II. HUMAN RIGHTS

A. Introduction

At the Nice Summit in December 2000, Europe's political leaders adopted the much-discussed EU Charter on Fundamental Rights in the form of a legally non-binding political declaration. It is the second such instrument in relation to human rights protection.[1] The Presidency Conclusions to both the 1999 Cologne and Tampere Summits ordered the preparation of a draft Charter which was to be solemnly proclaimed by the European Parliament, the Commission and Council at the Nice Summit.[2] It was only after that fact that "It will … have to be considered whether and, if so, how the Charter should be integrated into the treaties."[3]

The question which presents itself now is, therefore, if and how soon the Charter will become formally binding in future. In spite of the expressions by the European Parliament and the Commission in favour of formally incorporating the Charter into the Treaties[4] and the declaration annexed to the Treaty of Nice on the future of the Charter,[5] the fundamental differences between the positions of the Member States do not bode well as to the Charter's chances of becoming legally binding. The UK Government claims that there are at least six EU Member States that are firmly against this Charter becoming incorporated into the Treaties.[6]

In its present status, the Charter's role in human rights protection in the Union is limited. Because of its non-binding character, it is doubtful that it can be used as an international human rights treaty, representing a set of common principles to

1. In 1989, all but one member of the Council adopted the EC Charter on Fundamental Rights for Workers.

2. EC Bull 9–1999, 35; http://db.consilium.eu.int/df/intro.asp.

3. Conclusions of the Presidency of the Cologne European Council, 3 and 4 June 1999, Annex IV.

4. *On the Legal Nature of the Charter of Fundamental Rights of the European Union* COM (2000) 644 final, 3–4; the European Parliament Resolutions A5–0064/2000 of 16 March 2000 and B5–767/2000 of 2 Oct. 2000.

5. Annex IV to the Treaty of Nice, provisional text, Conference of the Representatives of the Governments of the Member States, SN 533/1/00 REV 1, Brussels 22 Dec. 2000, 83–84.

6. *The Times* and *The Guardian* 20 June 2000; according to PM Blair, Denmark, Finland, Spain, Sweden and Ireland supported the British position that the Charter should not become legally binding.

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which all Member States are committed.[7] It could be used at most as a declaration to *reaffirm* the EU's commitment to particular human rights.[8] Even when (if?) it becomes legally binding, it will not replace the present *acquis* on fundamental rights protection, but it will make it more visible,[9] clarify the details of the rights protected[10] and might also add to it.[11]

In this contribution I want to focus on three questions: I will examine, first, the submission that the definition of social rights as justiciable rights in the present Charter will be an obstacle to incorporating the Charter into the Treaties; second, the constitutional review nature of the Charter and, third, the relationship between the EU Charter and the European Convention on Human Rights (ECHR). Before turning to these questions, I will briefly introduce the background and contents of the Charter.

B. Background and Contents

In December 1999 a first meeting was held to discuss the contents of the Charter under the chair of the former German President, Roman Herzog. At the second meeting the group decided to call itself a Convention; it consisted of representatives of national parliaments and governments, the European Parliament and the Commission, representatives of the Council, the ECJ and the Council of Europe[12], while a number of bodies were invited "to give their views".[13] In January 2000, the agenda was set for a number of meetings at which the contents of the Charter were to be discussed; the aim was to have a first draft ready in June and, after comments at the June Summit, a second draft was to be completed before the Biarritz gathering in October; comments could then be included for the final draft to be adopted at the Nice Summit in December 2000.

The Charter is divided into seven chapters which categorise the provisions under the headings Dignity, Freedoms, Equality, Solidarity, Citizen's Rights, Justice and General Provisions. They include "classic" civil and political rights,

7. To draw inspiration from international human rights treaties, the ECJ does not require that Member States have actually signed or ratified a treaty, it is sufficient they "have collaborated" on them. See Case 4/73 *Nold* v. *Commission* [1974] E.C.R. 491, para. 13, repeated in Case 44/79 *Hauer* v. *Rheinland Pfalz* [1979] E.C.R. 3727, para. 15. It has, subsequently, become a standard formula.

8. See Advocate-General Tizzano in Case C–173/99 *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* v. *Secretary of State for Trade and Industry*, Opinion delivered 8 Feb. 2001, http://www.curia.eu.int/jurisp.

9. Lenaerts "Fundamental rights in the European Union" (2000) 25 E.L.Rev. 575, p. 600.

10. Fernandez Sola *A quelle nécessité juridique répond la négociation d'une charte des droits fondamentaux de l'Union européenne?* (2000) 442 Revue du Marché commun et de l'Union européenne, 595, p.596.

11. Questions remain with regard to those provisions in the EU Charter which have not been expressly recognised in other international human rights treaties and do not belong to the common constitutional principles (e.g. the rights referring to biogenetics). How can these be reaffirmed as "common fundamental principles" of Community law if they have not been recognised as such before?

12. One representing the ECHR.

13. EC-Bulletin 9–1999, 35–36. E.g. the Economic and Social Committee, the Committee of the Regions and the Ombudsman.

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"modern" economic and social rights (relating to workers and social protection of families) and "post-modern" or "third-generation" rights (relating to bioethics, information technologies and genetic engineering). It means that, by and large, the substantive provisions of the European Convention have been incorporated although not in exactly the same wording. In addition to that a number of rights are inspired by the 1961 European Social Charter (ESC)[14] and the 1989 Community Charter on Fundamental Rights of Workers. Finally there are some interesting new rights which have not yet been explicitly incorporated in the other "international human rights treaties" to which the Court usually refers.[15] Article 3 of the EU Charter contains a number of rather precise provisions with regard to the protection of the integrity of the person in the area of biogenetics; Article 8 contains specific rights on the protection of personal data; Articles 37 and 38 contain the rights to environmental and consumer protection.

In its appraisal of the Charter, the Commission submits that the Charter is a "balanced text" making "ambitious innovations" in that it supports the dogma of the indivisibility of rights as well as their universality. This last issue is an important one as it is the first time that rights of everyone lawfully within the jurisdiction of the Union are protected, although not all rights are given to all persons irrespective of their nationality or residence.[16] What the exact significance is of the universal application of the rights remains to be seen. In view of Article 52(2) reading that rights in this Charter shall be exercised "under the conditions and within the limits" defined by the Treaties, the effect of the Charter on the rights on non-Union citizens seems to be rather limited.[17] The Commission notes also that the Charter demands transparency and impartiality in the operation of the Community administration, "incorporating the right of access to administrative documents of the Community institutions and the right to sound administration …".[18] Such rights are set out in some detail in the chapter on Citizen's rights.

C. Social Rights as Justiciable Rights: An Obstacle for a Legally Binding Charter

The addition of economic and social rights and "third-generation" rights is to be welcomed. The inclusion of all categories of human rights makes the instrument, indeed, a balanced one, but it creates, at the same time, obstacles for its transformation into a legally binding instrument. This is almost certainly going to be the case with regard to the social rights in the section "Solidarity" where they are all defined as justiciable rights which means they can be invoked before the

14. The ESC was revised in 1996. So far, all Member States except the Netherlands, Germany and Spain have ratified this revised version of the Charter.

15. Some of them have been included through the interpretation of the supervisory body, e.g. the European Court on Human Rights (see further section 5 *infra*).

16. Certain rights are related to EU citizenship (e.g. right to vote and stand for election, diplomatic protection) or related to a certain status (e.g. children, workers).

17. See also the omission of mentioning nationality as a ground for discrimination in Article 13 TEC and in instruments relating to that provision, e.g. Directive 2000/78 (OJ L303/16) *establishing a framework for equal treatment in employment and occupation,* which expressly excludes "nationality" from its scope (Article 3(2)).

18. COM(2000) 644 final, *supra* n.4, p.2.

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ECJ by individual parties.[19] This is a logical development; the historic reasons for treating the two categories of rights strictly separately have, surely, lost their validity. When, after the Second World War, human rights treaties were drafted at UN as well as European level, there was always a strong resistance against treating economic and social rights on a par with civil and political rights. The main arguments for this division were that social rights required active government programmes to realise them; therefore, they could not be defined as justiciable rights to be used, like civil and political rights, to ward off government interference within the private sphere. A less legal, but possibly more consequential point, was the cost of realising social rights which required a certain level of social protection.

Fifty years on, these arguments are no longer credible with regard to most social rights. As the Charter demonstrates, it is perfectly possible to define social rights as justiciable rights even though they are not necessarily meant to ward off government interference. The cost argument cannot be upheld either, because protection of civil and political rights equally requires financial input by governments.[20] However, in view of the discussions within the Convention and comments in—particularly the British—newspapers, the inclusion of social rights as justiciable rights may possibly become the most difficult obstacle to overcome for this political declaration to be turned into a legally binding instrument. In that sense, not much has changed since the 1948 Universal Declaration on Human Rights where both categories are included, but, when it came to creating legally binding treaties, they were separated again.[21] At European level, the European Convention on the Protection of Human Rights and Fundamental Freedoms was adopted in 1950, while it took until 1961 before its social counterpart, the European Social Charter, could be adopted. The latter instrument never got a status or impact anywhere near that of the European Convention.

This separation of civil and political and economic and social rights seems to be an effective way of rendering social rights impotent. Indeed, the functioning of the UN Covenants shows a similar pattern. While the Political Covenant's supervision procedure immediately took off (this is not to say that it is necessarily very effective), it took two decades for the procedure under the Social Covenant to get into shape.[22] It would, therefore, be a major step forward to not only include all categories of rights in the same instrument, suggesting parity between the categories, but also to define them all as justiciable rights. The fear that this would lead to major interferences in national law, and in particular in industrial relations, seems to be largely unfounded.[23]

19. For the procedural aspects, see section 4 *infra*.

20. One of the pre-conditions for upholding the right to a fair and just hearing, for instance, requires the maintenance of a judicial system which is a considerable financial burden for governments.

21. The result was that two instruments were adopted: 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic and Social Rights.

22. See, e.g. Alston, P., "The Committee on Economic, Social and Cultural Rights" in ed. Alston, *The United Nations and Human Rights, A Critical Appraisal* (Oxford, 1992) 473.

23. See further section 3 *infra.*

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D. The Charter as an Instrument for Constitutional Review of Community Acts

So long as the Charter remains a political declaration, the ECJ will still have to rely on other international human rights treaties and so-called common constitutional principles when called to rule on alleged human rights violations in the context of Community/Union law. If the experience with the 1989 EC-Charter is anything to go by, it is unlikely that the ECJ will often refer to the 2000 Charter.[24] If the UK Government's claim is correct that nearly half of the present number of Member States are against a legally binding Charter, it may be expected that the ECJ will tread very carefully in using the Charter as a basis for its judgments. Moreover, it does not have much reason to do so, as it can continue its human rights jurisprudence on the bases of international human rights treaties and "common constitutional principles" which it has been using for some decades now. In so far as the ECHR and the ESC are concerned, their mentioning in the Treaties is a recognition of this case law. This is, in particular, the case with the ECHR which has been firmly incorporated into EU law by Article 6 TEU.

Only if and when the EU Charter becomes a legally binding instrument will this situation change for the ECJ, in that it then becomes the first port of call, provided that it will not be denied jurisdiction along the lines of Article 46 TEU which by and large puts the ECJ out of play where it concerns human rights protection under the second and third pillar.[25] However, the denial of the ECJ's jurisdiction on a legally binding Charter would be a contradiction in terms. If fundamental rights of European citizens are to be effectively protected then they must have the tools (judicial remedies) enabling them to claim such protection.[26] One of the remaining questions in this context is, thus, whether the ECJ will be given full jurisdiction over all the (pillars of the) Treaties or will be limited to the EC Treaties excluding Justice and Home Affairs, Security and Foreign Policy.[27] In view of the human rights violation-prone areas covered by these policies (asylum, visas, cross-border policing, etc) that would not give the right signal to the outside world. However, it is a very sensitive issue as witnessed also by exclusion of the Court's jurisdiction from the asylum and visa policies, which now form part of the EC Treaty (Articles 61–69).

If the Member States opt for a scenario maintaining the present restrictions on the jurisdiction of the Court, the full effect of the Charter as defined in Article 51(1) would be limited to the European Communities (excluding Articles 61–69 TEC), while it would have partial effect in the whole Union, as the new wording of Article 46 TEU now offers the ECJ jurisdiction over the action of institutions, but

24. In most cases in which the applicants invoked the 1989 Charter (also after the U.K. had signed it), the ECJ ignored these references and solved the questions on the basis of Community law. In only one case did the ECJ itself refer to the Charter: Case C–84/94 *U.K.* v. *Council* [1996] E.C.R. I–5755, in which the Working Time Directive was also at issue.

25. See on this aspect Lenaerts, *supra* n.9, pp.588–589.

26. A political procedure similar to Article 7 TEU would be wholly inappropriate in relation to a legally binding Charter aimed at judicial protection of human rights of European citizens.

27. See also Eicke "The European Charter of Fundamental Rights—unique opportunity or unwelcome distraction" [2000] E.H.R.L.R. 280 and King "Ensuring human rights review of intergovernmental acts in Europe" (2000) 25 E.L.Rev. 79.

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not over Member States.[28] Such a limitation would seem a contradiction of Article 51(1) which reads that the Charter's provisions are:

> addressed to the institutions and bodies of the Union with due regard to 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.

The Charter is, therefore, meant to secure human rights protection of individuals in the realm of Union law. With the present limitations over the Court's jurisdiction as well as the limitations on the access of individual parties to the Court,[29] this right cannot be exercised in all cases.[30]

It is submitted that the Charter's provisions do not, *in se,* constitute a right to litigation if there is not an accessory instrument which violates a right included in the Charter. Article 51(1) affirms the judicial review character of the Charter. It is an instrument of constitutional review of Union acts, which does not affect national legislation directly. The instrument which affects national law (e.g. a Regulation, Decision or Directive) must have another legal basis in the Treaties. This leaves two queries: the first is whether primary Union law, too, falls under this judicial review jurisdiction; the second is related to the uncertainty as to whether Member States have acted on the basis of national law or Union law — in other words the uncertainty of the conditions which determine when Member States' acts fall within the scope of Article 51(1) of the Charter. Article 51(1) speaks of acts of institutions and Member States when *implementing* Union law; it seems, therefore, to refer to secondary legislation only. Review of Treaty provisions themselves seems to be excluded.[31]

The question, when an act of a Member State falls within the scope of Community law, is not easy to answer. In the past, the ECJ has judged that acts that were thought to be purely national law fall within the scope of Community law.[32] Other problems may be caused in situations in which the Community and

28. This opens the interesting possibility that the European Court on Human Rights will have to review the Member States' actions in the areas covered by the second and third pillar. See further section 4 *infra.*

29. See, e.g. Article 230 TEC with limited (although much expanded by the ECJ case law) access to the ECJ and Articles 226 and 227 TEC where the role of the individual is limited to "informer" of a Member State violation. Under the Article 234 TEC procedure the individual is dependent on the national court to ask the questions.

30. There are as yet no signs that a special procedure will be created. This begs, again, the question of remedies under the second and third pillar. See also Grigolli *The EU Fundamental Rights Charter in current debate: Origins, Positions, Further Prospects* (The European Legal Forum, 2000/01) 2, pp.5–6.

31. This would be reminiscent although not exactly similar to the situation in the Netherlands where formal acts fall outside constitutional review. (In the EU the constitutional acts fall outside the review.) According to the Dutch Constitution, however, formal acts *can* be reviewed in the light of international treaty provisions, in so far as these are self-executing. This would raise the question of whether primary Community law can be reviewed on the basis of the ECHR, if the EU were to accede. It is submitted that it could be raised already on the basis of Article 6 TEU, but it remains doubtful that the ECJ would be prepared to review primary Community law in the light of the European Convention so long as there is no formal link between the EU and the ECHR.

32. See, e.g., Case 12/86 *Demirel* [1987] E.C.R. 3719, Case C–260/89 *Elliniki Radiophonia Tileorassi (ERT)* [1991] E.C.R. I–2925 and Case 5/88 *Wachauf* [1989] E.C.R. 2609.

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Member States share their competence. An illustration of this is the *Dior and Layher* cases[33] where direct effect was given to those parts of the WTO Agreement (to which both the Community and the Member States are parties) on which Community legislation[34] exists.[35] This judgment clearly defies the will of the Member States expressed in a Council Decision of 22 December 1994.[36] In this Decision, the Member States affirmed that the Agreement and the Annexes thereto is "by its nature" not susceptible to being directly invoked in Community or Member States' courts.[37] In other words, even in spite of the express will of the Member States, parts of an international treaty can become effective in national law, not through national mechanisms but through the principle of direct effect of Community law.

The uncertainty about the ECJ's moves is best expressed by Lenaerts who wonders whether the Court's decision in the *Familiapress* case[38] "foreshadows a greater willingness on the part of the Court of Justice to review the conformity of Members States'" legislation with the fundamental rights whose observance is guaranteed in Community law, to which he adds, that "Nothing appears less certain".[39] The use of the Charter as an instrument of constitutional review does not mean that it can be used by the Community legislature as a basis upon which to directly base new legislation,[40] nor can it be used by the ECJ to grant individuals rights which were not hitherto somehow incorporated in Community/Union law, either by its own legislation or through being part of the common constitutional principles.

The report in *The Times*,[41] therefore, that the BECTU case[42] proves that the Charter will be used to extend Community law, is a little premature. In the first place, the report concerns an Opinion of Advocate-General Tizzano, not a

33. Joined Cases C–300/98 and C–392/98 *Parfums Christian Dior SA* v. *Tuk Consultancy BV and Assco Geruste GmbH and Rob van Dijk* v. *Wilhelm Layher GmbH & Co KG and Layher BV* Judgment of 14 Dec. 2000, http://europa.eu.int/jurispr/cgi-bin/ge.

34. In this case the instrument was a Directive aimed at harmonising trade mark laws. The ECJ held that it concerned a uniform rule of Community law. It could be argued that, if the Member States had wanted a uniform rule, they would have adopted a Regulation to achieve that effect.

35. *Supra* n.33, paras 42–49. It concerned the interpretation of Article 50 of the TRIPs agreement. The ECJ held that, although the WTO Agreement did not fall within the scope of judicial review *ex* Article 230 TEC, in a field (*in casu:* trade marks) to which TRIPs (an annex to the WTO Agreement) applies and in respect of which the Community has legislated, judicial authorities of the Member States are required, by virtue of Community law, to apply national rules "as far as possible in the light of the wording and purpose of Article 50 TRIPs" (para. 47).

36. OJ 1994 l 336/1.

37. See further on this issue: Eeckhout "The Domestic legal Status of the WTO Agreement: Interconnecting Legal Systems" (1997) 34 C.M.L.Rev, 11.

38. Case C–368/95 *Familiapress* [1997] E.C.R. I–3689, in which the ECJ accepted the mandatory character of national rules maintaining press diversity provided they contributed to the freedom of expression as safeguarded in Article 10 ECHR (which forms part of the fundamental principles of Community law).

39. Lenaerts *supra*, n.9, p.591.

40. According to Article 51(2) 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."

41. *The Times*, 9 Feb. 2001 ("Freelancers will gain right to paid leave").

42. Case C–173/99 *supra* n.8.

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judgment of the Court. In the second place, the Advocate-General used the Charter to reaffirm the right to paid annual leave as a fundamental right to be protected in Community law. As it forms part of the European Social Charter (Article 2(3)) and the International Covenant on Economic, Social and Cultural Rights (Article 7(d)) as well as a number of ILO Conventions (to which the Advocate-General does not refer),[43] it already belongs to the common principles of Community law.[44] While the Advocate-General recognised that the EU Charter does not have "genuine legislative scope", "the fact remains that it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments".[45] The instrument under revision was Article 7 of the Working Time Directive, which recognises the right to paid annual leave. The question was whether national law in, effectively, excluding workers on short term contracts[46] from the right to paid annual leave was a violation of Article 7 of the Directive, not of Article 31(2) of the EU Charter, to which the Advocate-General referred only in the general opening statements. In other words, rather than establishing its existence in Community law, the Advocate-General used the Charter to reaffirm the fundamental character of a principle already forming part of Community law.

E. The Two Systems of Human Rights Protection in Europe

If the Charter becomes legally binding, there would be two different mandatory systems of human rights protection in Europe: one operating within the Council of Europe and one operating within the European Union. Concerns have been expressed that this might weaken the Council of Europe's system and lead to a two-speed Europe from a human rights perspective.[47] The Council of Europe's

43. The 1936 Convention on Holidays with Pay (No. 52); the 1952 Convention on Holiday with Pay (Agriculture) (No. 101), the 1970 Convention on Holidays with Pay (Revised) (No. 132); the 1974 Convention on Paid Educational Leave (No. 140). Although these particular Conventions are possibly less suitable to reaffirm the fundamental character of the right to paid leave, they could be useful instruments for the "substantive interpretation" of the relevant provisions of the Working Time Directive.

44. All EU Member States collaborate (nowadays in co-operation with the EC Commission) on the adoption of ILO Conventions, even though they have not all ratified all or even the same Conventions. There is a relatively small number of—important—Conventions which have been ratified by all EU Member States, notably those on freedom of association, collective bargaining, child labour, forced labour and equal treatment of workers.

45. *Supra* n.42, para. 28.

46. The challenged provision in national law states requires a period of 13 weeks of employment before the right to paid annual leave can be exercised.

47. House of Lords *European Union—Eighth Report* Session 1999–2000, http://www.parliament.the-stationery-of. . .a/ld199900/ldselect/ldeucom/67/670l.htm, paras 96–98.

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Parliamentary Assembly has, once again, advocated accession by the Union to the ECHR in order to link the two systems formally.[48]

The danger of two competing systems has clearly been recognised; however, some of the solutions proposed are clearly aimed at protecting the "Strasbourg" system, while others emphasise the importance of the ECJ's freedom to depart from the Strasbourg Court's interpretation of the ECHR,[49] stating that "as regards certain matters, including legal representation and interpretation the ECHR was insufficient and not "best practice" and should not become the bench mark for the Union".[50] It has also been submitted that the best solution would be to opt for "full and formal integration" of the ECHR as "part of directly written Union law which would avoid the subordination of the ECJ to the Court of Human Rights".[51] In this view, the ECJ would "remain the supreme guardian in respect of Union action as well as Member State action falling within the scope of EU law".[52]

Some see accession to the ECHR as "a vital piece in this jigsaw of the protection of fundamental rights in the EU",[53] or as an "additional logical step to take".[54] Others refer to the fear that, if the EU were to accede to the ECHR, it would acquire "more of the aspect of a State than it currently had".[55] While this is a political argument, most arguments focus on the relationship between the Luxembourg and Strasbourg judiciary. Advocate-General Jacobs points out that the whole notion of Community law might be in danger; judicial review of ECJ decisions by the Strasbourg Court might run the risk that, "the national constitutional courts … will not also feel that they have the right to question the decision of our court; and whether there will not be in any event a greater degree of uncertainty about our case law than there is in the present system".[56]

These extracts from the discussion in the House of Lords' European Committee demonstrate that there is little common ground for a generally acceptable solution. If one system of protection were to be maintained with the Strasbourg system retaining its full strength, it would be a logical step to make the

48. Parliamentary Assembly Council of Europe, Resolution 1210 (2000) Charter of fundamental rights of the European Union, Official Gazette Council of Europe, Jan. 2000. Parliamentary Assembly Committee on Legal Affairs and Human Rights *Charter of Fundamental Rights of the European Union,* Doc, 8611, 14 Jan. 2000. It is remarkable that, although inviting the Community "to make sure that when referring to social rights the revised European Social Charter of the Council of Europe will be taken into account" (para 10.iii of resolution 1210), the Assembly does not invite the Union to accede to the revised 1996 ESC. This is even more remarkable in the light of its Recommendation 1415 (1999) in which it pledges a strong commitment to the protection of social rights (Official Gazette of the Council of Europe June 1999).

49. House of Lords *European Union—Eighth Report*, *supra* n.47, para. 99.

50. *Ibid*, para. 101.

51. Apart from the question of whether the term "subordination" would be a correct characterisation of the relationship—this solution would not avoid rulings of the Strasbourg Court in cases in which the ECJ has no jurisdiction in Union law, nor would it solve the problem of the "grey areas".

52. *Supra* n. 47, para. 112.

53. *Ibid*, para. 104.

54. *Ibid*, para. 107.

55. *Ibid*, para. 109.

56. *Ibid*, para. 110.

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European Court on Human Rights—by a formal treaty to that effect—the final arbiter on all human rights question in Europe.[57] The ECJ would, like national courts, have to refer to the Strasbourg Court for its interpretation of human rights provisions in so far as these fall within the scope of the Convention and accept that an appeal of its decision to Strasbourg is possible.

Another method would be if the ECJ were to—expressly—recognise the authority of the interpretations of the Strasbourg Court in human rights matters. Van Dijk argues that the Strasbourg Court's case law "as embodied in the common constitutional principles of the Member States" forms part of Community law on the basis in any case. He submits that this would not infringe upon the ECJ's authority as final interpreter of Community law. The Strasbourg Court has always carefully restricted itself to interpreting and applying the Convention, leaving the interpretation of domestic law to domestic courts. Moreover, it has no power to annul or amend domestic law, leaving it to the national authorities to implement the judgments of the Strasbourg Court within their domestic legal system.[58] He points at the ECJ's recognition of the possibility of external international supervision of the Community.[59] The ECJ "would only have to recognise that the part of Community law which it has 'created' by incorporating the Convention provisions into Community law, encompasses the interpretation given thereto by the Strasbourg Court".[60] The acceptance that Article 6 TEU which incorporates the Convention also includes the case law of the Court would be the logical way to achieve this.[61]

The reference to Article 6 TEU is limited to the European Convention; a recognition that this includes the Strasbourg Court's case law does not solve the problem of the interpretation of other rights in the Charter which are based on the 1961 European Social Charter[62] and newly created rights. The reason why possible conflicts between the ECJ case law and the nearly 40 year old case law on the European Social Charter is not seen as a problem anywhere must be partly due to the lack of knowledge about this case law; a more formal reason might be that the ESC Committee of Experts[63] and the Governmental Committee are not judicial bodies.[64] It is unlikely that the ECJ will "submit" itself to the interpretations of non-judicial bodies.

57. In this sense also: Canor "Primus inter pares. Who is the ultimate guardian of fundamental rights in Europe" (2000) 25 E.L.Rev. 3, p.21 and Eicke, *supra* n.27.

58. van Dijk *Judicial Protection in the European Union—Divergence, Coordination, Integration* Exeter Paper in European Law No. 1, Centre for European Legal Studies, Exeter 1996.

59. ECJ Advisory Opinion 1/91 *Concerning the European Economic Space* [1991] E.C.R. I–6079, 6106.

60. Van Dijk, *supra* n.58, *ibid.*

61. *Ibid,* at 10.

62. As mentioned above, the 1961 European Social Charter was revised in 1996. The fact that three EU Member States have not yet ratified the 1996 Charter does not prevent it from being used. See *supra* n.7.

63. Now called the European Committee of Social Rights.

64. Moreover, there has been a long period of disagreement between the Committee of Experts and the Intergovernmental Committee on the interpretation of the Charter's rights, although nowadays the latter refrains from commenting on the Experts' interpretation.

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With regard to rights that do not form part of other international treaties or the "common constitutional principles", it seems to be a question of who is first. Even though these rights do not form part of the European Convention's provisions, the Strasbourg Court has shown itself quite capable of interpreting third generation rights into the Convention.[65] For a long time now, the Strasbourg Court has held that the ECHR is a "living instrument"[66] which must be interpreted according to "present day conditions".[67] Nevertheless, if the Convention is to be the leading instrument in Europe, it should be brought up-to-date as soon as possible.[68] The EU Charter itself gives no indication of any formal link between the two jurisdictions. There are two articles addressing the problem which are difficult to reconcile. On the one hand, in the words of the Commission[69] "the danger of diverging case law of the Luxembourg and Strasbourg courts is removed" by Article 52(3) which reads that, with regard to rights corresponding to those in the European Convention, "the meaning and scope of those rights shall be the same as those laid down by the said Convention". It then adds, immediately afterwards, "This provision shall not prevent Union law providing more extensive protection". How can these two principles be reconciled? If instruments can be created which provide a more extensive protection than the ECHR then it is not unlikely that the ECJ will come to interpretations of the EU Charter's provisions which diverge from the Strasbourg Court on similar provisions in the Convention. Even if there is an informal understanding between the two courts not to do so, it cannot be ruled out that there will be disparate interpretation of certain provisions. In view of the different types of legal orders for which these two instruments are written, it is hardly avoidable.

Moreover, the difference in wording between the rights in the two instruments is an open invitation for diverging interpretations. Article 52(3) with its conflicting messages, does not avoid an ECJ judgment along the lines that, although the meaning and scope of the right to, for instance, liberty and security[70] is the same as under the Convention, in this case a more extensive protection is required. The rule granting that more extensive protection becomes part of the *acquis* and will start its "own life". If there were to be a formal link established between the two jurisdictions, would this, indeed, solve the problems of lack of clarity and legal certainty? At present, the European citizen is faced with a choice of different litigation routes in human rights questions. National courts and/or Luxembourg with regard to violations of human rights in Community law; national courts and Strasbourg with regard to violations in national law. If the two systems become formally linked, these routes would not be much easier: national courts and/or Luxembourg and then Strasbourg, or national courts and directly to Strasbourg.

65. It did so, for instance, with regard to aspects of environmental rights. See Grief "Convention Rights and the Environment" in ed. Betten *The Human Rights Act 1998 What It Means* (Martinus Nijhoff, 1999) p.141

66. E.g. *Tyrer* v. *United Kingdom* 25 April 1978, Series A, vol. 26.

67. See further Mahoney "Principles of Judicial Review" in ed. Betten *supra* n.65.

68. Even more so, because there are limits to what the Strasbourg Court can do.

69. COM(2000) 644 final, *supra* n.4., pp.4–5.

70. Article 6 EU Charter, Article 5 ECHR. The latter wording is far more extensive and detailed than Article 6 EU Charter which reads, simply that "Everyone has the right to liberty and security of person."

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In terms of litigation, therefore, the formal linking of the two systems would not make much difference. However, in terms of contents, it would make a difference as, if there were one supreme human rights court (Strasbourg), a consistent body of case law could be developed instead of two possibly diverging systems. It would also address the important problem of the "grey areas" where the borderline between Community law and national law is not clear. Although it would still be a problem in terms of litigation (which route to follow), it would matter less in terms of substance as the final interpreter would be the Strasbourg Court.

What is certain is that EU Member States cannot avoid their responsibility under the ECHR. In the case of *Matthews* v. *UK*,[71] the Strasbourg Court has also made clear that it will not hesitate to review Community/Union law where there is no remedy before the ECJ.[72] In light of the above, it seems to be highly recommendable for the Council of Europe to review the contents of the Convention and bring this "living instrument" up to date instead of putting the entire burden on the Strasbourg Court. It is a responsibility which also falls on Europe's political leaders, only this time not limited to the Union's Heads of State and Governments. Negotiating an agreement on a new text for the Convention could be a dress rehearsal for future negotiations within the Union.

F. Conclusion

The adoption of the EU Charter has raised a number of questions, not all of which are entirely new. However, before this political declaration can be transformed into a legally binding instrument, a number of these questions have to be addressed head on and not avoided as has, so far, mostly been the case. The debate should be reopened on one of the most pressing questions i.e. the relationship between the Strasbourg system and the Luxembourg system of human rights protection.[73] It is up to the EU Member States to solve it, as the ECJ has made it clear that this needs a formal amendment to the Treaties.[74] If the Charter becomes formally incorporated into the Treaties, without solving this problem, it might defy the very objective stated at the Cologne and Tampere Councils of creating more clarity in human rights protection in the European Union (and, for that matter, in the whole of Europe).

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71. Appl 24833/94 Judgment of 18 Feb. 1999 [1999] E.H.H.R., 361.

72. See also King, *supra* n.27.

73. See Dutheil de la Rochère *La Convention sur la Charte des Droits Fondamentaux et le Processus de Construction Européenne* [2000] 437 Revue du Marché commun et de l'Union européenne, p.223.

74. ECJ, Opinion 2/94 [1996] E.C.R. I–1759.

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