear.

⁴⁰ We will recall that in the *Matthews case* the Court of Justice emphasised the impossibility of control by the Court of Justice of the European Electoral Act of 1976 and of the Maastricht Treaty, from which combination the alleged violation of the Convention arose. This has been interpreted by Cohen-Jonathan as an inevitable intervention in a particular context of juridical vacuum that entailed the refusal of justice (*A propos de l'Arrêt Matthews v. Royaume-Uni*, *Revue Trimestrielle des Droits de l'Homme*, 1999, n. 4, p. 645-646; along the same lines, *vid. K. Lenaerts, Respect for Fundamental Rights as a Constitutional Principle of the European Union*, quoted, p. 15-17). De Schutter and L'Hoest, however, consider irrelevant the distinction between primary law (excluded from the control of the Court of Justice in terms of validity) and secondary law in regard to control from Strasbourg, and they focus their attention on the difficulties presented by the imputability of the responsibility to the Member States for the infringement of the Convention precisely within the framework of secondary law, particularly of the law adopted by a majority within the Council (*La Cour Européenne des Droits de l'Homme juge du Droit Communautaire: Gibraltar, l'Union Européenne, et la Convention Européenne des Droits de l'Homme*, *Cahiers de Droit Européen*, 2000, n. 1-2, p. 141 onwards, especially 208).

⁴¹ *Vid.* the decision by the former European Commission of Human Rights on the *M & Co. case*, 9 February 1990 (13258/87). The thesis of equivalent protection laid down therein is presently pending debate by the European Court of Human Rights itself, in the light of an action brought by a German company *against the fifteen States of the Union* concerning a sanction imposed on the applicant by the EC Commission in applying Community Law of Competition (a sanction which has at the same time been contested before the Court of First Instance): *DSR-Senator Lines GmbH case* (56672/00).

⁴² Therefore, Lenaerts and De Smijter do not deny that it may be the object in future of a stricter approximation by Strasbourg with the aim of “making the States in the European Union understand that only accession of the EC/EU to the ECHR will shield them from liability for possible violations of this Convention committed by institutions of the Union” (*The Charter and the Role of the European Courts*, *Maastricht Journal of European and Comparative Law*, 2001, n. 1, p. 101). *Vid.* in this respect the “accession in a bad way if not in a good one” mentioned by Sudre in the aforementioned debate on the issue *Le contexte de la Charte des droits fondamentaux* in the Seminar on the Charter directed by F. Benoit-Rohmer, p. 13.

At this stage, the debate is concentrated on the possible accession of the Communities –or the Union⁴³- to the European Convention on Human Rights⁴⁴. An accession that the Treaty of Amsterdam did nothing to pave the way for, once the Court of Justice had stated the need for an express modification to this end of the primary community law⁴⁵.

Whatever the intention of national Governments was when they decided to endow the Union with the Charter⁴⁶, the latter has actually not closed the debate on a possible accession to the Convention: a few days before the Charter was approved by the *Convention* on 2nd October 2000, the Commission itself claimed that the “the existence of a Charter does not diminish the interest in joining -the Convention-, as accession would effectively establish external supervision of fundamental rights at Union level”⁴⁷; and a few

⁴³ At present, the debate concerns the possibility of accession to the Convention considering its lack of legal personality. Against such possibility, vid. O. De Schutter and Y. Lejeune, *L’adhésion de la Communauté à la Convention Européenne des Droits de l’Homme: à propos de l’avis 2/94 de la Cour de Justice des Communautés Européennes*, Cahiers de Droit Européenne, 1996, n. 5/6, p. 600, note 100; J.V. Louis, *Le Traité d’Amsterdam: Un occasion perdue*, Revue du Marché Unique Européen, 1997, n. 2, p. 9; P. Oliver, *Fundamental Rights in European Union Law After the Treaty of Amsterdam*, in *Liber Amicorum in Honour of Lord Slynn of Hadley –Judicial Review in European Union Law*, Ed. Kluwer Law International, The Hague-Boston-London, 2000, p. 329. In favour, based on the Community-Union system’s unity, vid. S. Van Raepenbusch, *L’émergence de l’Union Européenne dans l’ordre juridique international*, and A. Tizzano, *La personnalité internationale de l’Union Européenne*, both in *Mélanges en hommage à M. Waelbroeck. Volume I*, Bruylant, Brussels, 1999, p. 290 and 202-3, respectively; A. von Bogdandy, *The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System*, *Common Market Law Review*, 1999, n. 5, p. 907; D. Curtin and I. Dekker, *The EU as a “Layered” International Organization: Institutional Unity in Disguise*, in *The Evolution of EU Law* (dir. P. Craig and G. De Búrca), Oxford University Press, 1999, p. 131-132.

⁴⁴ Vid. J.F. Renucci, *Droit Européen des Droits de l’Homme*, Librairie Générale de Droit et de Jurisprudence, Paris, 1999, p. 476 onwards.

⁴⁵ *Opinion 2/94, 28 March 1996.*

⁴⁶ It is worthwhile to remember that the European Council of Cologne approached the idea of the Charter just one month after the entry into force of the Treaty of Amsterdam, which had done nothing, as we have just seen, to pave the way to joining the Convention; and three months after the *Matthews case*.

⁴⁷ *Communication on the Charter of Fundamental Rights of the European Union –COM (2000) 559 final*, 13 September 2000. The Finnish delegation, in turn, sent the other governmental representatives a draft proposal (22 September 2000, *CONFER 4775/00*), advocating a parallel –to the adoption of the Charter- reform of the Treaty that would include the Community competence to join the Convention.

days later⁴⁸, insisted that “if the draft Charter is silent on the question of Union accession to the European Convention, of course, it must be acknowledged that the question remains open”, as “the existence of a Charter does not diminish the interest in joining what would be originated by the establishment of external supervision of fundamental rights at Union level”⁴⁹.

As I have elsewhere claimed⁵⁰, apart from the convenience, supported by a wide doctrinal sector⁵¹, of submitting Union Law to external control regarding its respect for fundamental rights, the truth is that there do not appear to be conclusive reasons to support an exclusion of Union Law, with the Court of Justice as its supreme interpreter, from a control reaching the Law of the Member States, including their constitutional law as interpreted by their highest courts. This has also been, at least, the opinion held by the Commission for Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly⁵², and by the Council of Europe observers in the *Convention*⁵³.

⁴⁸ *Communication on the legal nature of the Charter of Fundamental Rights of the European Union* –COM (2000) 644 final, 11 October 2000.

⁴⁹ “Similarly”, added the Commission, “joining the Convention would not in any way take from drawing up a Charter of the European Union”.

⁵⁰ *La Carta de los Derechos Fundamentales de la Unión Europea*, Gaceta Jurídica de la Unión Europea y de la Competencia, 2000, n. 209, p.11.

⁵¹ Vid. for example G. Cohen-Jonathan, *Aspects européennes des droits fondamentaux*, Montchrestien, Paris, 1999, p. 173; D. Curtin, *The “EU Human Rights Charter” and the Union Legal Order: The “Banns” Before the Marriage?*, in *Liber Amicorum in Honour of Lord Slynn of Hadley –Judicial Review in European Union Law*, Ed. Kluwer Law International, The Hague-Boston-London, 2000, p. 317; E. Bribosia, *La protection des droits fondamentaux*, in *La constitution de l’Europe*, Editions de l’Université de Bruxelles, 2000, p. 111 onwards.

⁵² In their *Report on the Charter of the Fundamental Rights of the European Union (14th September 2000 – CHARTE 4465/00 CONTRIB 319)*: “The Assembly is convinced that the aim of the draft Charter, which is to enhance and make more visible the protection of fundamental rights in EU member states, can only be reached if institutions and bodies of the European Union are bound not only by the draft Charter, but also by the European Convention on Human Rights. In a democratic society, a system of checks and balances is essential. All member states of the European Union, honouring this democratic principle, have submitted themselves to the external supervision of the European Court of Human Rights under this Convention, without endangering national sovereignty or the principle of subsidiarity. There is no legitimate reason why acts carried out on behalf of the European Union should be exempt from this fundamental external control mechanism, thus in effect withdrawing the protection of the ECHR from persons adversely affected in their fundamental rights and freedoms by Community law”. The Report itself echoes *Assembly Recommendation*

Yet, there are authors⁵⁴ who direct their fears towards possible control by a Court at Strasbourg impaired to a certain extent by the avalanche of members from countries with limited tradition in the field of fundamental rights⁵⁵.

However, if acknowledged the fear of a European Union controlled by Strasbourg for the above-mentioned reason⁵⁶, this same fear has to be referred to the States of the Union on an individual basis. In other words, I do not see why there should be differences made between the treatment given to the Union and that given to the Member States, as the former is a community of values based precisely on the values which are the very essence of each of the latter.

Not to start from that premise, as well as implying, as I see it, incoherence, leads into a not at all theoretical arena with possible cul-de-sacs, given the direction that Strasbourg appears to be taking.⁵⁷ If it were to continue along the same lines, it might lead

1439 (2000) on the Charter of Fundamental Rights of the European Union adopted on 25th January 2000, which invited the Council of Ministers of the Council of Europe to make a statement in favour of the Union's joining the Convention and to prepare the reforms of the latter towards that end.

⁵³ CHARTE 4961/00 CONTRIB 356, 13 November 2000.

⁵⁴ Such as Rodríguez Berejio, in *La Carta de Derechos Fundamentales de la Unión Europea*, quoted, p. 32; vid., in similar terms, H.G. Schermers, *The New European Court of Human Rights*, *Common Market Law Review*, 1998, n. 1, p. 5-6, and Lord Hoffmann, *Human Rights and the House of Lords*, *The Modern Law Review*, 1999, n. 2, p. 165.

⁵⁵ Avalanche however accepted, among others, by the fifteen States of the Union, which “contributed in this way so that the Organization born in 1949 is currently more a Council of *Eurasia* rather than a Council of Europe” (J.A. Carrillo Salcedo, *Notas sobre el significado político y jurídico de la Carta de los Derechos Fundamentales de la Unión Europea*, *Revista de Derecho Comunitario Europeo*, 2001, n. 9, p. 23 – the italics by Carrillo).

⁵⁶ And which, by the way, did not prevent the Union from addressing the President of the European Court of Human Rights, on the basis of its institutional independence and impartiality, requesting the nomination of three individuals in charge of examining the Austrian government's commitment to the common European values and the political evolution of FPÖ (individuals who, by the way, did not hesitate when it came to use the Charter's draft: vid. *Informe Athisaari-Frowein-Oreja, September 8th*, *Revista de Derecho Comunitario Europeo*, 2000, n. 8, p. 775).

⁵⁷ A different issue which need not be discussed at present is the opinion deserved by its more or less correct judgements which are also open to criticism when the control is exercised over these same States when they act in fields other than the Union. And having said that, the European Court of Human Rights will not be unattended of the critiques, considering the lack of a *stricto sensu* hierarchy and its need of the highest

into Kafkaesque situations: given certain Community or Union activity backed by Luxembourg and censured by Strasbourg on the occasion of its implementation in a Member State, the latter would be faced with the dilemma, with unsatisfactory results either way, of opting towards complying with the obligations derived from its membership in the Union system, or with those derived from its belonging to the Convention system⁵⁸.

Having reached this point, two roads appear to open: either the Convention is strengthened –reinforcing democracy in the new countries that have joined it and promoting at the same time confidence in the system, the maximum expression of which would be if the European Community (or the Union) were to join it⁵⁹–, or it is weakened –which would have to mean the Convention should be denounced by the Member States of the Union or at the very least, that it should be profoundly revised to allow them to concentrate their responsibilities in the Union system⁶⁰ (which would, by the way, demand a new look at the current jurisdiction of the Court of Justice on fundamental rights, limited at present, as we have seen, to such sectors of legal life as are included within the scope of action of the Union.)-

support –from academia, lawyers and, above all, national courts- to its rulings. Vid. in this respect D. Nicol, *Lessons from Luxembourg: Federalisation and the Court of Human Rights*, European Law Review, 2001, H.R.Survey, p. 20-21. Neither will the Court of Justice be unattended: vid. the comments of U. Everling, *Will Europe Slip on Bananas? The “Bananas” Judgement of the Court of Justice and National Courts*, Common Market Law Review, 1996, n. 3, p. 401 and following, particularly p. 434-436, and G.C. Rodríguez Iglesias and A. Valle Gálvez, *El Derecho Comunitario y las relaciones entre el Tribunal de Justicia de las Comunidades Europeas, el Tribunal Europeo de Derechos Humanos y los Tribunales Constitucionales nacionales*, quoted, p. 336-337, particularly note 9.

⁵⁸ On this issue, vid. D. Anderson, *Shifting the Grundnorm (and Other Tales)*, in *Liber Amicorum in Honour of Lord Slynn of Hadley –Judicial Review in European Union Law*, quoted p. 356-7. The latter is true, even leaving aside the problems that may be posed by the possibility of a control exercised by the European Court of Human Rights over the States in the Union not just on an individual basis, but together, i.e. against the fifteen States (an issue currently pending settlement in the light of the aforementioned *DSR-Senator Lines GmbH case 56672/00*; vid. F. Tulkens, *L’Union européenne devant la Cour européenne des droits de l’Homme*, in the Seminar directed by F. Benoit-Rohmer, quoted, p. 56-57); or the possibility of control over the States in the Union not just as the executors of Union Law, but as participants in its very configuration (vid., to this end, O. De Schutter and O. L’Hoest, *La Cour Européenne des Droits de l’Homme juge du Droit Communautaire: Gibraltar, l’Union Européenne, et la Convention Européenne des Droits de l’Homme*, quoted, p. 167 onwards.).

⁵⁹ Vid., supporting this thesis, V. Constantinesco, *La Carta Europea de Derechos Fundamentales. Una visión desde Francia*, quoted, p. 193.

⁶⁰ Vid., to this end, A. Toth, *The European Union and Human Rights: The Way Forward*, Common Market Law Review, 1997, n. 3, p. 512 onwards.

If the first option is taken, as I consider it should, we would have to then question the role to be played by Strasbourg within Union Law.

I would rule out the possibility⁶¹ of establishing a preliminary ruling (from the judge in Luxembourg to the judge in Strasbourg⁶²) following the model set down in Article 234 TEC⁶³. The reason, above all⁶⁴, is that it would often be added to a community preliminary ruling (from the national judge to the judge in Luxembourg) awaiting solution⁶⁵. Moreover, we should not forget that the very system of the preliminary ruling might prolong the main trial so much as to cause delays contrary to the Convention itself (i.e. to the right to a hearing within a reasonable time provided for in Article 6.1).

In fact, the European Court of Human Rights has already considered that to be the case, when it ruled Germany in 1997⁶⁶ to compensate the appellants for the damages suffered as a consequence of the suspension of the main trials for a period of five years in

⁶¹ Which has been considered for quite some time: vid.. G. Sperduti, *Le rattachement des Communautés Européennes à la Convention Européenne de Rome sur la sauvegarde des droits de l'homme et des libertés fondamentaux*, *Revue du Marché Commun*, 1980, n. 236, p. 173; vid. also H.G. Schermers, *The Scales in Balance: National Constitutional Court v. Court of Justice*, *Common Market Law Review*, 1990, n. 1, p. 104-5, and K. Lenaerts, *Fundamental Rights to Be Included in a Community Catalogue*, *European Law Review*, 1991, n. 5, p. 380, as well as Advocate General Warner's Opinion on *Prais v. Council*, 26 October 1976 (130/75) and the allegations of the Portuguese, Danish and Swedish Governments in the frame of *Opinion 2/94*.

⁶² In my opinion, preliminary rulings from the national judge before Strasbourg, as envisaged by Schermers (*European Remedies in the Field of Human Rights*, in *The Future of Remedies in Europe*, ed. C. Kilpatrick, T. Novitz and P. Skidmore, Hart Publishing, Oxford - Portland Oregon, 2000, p. 209) will not provide improvements when it comes to solve potential conflicts between the Court of Justice and the European Court of Human Rights.

⁶³ Including the variations on articles 35 TEU and 68 TEC.

⁶⁴ And regardless of whether this possibility might demand a specific provision to this end not only in the Convention but in the EC/EU Treaty itself to meet the demands derived from *Opinion 2/94* (vid., for example K. Lenaerts, *Respect for Fundamental Rights as a Constitutional Principle of the European Union*, quoted, p. 10, note 38).

⁶⁵ Vid. R. Lecourt, *Cour Européenne des Droits de l'Homme et Cour de Justice des Communautés Européennes*, in *Protecting Human Rights: The Federal Dimension. Studies in Honour of G.J. Wiarda*, Carl Heymanns, Cologne-Berlin-Bonn-Munich, 1988, p. 338-339.

⁶⁶ *Probstmeier and Pammel cases*, settled by two judgements on 1 July 1997.

one case, and of seven in another, awaiting decisions from the Federal Constitutional Court to settle the issues of unconstitutionality referred to it.⁶⁷

And we should not cast aside the possibility that this approach might not be followed in the context of the community preliminary rulings, in spite of the doubts arisen by the *Pafitis e.a. case*, of 26th February 1998. In this case, the violation of article 6.1 of the Convention was alleged due to delays in a set of proceedings that included staying the procedure –for two years, seven months and nine days- as a consequence of having referred to Luxembourg. But Strasbourg stated that it could not consider the aforementioned period as “even though it may at first sight appear relatively long, to take it into account would adversely affect the system instituted by Article 177 of the EEC treaty⁶⁸ and work against the aim pursued in substance in that Article”. However, this statement should not, I believe, be taken out of the particular context of the issue submitted to its control⁶⁹ regarding the average time the Court of Justice takes to settle preliminary rulings⁷⁰. Otherwise, an interpretation aimed at wavering to this control purely on the basis of the *sui generis* nature of the latter, would to my understanding establish an unjustified difference in the treatment of domestic preliminary rulings on constitutionality, every bit as much of a “cornerstone”⁷¹

⁶⁷ Vid. E. Cobreros Mendazona, *La violación del “plazo razonable” en la jurisdicción constitucional*, in *Repertorio Aranzadi del Tribunal Constitucional*, 2002, n. 16, p. 13 onwards.

⁶⁸ Currently 234 TEC.

⁶⁹ Considering that the Court always insists on the need that the said control be presided, especially in this area of undue delays, by “the circumstances that are particular to each case”.

⁷⁰ The period of little more than 31 months that the Court of Justice took to settle the preliminary ruling referred by the Court of the District of Athens did not constitute a considerable excess with respect to the average, then quoted, in months and fractions of month, as 20.8 (a figure that has gradually increased to 21.2 in 1999 and 21.6 in 2000: vid. the statistics of Appendix I of *The judicial system of the European Union*, Reflection Document presented by the President of the Court of Justice before the Ministers of Justice who met in Council in Brussels on 27th and 28th May 1999, as well as the statistics included in n. 35 of the Proceedings of the Court of Justice and the Court of First Instance corresponding to the year 2000).

⁷¹ According to the expression, referring to preliminary rulings, by R. Lecourt (*La Cour de Justice des Communautés Européennes vue de l'intérieur*, en *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit -Geburtstag von H. Kutscher*, Nomos, Baden-Baden, 1981, p. 271) used by the Court itself in its *Report on certain aspects of the implementation of the Treaty on the European Union* (published in the Proceedings of the Court of Justice and the Court of First Instance of the European Communities, n. 15/95).

in the working of the judicial system in several States of the Union as is the preliminary ruling –on interpretation or validity of Union Law- mechanism in the working of the Union itself⁷².

On the other hand, I do not consider that it would be convenient to make any special arrangements to this end for the Community or the Union⁷³: access to Strasbourg should only be possible after having exhausted the domestic judicial remedies. And this is where a second debate has to be introduced.

Particularly, the main point of the debate concerns guaranteeing prior intervention by the Court of Justice, before acceding to Strasbourg. This would permit an interpretation of the Charter by Luxembourg, insofar as the rights and freedoms that are corresponded in the Convention are concerned, with a meaning and scope, as reads Article 52.3, equal at the very least to those conferred by the Convention.

Does this guarantee exist in the context of the current system before the Court of Justice? No, it does not.

First of all, the deficiencies of the system regarding *locus standi* for direct actions before the Court of Justice and the Court of First Instance are well known and have been criticised within the Courts themselves⁷⁴. We are also aware of the increasingly large

⁷²On the other hand, we should also remember that Strasbourg has already compared the decisions of the Court of Justice to the decisions by the national courts in considering the unjustified delays in their execution as a violation of article 6.1 of the Convention (vid. *Hornsby case 19 March 1997*).

⁷³ As far as other matters related to the accession are concerned, vid. F. Benoit-Rohmer, *L'adhésion de l'Union à la Convention Européenne des Droits de l'Homme*, in the Seminar directed by her, aforementioned, p. 57 and following. On the issue of Luxembourg requesting opinions from Strasbourg, vid. also Fischbach's intervention in the debates of the mentioned Seminar, on "the protection of rights" (p. 64), as well as his comments, along with Krüger, on the works of the *Convention* from his perspective as a Council of Europe observer –CHARTRE 4136/00 CONTRIB 29.

number of voices, both doctrinal⁷⁵ and institutional⁷⁶, that demand a more open system. This opening could come from a change in the case-law of the Court (which would make unnecessary a formal reform⁷⁷)⁷⁸ towards making more flexible the requirement of “direct and individual concern” mentioned in the Treaty for exercising an action for annulment⁷⁹, by the use of concepts such as “legitimate”⁸⁰ or “sufficient”⁸¹ interest.

⁷⁴ Vid. G.F. Mancini, *Democracy & Constitutionalism in the European Union –Collected Essays*, Hart Publishing, Oxford – Portland Oregon, 2000, p. 46-48; F.G. Jacobs, *Public Law: The Impact of Europe*, Public Law, 1999, Winter, p. 240-241, and *The Right to a Fair Trial in European Law*, European Human Rights Law Review, 1999, n. 2, p. 148; K. Lenaerts, *The Legal Protection of Private Parties under the EC Treaty: A Coherent and Complete System of Judicial Review?*, in *Scritti in Onore di G.F. Mancini –Volume II. Diritto dell’Unione Europea*, quoted, p. 591 onwards.

⁷⁵ The criticism dates back to the first years of the Community: for example, R. Kovar, *Chronique de la jurisprudence de la Cour de Justice des Communautés Européennes*, Journal de Droit International, 1966, n. 3, p. 707 onwards. Recently, vid. M. Canedo, *L’intérêt à agir dans le recours en annulation du Droit Communautaire*, Revue Trimestrielle de Droit Européen, 2001, n. 3, p. 451 onwards, and A. Arnull, *Private Applicants and the Action for Annulment since “Codorniu”*, Common Market Law Review, 2001, n. 1, p. 7 onwards, and J. Ziller, *La dialectique du contentieux européen: le cas des recours contre les actes normatifs*, in *Les droits individuels et le juge en Europe. Mélanges en l’honneur de M. Fromont*, Presses Universitaires de Strasbourg, Strasbourg, 2001, p. 443 and following.

⁷⁶ Vid. *The Role and Future of the European Court of Justice –A Report of the EC Advisory Board of the British Institute chaired by Lord Slynn of Hadley*, The British Institute of International and Comparative Law, European Law Series, London, 1996, p. 93-94.

⁷⁷ Vid. A. Saggio’s comments on this issue in *Appunti sulla ricevibilità dei ricorsi d’annullamento in base all’articolo 173, quarto comma, del Trattato CE*, in *Judicial Protection of Rights in the Community Legal Order*, Congrès de l’Union des Avocats Européens (Venice 30&31/5 – 1/6 1996), Bruylant, Brussels, 1997, p. 126.

⁷⁸ Vid. the recent decision of the Court of First Instance in *Jégo-Quéré v. Commission case, 3 May 2002 (T-177/01)*, and the Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores v. Council (pending) case (C-50/00 P)*, which the Court has decided to hear in plenary session with a view to reconsidering its case-law on individual concern.

⁷⁹ Article 230 TEC.

⁸⁰ Vid. article 24.1 of the Spanish Constitution

⁸¹ Vid. *Section 31 of the British Supreme Court Act*. As the *Report of the Committee of Justice –All Souls Review of Administrative Law*, “*Administrative Justice: Some Necessary Reforms*”, 1988, p. 179-180 warns: “The question of standing may at first sight appear to be a matter of procedure and hence of less importance than issues relating to substantive law. To regard standing in this manner is, however, to underestimate its central significance. A generous approach by the courts to standing and a willingness by judges to accord standing wherever serious illegality is alleged are, in our view, essential if the rule of law is to be a living precept and not a rhetorical phrase to be rehearsed in ceremonial speeches.”

These deficiencies, especially intense in the area of general measures⁸² (including omissions of a normative nature⁸³), were dealt with by the Court of Justice itself, in the specific context of the fundamental rights, in its *Report on certain aspects of the implementation of the Treaty on the European Union*⁸⁴, in which it asked whether the requirement of direct and individual concern was enough to guarantee individuals effective judicial protection against the possible violation of their fundamental rights by the legislative activity⁸⁵ of the Community institutions⁸⁶.

It is true that the said legislative activity may always be questioned by the indirect channel of the plea of illegality or the preliminary ruling on validity. But it is also true that in this last case, the final decision of allowing the intervention of the Court of Justice lies

⁸² For Moitinho de Almeida, the possibility opened up to individuals to contest both abstract and general measures would not appear to constitute a requirement belonging to the Rule of Law, as may be demonstrated by the fact that, apart from rare exceptions, national Law does not allow individuals to directly challenge parliamentary acts. He does however admit that the limits concerning the measures adopted by the Council (together, if so be the case, with the Parliament) should not be extended to the Commission regulations, proposing that the Court, *iure condendo*, should replace the requirement of individual concern by the simple interest, although in his opinion, it would be necessary to carry out a thorough study of the capacity to respond of the community judicial apparatus (*Le recours en annulation des particuliers: nouvelles réflexions sur l'expression "la concernant...individuellement*, in *Festschrift für U. Everling*, Nomos, Baden-Baden, 1995, p. 869 onwards.). However, it should be remembered that national Law, rather than excluding in absolute terms the right of private individuals to directly contest parliamentary acts, strongly restricts the *locus standi* in terms that recall the restriction managed by the Court of Justice *in general terms*, i.e, regardless of the legislative or executive (or administrative) nature of the measure (vid. D. Waelbroeck and M. Verheyden, *Les conditions de recevabilité des recours en annulation des particuliers contre les actes normatifs communautaires*, Cahiers de Droit Européen, 1995, n. 3-4, p. 399 onwards; vid. also F.G. Jacobs, *Access to Justice as a Fundamental Right in European Law*, in *Mélanges en hommage à F. Schockweiler*, Nomos, Baden-Baden, 1999, p. 204).

⁸³ Vid. my article *Actividad judicial v. Inactividad normativa (El Tribunal de Justicia de las Comunidades Europeas frente al déficit normativo de las Instituciones y de los Estados miembros)*, *Revista de Administración Pública*, 2000, n. 151, p. 77 onwards.

⁸⁴ The Proceedings of the Court of Justice and the Court of First Instance of the European Communities, n. 15/95.

⁸⁵ And not only, "legislative", but in general terms, "executive", considering that, as I have just indicated, the Court doctrine does not make any distinction between measures of legislative and executive (or administrative) nature.

⁸⁶ It would be appropriate at this point to discuss the convenience of a specific appeal in the case of the invocation of a violation of the fundamental rights or, simply, the general suppression of the requirement regarding direct and individual concern in order to apply for annulment (vid. E. Bribosia, *La protection des droits fondamentaux*, quoted, p. 115, n. 35).

with the national judge, whose infringement of the obligation to address Luxembourg may only be corrected *de facto* by resorting to the remedies that may be offered to this end by the national legal orders⁸⁷.

This situation, which is unsatisfactory for both the uniformity in the protection of the community fundamental rights and its effectiveness, could be readjusted by the introduction of an appeal before the Court of Justice⁸⁸ after the domestic judicial remedies have been exhausted without Luxembourg having had the opportunity to make a statement on the alleged violation of a right or freedom proclaimed in the Charter (thereby allowing the Court of Justice to make a statement *ex ante* as *condictio sine qua non* for acceding to Strasbourg).

The introduction of such appeal would certainly alter the cooperative philosophy behind the mechanism of preliminary rulings.⁸⁹ However, has the time not come to call for a substantial reform of the judicial system of the Union as part of the constitutionalisation process, or at least an “approximative”⁹⁰ one, for which the Charter of Fundamental Rights

⁸⁷ Vid. my *Community and National Legal Orders: Autonomy, Integration and Interaction*, Collected Courses of the Academy of European Law, Volume VII, Book 1, p. 100 onwards. At this stage, we can see that the possibility of reaching Strasbourg by linking the violation of article 234 TEC with article 6.1 of the Convention seems remote in the light of the doctrine set down by the European Commission of Human Rights by requiring, in the same way as the German and Spanish Constitutional Courts have in interpreting articles 101 (1) and 24 of respective Constitutions in regard to Article 234 TEC, the presence of arbitrariness in the decision not to refer to the Court of Justice. Concerning the Commission, vid. *Divagsa case*, 12th May 1993 (20631/92) and *FS and NS case*, 28th June 1993 (15669/89); as far as the European Court of Human Rights, vid. its rulings of inadmissibility in *Desmots*, 23 March 1999 (41358/98) and *Dotta*, 7 September 1999 (38399/97).

⁸⁸ Adding to the opening up of standing requirements in order to have direct access to Luxembourg.

⁸⁹ *Schwarze case*, 1 December 1965 (16/65).

⁹⁰ The expression by V. Constantinesco, *La constitutionnalisation de l'Union européenne*, in *De la Communauté de Droit à l'Union de Droit. Continuités et avatares européennes*, (dir. J. Rideau), Librairie Générale de Droit et Jurisprudence, Paris, 2000, p. 152. Favoreu, on the other hand, is very much against the use of “constitutional” terminology, as it would tend to cover up the deficiencies in the construction of Europe in the eyes of the citizens (vid. his report *Quel(s) modèle(s) constitutionnel(s)?* presented in the Colloquium dedicated to European Constitutional Law on the occasion of the 40th anniversary of the Institute for Higher European Studies of the Robert Schuman University of Strasbourg, and his participation in the subsequent debate, in *Revue Universelle des Droits de l'Homme*, 1995, n. 11-12, p. 357 onwards, as well as his debate

would appear to have paved the way? Is it not time to take a closer look at the new European judicial architecture designed in Nice, where the quantitative question of preparing the structure –including the judicial structure– of a possible Union with twenty-seven partners was predominant, postponing the debate about its future in qualitative terms for the next Intergovernmental Conference?

* * *

*Level of protection*⁹¹

In Article 53, the Charter includes the clause on the minimum standard of protection, so familiar in the international agreements on the protection of human rights⁹², including the European Convention itself⁹³, and which figured both in the European Parliament Resolution of 1989 on the Fundamental Rights and Freedoms⁹⁴ and in the European Constitution Project of 1994⁹⁵.

This clause, insofar as it entails the potential displacement of the instrument of which it forms part by others which offer a greater level of protection, poses in the case of the Charter a first complication in its interpretation⁹⁶: unlike the international treaties

with Oberdorff published in the *Revue du Marché Commun et de l'Union Européenne*, 2000, n. 435, p. 94 onwards, under the title *Droit Constitutionnel et Droit Communautaire: Les rapports de deux ordres juridiques*).

⁹¹ Article 53: “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.”

⁹² Vid. article 5.2 of the International Convent on Civil and Political Rights and article 5.2 of the International Convent on Economic, Social and Cultural Rights.

⁹³ Article 53; also within the framework of the Council of Europe, vid. article 32 of the European Social Charter.

⁹⁴ Article 27.

⁹⁵ Section 23 of Title VIII.

confined to human rights, which have the clear vocation of complementing the national systems of protection, the Charter is part of a context, the Union context, which is constructed in conceptual terms as an autonomous legal order with an integrating vocation that tends to displace, by means of the principle of supremacy, the disparities between the Member States.

In other words, while the international instruments for the protection of human rights serve to interpret the domestic system of protection and, if needed, make up for its deficiencies, the Union's Charter, within the global Union system, acquires the role of protagonist and, conferred the conceptual autonomy that belongs to the system tends not just to relegate to secondary roles other instruments of protection, but even to refuse any role, on the basis of its supremacy, to any deviation from the original script.

The second difficulty in interpreting Article 53 comes with the very usefulness of the technique of comparing the level of protection, which has been questioned by those who consider it *de facto* impracticable⁹⁷ given that, on the one hand, the discussion on

⁹⁶ It goes without saying that I disagree with those who (like De Siervo, *L'ambigua redazione della Carta dei Diritti Fondamentali nel processo di costituzionalizzazione dell'Unione Europea*, Diritto Pubblico, 2001, n. 1, p. 50), rule out the possible displacement of the Charter by the national constitutions in the case that the latter should offer a greater level of protection, claiming the reference in article 53 to the "respective fields of application". Such field, as it is argued and relating to national Constitutions, would be strictly domestic, that is, excluding national law connected to Union law (vid. Jacqué's reply to De Schutter in the debate on the Charter held at the Seminar directed by F. Benoit-Rohmer, p. 49). Notwithstanding the intentions of the Council and Commission's legal services supporting such thesis (definitely ambiguous, considering the Commissions' Communications released in September and October 2000 on the legal nature of the Charter, already quoted), I do not believe that the "respective field of application" can be identified with the national sphere excluded from the frame of Union law, for the sole reason that article 51 already refuses that Union law, including the Charter, can *per se* affect such sphere (vid. J. Bering Liisberg, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law. Article 53 of the Charter: A Fountain of Law or Just an Inkblot?*, Harvard Law School. The Jean Monnet Chair, Paper 010401, points 2 and 4). Having said that, however, ¿what scope –presuming it has one– must the reference in Article 53 to the "respective field of application" have? In my opinion, it points out towards the three *complementary* degrees of protection guaranteed by Charter rights: national, European (in its twofold structure of the European Union and the Council of Europe), and international. As far as national constitutions are concerned, Article 53 solely reaffirms, at the European level, the exceptions held by national Constitutional and Supreme Courts to the absolute and unconditional supremacy of Community law, as understood by the Court of Justice (supporting this thesis, vid. A. López Castillo, *Algunas consideraciones en torno a la Carta de Derechos Fundamentales de la Unión Europea*, Revista de Estudios Políticos, 2001, n. 113, p. 68).

fundamental rights often endeavours to weigh up various rights at stake, and, on the other hand, this discussion is not ultimately about rights but about values, i.e. about rights that are delimited by the general interest, which makes it hard, if not impossible, to make a comparison based on a greater or lesser degree of protection, as the values must be identical as a premise for the operation⁹⁸.

Even without ignoring these difficulties⁹⁹ and the need to act prudently¹⁰⁰, it should be accepted that the discussion on the fundamental rights is, at least in essence, a discussion of the individual's rights before public authority (either in the classic version of the limits on the latter's intervention in the legal sphere of the former, or the more modern version impregnated with positive actions to be taken by public authority in favour of the individual). And in this context, we should consider as the system with the highest degree of protection, the one which presents the highest degree of requirements in favour precisely

⁹⁷ Vid. J.H.H. Weiler, *Protection of Fundamental Human Rights within the Legal Order of the European Communities*, in *International Enforcement of Human Rights (Reports submitted to the Colloquium of the International Association of Legal Science, Heidelberg 28-30 August, 1985)* (Eds. R. Bernhardt & J.A. Jolowicz, p. 126-129; *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities*, *Washington Law Review*, 1986, n. 3, p. 1122-1129; and, particularly, *Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human rights in the European Legal Space*, in *The Constitution of Europe ("Do the new clothes have an emperor?" and other essays on European integration)*, Cambridge University Press, 1999, p. 102 and following (based on another work published under the title *Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in The European Union and Human Rights* (eds. N. Neuwahl and A. Rosas), Martinus Nijhoff, The Hague-Boston-London, 1995, p. 51 and following). For and against Weiler's thesis, vid., respectively, in M. Cartabia, *Principi inviolabili e integrazione europea*, Giuffrè, Milano, 1995, p. 32, and L. Besselink, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, *Common Market Law Review*, 1998, n. 3, p. 629 and following.

⁹⁸ Both of these considerations are reflected, as we have seen, in Article 52.1 of the Charter, which allows the possibility of introducing limitations that genuinely meet "objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

⁹⁹Vid. the reflections of the former judge at both the European Court of Justice and of Human Rights, A.M. Donner, *Transition*, in *Protecting Human Rights: The Federal Dimension. Studies in Honour of G.J. Wiarda*, quoted, p. 147-148.

¹⁰⁰ Vid. O.Due and C. Gulmann, *Community Fundamental Rights as Part of National Law*, in *Scritti in Onore di G.F. Mancini –Volume II. Diritto dell'Unione Europea*, quoted, p. 410.

of the individual and not of public authority¹⁰¹, no matter how much the latter's intervention would appear to be backed by the general interest¹⁰².

On the other hand, and coming back to the question of the values, it should be underlined that the Union is based, as the Preamble to the Charter reads, if not on an identity, then on a community of values: "Conscious of its spiritual and moral heritage," according to the Preamble, "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law...The Union contributes to the preservation and to the development of these common values".

And if it is accepted, as it should be, the existence of this community of values (including the possible limitations to the rights –according to Article 52.1 of the Charter– that meet "objectives of general interest recognised by the Union", subject in any case to the superior values enunciated in the Preamble, among which the requirements of a freely competitive common market are not included, whereas the requirements that are derived from democracy¹⁰³ and the Rule of Law have been¹⁰⁴), it must be also accepted that there is

¹⁰¹ Weiler not so much questions this statement as he claims that a high level of protection should not simply be taken for granted as part of the community legal order (vid. *Fundamental Rights and Fundamental Boundaries...*, quoted, p. 108-112; along the same lines, vid. B. De Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in *The EU and Human Rights*, quoted, p. 881-883).

¹⁰² Compare Weiler's considerations on property rights (vid. previous note), and Braibant's (in the Conclusions to the many times quoted Seminar directed by F. Benoit-Rohmer, p. 68-69), the latter with a special authority having been the French Government representative before the Convention. Braibant insisted on incorporating national constitutions to the text in Article 53, in order to avoid the diminishment in the degree of protection granted by the French legal system on expropriation, and thus avoid possible expropriations without *prior* compensation (Article 53 therefore confirming what Braibant –in a later work– calls the principle of "*non-regression*", according to which "the more protective provisions contained in a national Constitution shall prevail over the Charter" –*La Charte des droits fondamentaux de l'Union Européenne*, Editions du Seuil, Paris, 2001, p. 269).

¹⁰³ Vid., of the same opinion, F. Sudre, *La Communauté Européenne et les droits fondamentaux après le Traité d'Amsterdam: Vers un nouveau système européen de protection des droits de l'homme*, La Semaine Juridique, 1998, n. 1-2, p. 11. Even while references to the requirements of a democratic society were erased at the last minute from article 52.1 (attached to July's last draft CHARTE 4422/00 CONVENT 45), although maintaining a reference to "the objectives of general interest recognised by the Union", taken from the Court

a solid base in order to operate in comparative terms with the technique of the level of protection¹⁰⁵.

of Justice's doctrine (vid., among others, *Karlsson case, e.a., 13 April 2000, C-292/97*, quoted by the Presidium in its explanatory notes). This is one of the dangers that has been implied by the functionalist approach of the Court of Justice in configuring the fundamental rights "as the general principles of Community Law": it is the common market that must imperatively submit itself to the needs of a democratic society, and not the other way around. For example, Article 8 of the Convention, which proclaims the right to respect of private and family life, whose exercise, as Section 2 explains, may only be subjected to interference by a public authority if in accordance with the law and when "necessary in a democratic society in the interests of...the economic well-being of the country" (from where it can be clearly deduced that it is not the democratic society that should suit itself to the economic well-being, but, as I said before, vice-versa). That is how Strasbourg interpreted it in the *Berrehab case, 21 June 1988*, in which, although the legitimate nature of the aim that was being pursued, which was none other than the economic well-being of the country (specifically, the labour market), judged that the measure that was taken in that particular case (expulsion from Dutch territory of a Moroccan citizen who had divorced his Dutch wife) had exceeded the needs of a democratic society. More specifically, the Court considered that article 8 of the Convention had been violated given the lack of proportion between the measures that were employed and the aim that was being pursued, considering that the case did not refer to a foreigner requesting entry in the Netherlands for the first time (but a person who had already lived there legally for several years with a home and a job, and against whom the Dutch government did not have any complaints), and that the paternal-filial ties would be in danger of severance were the expulsion in fact to take place (vid., on the other hand, the different approach of Luxembourg in *Diatia case, 13 February 1985, 267/83* and *Demirel case, 30 September 1987, 12/86*).

¹⁰⁴ Vid. D. Simon, *La Communauté de droit (comme fondement du Droit communautaire des droits fondamentaux?)*, in *Realité et perspectives du Droit communautaire des droits fondamentaux*, (Dir. F. Sudre and H. Labayle), Bruylant, Brussels, 2000, p. 85 and onwards.

¹⁰⁵ That is why I am doubtful of Weiler's approach to the example of the scope of freedom of expression in the particular context of a neo-nazi demonstration in a neighbourhood inhabited by people who survived the Holocaust (vid. *Fundamental Rights and Fundamental Boundaries...*, quoted, p. 105-106). Weiler believes that while the United States system would be permissive towards this demonstration because of the great regard in which Americans hold freedom of expression, many European countries –and clearly, Germany– would probably ban the demonstration without believing the ban to be contrary to the essential nucleus of the said freedom. And the choice between one system or another, according to Weiler, could not be justified in terms of a greater or lesser degree of protection of freedom of expression, which would ultimately show the inadequacy of the technique of comparing the levels of protection in order to consider the various ways of understanding a right with underlying different social values.

In my opinion, this approach focuses the analysis of freedom of expression on its possible limitations in the light of deeply rooted social appraisals (vid. article 10.2 of the European Convention), when the fact is that this analysis should be considered more a question of weighing up conflicting rights and freedoms, more specifically, the balance between freedom of expression and personal dignity (vid. the *Jersild case, 23 September 1994*, in which Strasbourg balanced freedom of expression with racial discrimination in all its forms and manifestations –and human dignity, in last instance, as judges Ryssdal, Bernhardt, Spielman and Loizou state in their dissenting opinion–, in the framework of a criminal sanction on a journalist for having interviewed a racist group, in which the interviewed made highly xenophobic comments). And it is precisely the nature of this terrain, with the presence of conflicting rights and freedoms that would prove the discursive inaptitude of the technique of comparing the levels of protection.

This technique can however be suitable when approaching various ways to understand the scope of a right as such and *per se* confronting intervention of public authority. To continue with the comparison between the United States and the European models, both share, in a wide sense, the values mentioned in the Preamble to the Charter of Fundamental Rights of the Union (which is the premise to operate with the technique of comparing the levels of protection). What would have to be said within the framework of those large-scale common values regarding the way of approaching the right to life? Considering that the European system

Returning to the unsettled question of the complexity inherent in talking about human rights within a framework of autonomy and supremacy, it should first of all be reminded that the autonomy of the legal order of the Union has never been understood by the Court of Justice in absolute terms, especially with respect to the fundamental rights which, in the absence of a Charter, the Court has been shaping inspired mainly by the Convention and by the constitutional traditions common to the Member States¹⁰⁶.

That being reminded, once the Charter is adopted, would it imply a consecration of autonomy in absolute terms, with the correlative abandonment of the aforementioned sources of inspiration?

I consider that the Charter will not diminish the influence exercised up to now by the Convention and the constitutional traditions, but rather increase it¹⁰⁷.

refuses capital punishment, while the United States system allows it, would it be inadequate to approach both systems in terms of a greater or lesser level of protection of the right to life?

¹⁰⁶ It is true such inspiration has developed in quite flexible terms, thus conforming general principles of Community Law, that is, as principles adapted to specific needs of the Community legal system. Therefore, and as far as the Convention is concerned, some have launched the idea of “the European Court of Justice’s fundamental freedom to interpret rights” (R. Lawson, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, quoted, p. 227). As regards to common constitutional traditions, some have supported that their comparison by the Court of Justice has allowed the creation of autonomous concepts, unrelated to the Law of Member States (vid. C. Grewe, *Les conflits de normes entre Droit communautaire et Droits nationaux en matière de droits fondamentaux* (dir. S. Leclerc, J.F. Akandji-Kombé and M.J. Redor), Bruylant, Brussels, 1999, p. 70-71; the aforementioned comparison has been regarded as “uncertain” and “discretionary”, by, respectively, J.C. Gautron and O. Dord –*Des droits fondamentaux communs dans la jurisprudence de la Cour de Justice des Communautés Européennes*, in *Le patrimoine constitutionnel européen*, Actes du séminaire UniDem-CERCOP, Montpellier November 22nd -23rd, 1996, Editions du Conseil d’Europe, 1997, p. 168, and *Systèmes juridiques nationaux et cours européennes: de l’affrontement à la complémentarité?*, in *Les Cours Européennes. Luxembourg et Strasbourg*, Pouvoirs, 2001, n. 96, p. 12). Regarding the difficulties presented by using the concept “common constitutional traditions”, vid. F. Moderne, *La notion de droit fondamental dans les traditions constitutionnelles des Etats membres de l’Union européenne*, in *Realité et perspectives du Droit communautaire des droits fondamentaux*, quoted, p. 35 onwards. These difficulties will augment as the number of the Member States increase and, thus, the number of legal systems in consideration: vid. M. Kiikeri, *Comparative Legal Reasoning and European Law*, Kluwer Academic Publishers, Dordrecht-Boston-London, 2001, p. 301.

¹⁰⁷ Along the same lines, vid.. J.I. Ugartemendia Eceizabarrena, *El Derecho Comunitario y el legislador de los derechos fundamentales (Un estudio de la influencia comunitaria sobre la fundamentalidad de los derechos constitucionales)*, Instituto Vasco de Administración Pública, Oñati, 2001, p. 120.

As for the Convention, not only because of Article 52.3 of the Charter, but also because abandoning it as source of inspiration would place the Union at risk of disapproval by Strasbourg¹⁰⁸. This appears to be so no matter how much importance we give to the exculpatory theory of “equivalent protection”¹⁰⁹ (imported from Germany, where it was

¹⁰⁸ Regardless of whether the Union joins the Convention or not. Such risk is mainly present, as we previously saw, in those legal areas where the Union has deficiencies in order to proceed through a self-purging process on the base of respect to fundamental rights with equivalents in the Convention. Such deficiencies do not only concern primary Law, excluded from the Court of Justice’s control in terms of validity (although not in terms of interpretation, it must be added, considering the margins granted to the Court in the search of “concurrent” or “consistent” lectures of the Treaties, in accordance to the Convention), but also secondary Law in the second pillar’s framework (also noting the shortages linked to the system’s special versions of EC remedies before the Court, on Title IV TEC -article 68- and VI TUE -article 35-): vid. T. King, *Ensuring Human Rights Review of Intergovernmental Acts in Europe*, *European Law Review*, 2000, n° 1, p. 79 and onwards. Needless to say the potential breaches of the right to a fair trial (Article 6.1 of the Convention) in procedures before the Court of Justice without a possible appeal according to the Union’s own system (vid. *Baustahlgewebe v. Commission*, 17 December 1998, C-185/95 P, where the Court of Justice recognized unjustified delays – approaching Article 6.1 of the Convention *directly*, that is, without previously converting it into a general principle of Community Law- and K. Lenaerts’ considerations in *Respect of Fundamental rights as a Constitutional Principle of the European Union*, quoted, p. 16-17; in fact, the Union has recently passed the test of Article 6.1 of the Convention in relation to the Advocate General’s role, unlike the *Conseil d’Etat’s Commissaire du Gouvernement* -vid. *Kress case*, 7 June 2001, particularly paragraph 86 of the Judgement; vid. also *Frette case*, 26 February 2002). To which, in my opinion, we might add that the Charter does not close the doors on the praetorian task, i.e., the possibility to at least interpret the rights and freedoms explicitly guaranteed in same in a generous and dynamic way. And at most, to shape rights not incorporated to the Charter if not as fundamental rights understood *stricto sensu* (i.e. as part of the “Constitutional” law of the Union) then as general principles of –ordinary- law (vid. J. Bering Liisberg, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law*, quoted, point 4.3). Concerning the Constitutional and Supreme Courts’ power to proclaim, in Union’s Member States, fundamental rights not recognized by constitutional texts, vid. C. Grewe and H. Ruiz Fabri, *Droits constitutionnels européens*, Presses Universitaires de France, Paris, 1995, p. 146 onwards. In relation to the Convention, vid. J. De Meyer, *Brèves réflexions à propos de l’article 60 de la Convention Européennes des Droits de l’Homme*, in *Protecting Human Rights: The Federal Dimension. Studies in Honour of G.J. Wiarda*, quoted p. 147-148. Regarding the absence up to now of clarity on the concept of fundamental rights in Community Law, in the sense of a dogmatically drawn up concept with precise legal consequences, vid. G.C. Rodríguez Iglesias and A. Valle Gálvez, *El Derecho Comunitario y las relaciones entre el Tribunal de Justicia de las Comunidades Europeas, el Tribunal Europeo de Derechos Humanos y los Tribunales Constitucionales nacionales*, quoted, p. 333, note 3.

¹⁰⁹ Or “reasonable alternative” of protection, according to the European Court of Human Rights in *Waite and Kennedy* and *Reagan* cases, both dated the 18 February 1999 (vid. G. Ress, *Media Law in the Context of the European Union and the European Convention on Human Rights*, in *Protecting Human Rights: The European Perspective. Mélanges à la mémoire de R. Ryssdal*, quoted, p. 1182), which requires first of all a thorough motivation by the Court of Justice as to the choice of the rights to be protected (or, if so be the case, cast aside) and, above all, as to the determination of their particular standard of protection, which, as has been acknowledged from within the Court itself, is often conspicuous by its very absence (vid. G.C. Rodríguez Iglesias and A. Valle Gálvez, who refer to the “nature, often not too explicit, of the judicial discourse” of the Court of Justice in determining the common parameter of protection of the fundamental rights –*El Derecho Comunitario y las relaciones entre el Tribunal de Justicia de las Comunidades Europeas, el Tribunal Europeo de Derechos Humanos y los Tribunales Constitucionales nacionales*, quoted, p. 336; K. Lenaerts, for his part, insists on the need for “transparency” of the community Courts, which should refer explicitly to the precedents in Strasbourg in order to clarify to what extent they are or are not relevant within the specific

proclaimed first at the Court in Karlsruhe¹¹⁰ and later included in the constitutional text itself¹¹¹), which in any case would seem to be a good point of reference within a *multiple and dialectical constitutional framework* like the European one, integrated by the Community and Union Treaties and the national Constitutions and completed, in the field of the protection of human rights, by the European Convention for the Protection of Human Rights and Fundamental Freedoms¹¹².

The main problem, and we are now entering the issue of the role to be played by the national Constitutions in the interpretation and scope of the Charter, consists in finding the way to approach this point of reference. It is my belief that it must be the way of co-operation and dialogue between the supreme interpreters of the various components of the aforementioned constitutional framework (i.e. the Court of Justice and the Constitutional - or similar- Courts of the Member States¹¹³ -and, in the field of human rights, the Court at

framework of the Union -*Respect of Fundamental Rights as a Constitutional Principle of the European Union*, quoted, p. 10).

I myself claimed years ago, and continue to claim, that “this is precisely the challenge before the Court of Justice: to define and *convince as it does so*, in the light of and for the European framework, situations in which the citizens are more free and therefore more citizens, while taking into consideration the requirements of the <civitas> understood as the environment the individual needs, in a permanent dialectical process where the latter, while set up against the concept of collectivity, is also part of that collectivity” (*Derechos fundamentales y Comunidades Europeas*, in *Estudios sobre la Constitución Española. Homenaje a E. García de Enterría. Volumen II*, Civitas, Madrid, 1991, p. 837).

¹¹⁰ The *Solange II* doctrine (the decision on Maastricht -12 October 1993- “neutralised” by the decision of 7 June 2000: vid. W.Zimmer, *De nouvelles bases pour la coopération entre la Cour Constitutionnelle Fédérale et la Cour de Justice de Luxembourg? (à propos de BverfGE, 7 juin 2000, Solange III)*, Europe, 2001, Mars, p. 5).

¹¹¹ Article 23.1 of the Constitution.

¹¹² Defined by the European Court of Human Rights as a “constitutional instrument of European public order” (*Loizidou case*, 23 March 1995).

¹¹³ A dialogue and co-operation that should also function between the Constitutional and Supreme Courts of the Member States, and which already does in fact work to a certain extent, as is shown by the increasingly less unusual presence in the respective case-law of doctrines from other Supreme or Constitutional Courts (vid. N. Kakouris, *L'étape actuelle de l'histoire de l'humanité et la contribution des cours constitutionnelles et de la Cour de Justice des Communautés Européennes*, en *Scritti in Onore di G.F. Mancini -Volume II. Diritto dell'Unione Europea*, quoted, p. 499 onwards; along the same lines, C. Mirabelli, *Preliminary Reflections on Fundamental Rights as the Basis of a Common European Law*, in *The Clifford Chance Millenium Lectures: The Coming Together of the Common Law and the Civil Law*, ed. B.S. Markesinis, Hart Publishing, Oxford-Portland Oregon, 2000, p. 236-237).

Strasbourg-)¹¹⁴. And thus fostering the debate with a modesty¹¹⁵ that is shared¹¹⁶, proper of dialectics and multiplicity (a debate which, if we wish to be consequential with the spirit of integration¹¹⁷, should be presided by interpretative efforts *pro unione* on the part of the national Constitutional or Supreme Courts and *pro constitutione* on the part of the European Court of Justice)¹¹⁸, it will be possible to continue ahead, as the Preamble to the Charter reads, in “an ever closer union” of the peoples of Europe, sharing a “peaceful future based on common values ” whose ultimate beneficiary is the “individual” at the “heart of the activities” of this union.

In any case, we should be aware that the theory of equivalent protection, which serves to strike an abstract balance between the possible tensions concerning the legal orders that converge in the European constitutional framework and put the principle of supremacy of Union Law into effect, does not give an entirely satisfactory answer to the particular discussion on human rights as regards the essential aspect of limitations to public authority, a deficiency that is corrected by acknowledging in this discussion the natural ground of the theory of the level of protection, which entails the prevalence of the higher standard.

¹¹⁴ Vid. J. Andriantsimbazovina, *La Convention Européenne des Droits de l'Homme et la Cour de Justice des Communautés Européennes après le Traité d'Amsterdam: de l'emprunt à l'appropriation?*, Europe, 1998, Octobre, p. 6-7.

¹¹⁵ The expression was used when referring to the national Constitutional Courts by J. González Campos, Judge in the Spanish Constitutional Court, in his intervention in the International Seminar of High Judges held in Rome on 14-15 July 1995, published under the title *Diritto Comunitario Europeo e Diritto Nazionale*, Giuffrè, Milano, 1997, p. 220.

¹¹⁶ Vid. the intervention of J.M. Cardoso da Costa, President of the Portuguese Constitutional Court, in the previously mentioned Seminar (p. 198), emphasising the need for reciprocal co-operation.

¹¹⁷ “Interconstitutional”, as A. Ruggeri defines it, in *Sovranità dello Stato e sovranità sovranazionale, e prospettive di un diritto europeo “intercostituzionale”*, *Diritto Pubblico Comparato ed Europeo*, 2001, II, especially pages 570 and onwards.

¹¹⁸ Vid. N. MacCormick, *Juridical Pluralism and the Risk of Constitutional Conflict*, in *Questioning Sovereignty. Law, State and Nation in the European Commonwealth*, Oxford University Press, 1999, p. 113 and following, backing his reasoning, however, not in the Union’s plural constitutional frame, but under what he calls “pluralism under International Law.”

In other words, the debate on fundamental rights in the context of conflicts between them should give way to a balancing test carried out in the last instance by the Court of Justice as the supreme interpreter of the Charter, respected in terms of generic equivalence by national courts (as the technique of comparing the level of protection foreseen in Article 53 would lack potentiality in this context), under the ultimate control, just like the Law of the Member States, of Strasbourg which should be deferential to the judicial consensus reached at the Union level. But the same debate, in the context of conflicts liable to be channelled in essence towards a confrontation between the individual and public authority should be *pro individuo* and thus imply a concrete application of the national standard instead of Union Law if it is in fact more favourable towards the individual¹¹⁹, or vice-versa (i.e. application of the European standard instead of national Law -insofar as the latter enters in the scope of action of the former¹²⁰-, also based on higher protection for the individual and not on the principle of supremacy of Union Law over domestic Law).

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¹¹⁹ Article 53 *does not impose* on the European Court of Justice the acceptance of the national highest standard of protection as part of the Charter, only stating the pillars of a *judicial policy* in favour of the utmost possible individual protection. In other words, the Court is free to deny a national higher level of protection as its own; but if it does so, then it shall incur in the risk of accepting, and now by the mandate of Article 53, slits in the Union's legal uniformity, which shall yield before hypothetical national higher levels of protection (the Court having to handle with skill in that case reference to national law, such as it did in *Hoechst*). The same can be said, not so much in terms of degrees of protection but of recognition of a particular right of freedom, in case the Court refuses to integrate extensions of rights and freedoms explicitly contained in the Charter, in the light of the patterns previously marked by national constitutional legal systems. Such approach, by the way, enables to overcome the at first sight redundancy incurred by articles 53 and 52.3, concerning the Convention: while the latter would impose on Luxembourg the acceptance of hypothetical higher degrees of protection, the former would simply imply respect for rights of the Convention not incorporated to the Charter (such as, within criminal offences, the right to an appeal and the right to damages for miscarriage of justice, provided for in articles 2 and 3 of Protocol 7).

¹²⁰ Beyond the frame of EU Law, it is possible to "import" European standards according to what national legal orders provide (vid., in the Spanish case, Article 10.2 of the Constitution and, particularly, in relation to the interpretative use of the Charter concerning domestic fundamental rights, *Judgements 292/2000, 30 November 2000* and *53/2002, 27 February 2002*, of the Spanish Constitutional Court; regarding the interpretative use of the Charter by the European Court of Human Rights, vid. the partly dissenting opinion of judges Bratza, Fuhrmann and Tulkens in *Frette case, 26 February 2002*).

*Prohibition of abuse of rights*¹²¹

To finish, a very brief reference to Article 54, which closes the Charter incorporating a clause that is also familiar in international agreements on the protection of human rights¹²², including the European Convention itself¹²³, and which was also included in the European Parliament Resolution of 1989 on the Fundamental Rights and Freedoms¹²⁴, and the European Constitution Project of 1994¹²⁵. This is a clause of “legitimate defence”¹²⁶ against a possible “anti-system” use of the rights and freedoms stated in the Charter itself¹²⁷, the concretion of the principle, in its original French formulation, *pas de liberté pour les ennemis de la liberté*¹²⁸.

¹²¹ Article 54: “Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.”

¹²² Vid. Article 5.1 of the International Covent on Civil and Political Rights and Article 5.1 of the International Covent on Economic, Social and Cultural Rights.

¹²³ Article 17.

¹²⁴ Article 28.

¹²⁵ Section 24 of Title VIII.

¹²⁶ Or “cran de sécurité”, as it is called by A. Spielmann in *La Convention Européenne des Droits de l’Homme et l’abus de droit*, in *Mélanges en hommage à L.E. Pettiti*, Bruylant, Brussels, 1998, p. 686.

¹²⁷ Thereby avoiding the “vicious circle” (according to T. Opsahl’s expression, *The Other Side of the Coin*, in *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press, Oslo, 1992, p. 465).

¹²⁸ Vid. E. García de Enterría, E. Linde, L. Ortega and M. Sánchez Morón, *El sistema europeo de protección de los derechos humanos*, Civitas, Madrid, 1983, p.45.