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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

IMPLICATIONS OF A LEGALLY-BINDING EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS ON HUMAN RIGHTS PROTECTION IN EUROPE

Comments by
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**PROTECTION OF FUNDAMENTAL RIGHTS IN EUROPE:
INTERACTION BETWEEN STRASBOURG AND LUXEMBOURG**

1. The decision by the drafters of the EU Charter of fundamental rights not to draft the latter in terms identical to those of the ECHR and to include a "switch provision" to connect the two documents has at times been criticised to the extent that it increases the risk of diverging interpretations of common European standards.

The 'switch provision' in Article 52 (3) of the EU Charter may indeed lead to difficulties, but in my opinion there is a number of reasons which clearly justify the decision of the Convention.

2. Protection of human rights according to the ECHR is – as we all know – since the cases of *Nold*[1], *Hauer*[2] and *Johnston*[3] firmly established as part of EC law – not by means of legislation, but as a consequence of the EC Court's recognition of fundamental rights as an integral part of the general principles of Community law whose observance is ensured by the Community judicature. This is settled case law of the EC Court.[4]

3. It is also settled case law, that the EC Court for that purpose draws inspiration from the constitutional traditions common to the Member States and the guidelines supplied by international treaties and conventions on the protection of human rights on which the Member States have collaborated or to which they are signatories;[5] and it has to be taken into account that this link between EC law and the law of the Member States as a source of inspiration, the *Algera*-formula, was established as early as 1957.[6] This strengthening of the position of the Community citizen by the EC Court has been widely – and in my opinion quite rightly – regarded as one of the Court's great achievements.[7]

4. In the primary law of, originally, the European Communities and, now, the European Union this case law has had its base in Article 164 of the EC Treaty, and it has it now in Article 220 EC and Article 6 (2) EU (and its predecessor Article F.2 of the Treaty on European Union). Further, this case law is part of the *acquis communautaire*, which as a precondition of admission was accepted by the – then – new Member States Austria, Finland

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[1] Case 4/73, Judgment of 14.05.1974, Nold KG v. Commission, Rec.1974 p. 491.

[2] Case 44/79, Judgment of 13.12.1979, Hauer v. Land Rheinland-Pfalz, Rec. 1979 p.3727.

[3] Case 222/84, Judgment of 15.05.1986, Johnston v. Chief Constable of the Royal Ulster Constabulary, Rec.1986 p.1651.

[4] Case C-238/99 P and others, Judgment of 15.10.2002, Limburgse Vinyl Maatschappij (LVM) and others v. Commission, Celex 61999J0238, paragraph 167, with reference to Opinion 2/94 of the Court of Justice, 1996 ECR I-1759, paragraph 33, and Case C-299/95, Kremzow, 1997 ECR I-2629, paragraph 14

[5] Cf. footnote 4.

[6] 7/56, Judgment of 12.07.1957, Algera and others v. Common Assembly, Rec.1957 p. 81.

[7] Cf. H. Steinberger in: Der Verfassungsstaat als Glied einer europäischen Gemeinschaft, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 50 (1991) p. 9, on p. 24: „Es ist die bislang eindrucksvollste Leistung des Gerichtshofs, dass er die Rechtsstellung des Marktbürgers auf einen Standard gehoben hat, der dem Standard verfassungsstaatlicher Rechtsordnungen im wesentlichen gleichkommt, ja ihn für einige Mitgliedstaaten eher übertrifft."

and Sweden in 1994 in Article 2 of the Act concerning the conditions of accession to the Treaties on which the European Union is founded.

5. The application of the ECHR by two Courts above State level has led to the very obvious advancements in human rights law in both jurisdictions. But – and this is also obvious – the development has not been a strictly parallel one. At times, EG or EU law in some areas could be regarded as having achieved a somewhat more advanced standard of human rights protection than the law of the ECHR as interpreted by the European Court of Human Rights. Examples, which usually are mentioned in this context, are
– the right to compensation under the *Francovich*-doctrine[8],
– the rights to court review in administrative matters,[9] and
– social rights.
But the situation is not static – nor has it ever been; the picture changes all the time.

6. The ECHR was drafted more than half a century ago. As a human rights text the ECHR is aging, and – as in the case of old constitutions – the *text* concerning the human rights nowadays cannot be more than a starting point for the definition of human rights *norms*.[10] This well known problem not so rarely causes the well known tensions between the judges of the Court and legislators or administrators in the Member States, when judicial review of a legislative or administrative act of a Member State is in question.

7. One of the fundamental ideas underlying the work of the Herzog-Convention was to codify and thus to make visible today's human rights *norms*, and this idea has later become one of the guiding principles mentioned in the Preamble to the EU Charter, declaring it

> "… necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter."

while at the same time reaffirming

> "… the rights as the result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights".

8. These clauses of the Preamble clarify that the aim of the Charter is to bring text and norms closer together and to make them more visible. And to these two aims a third is added: the aim to harmonise the enormous corpus of norms in the field of human rights and fundamental freedoms which has been developed within the European Communities and the European Union during the last 50 years. I do not think that any of these three aims could have been

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[8] Cf. Case C-6/90, Judgment of 19.11.1991, Francovich and Bonifaci v. Italy, 1991 ECR I-5357, and Case C-46/93, Judgment of 5.3.1996, Brasserie du pêcheur v. Germany, 1996 ECR I-1029.

[9] For the development of EC law in this respect cf. E. Drewes, Entstehen und Entwicklung des Rechtsschutzes vor den Gerichten der Europäischen Gemeinschaften am Beispiel der Nichtigkeitsklage, Berlin 2000.

[10] Cf. E. Smith, Introduction, in: E. Smith (ed.), Constitutional Justice under Old Constitutions, The Hague 1995, p. xi, at p. xvii.

achieved by drafting the Charter in terms identical to those of the ECHR; to do it would have meant to retain the gap between text and norm of the ECHR, not to close it.

9. Finally, in my opinion, the third aim, harmonisation, is a complicating factor, which has to be taken very seriously. To introduce the instrument of specialised preliminary rulings concerning the interpretation of the ECHR and its protocols may of course facilitate necessary harmonisation or at least be helpful to achieve a reasonable level of consistency of the norms within the whole area mentioned in the Preamble to the EU Charter. But in the perspective of EU law, I fear, the instrument of specialised preliminary rulings will have to be used very delicately in order not counteract what the EU Charter as a whole is meant to achieve.