ARTICLE

A Charter of dubious utility

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1. Introduction

The immediate aim of the Charter of Fundamental Rights of the European Union[1] is, in the words of its creating body, to consolidate "the fundamental rights applicable at [the] Union level . . . and thereby ma[k]e [them] more evident"[2] and "to make their overriding importance and relevance more visible to the Union's citizens."[3] Although these words evoke those employed in the Declaration of the Rights of Man and Citizen,[4] and the subsequent preamble to the Universal Declaration of Human Rights,[5] the similarities (surely deliberate) end there. In contrast to those glorious texts, the Charter was not created so that Europeans would become aware of the more or less natural rights they possess but do not enjoy in practice. The Charter's goal, rather, is simpler and more modest: to help us appreciate the rights that the legal order of the European Union (EU) has guaranteed for years.[6]

This pedagogical and, in a certain sense, propagandistic purpose could hardly justify the arduous task of creating a charter of rights, unless the European Council expected to pursue some other political goals of greater

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[1] 2000 O.J. (C 364) 1, *also available at* http://www.europarl.eu.int/charter/pdf/text_en.pdf [hereinafter Charter].

[2] Cologne European Council, Presidency Conclusions (June 4, 1999), Doc. No. 150/99, S. 44, *available at* http://ue.eu.int/Newsroom/related.asp?max=1&bid=76&grp=1799&lang=1.

[3] *Id.* annex IV.

[4] Déclaration des Droits de l'Homme et du Citoyen [Declaration of the Rights of Man], August 26, 1789, *available at* http://www.justice.gouv.fr/textfond/ddhc.htm (in French) and *at* http://www.yale.edu/lawweb/avalon/rightsof.htm (in English).

[5] The Universal Declaration of Human Rights, Dec. 10, 1948, U.N. G.A. Res. 217 A (III), *available at* http://www.unhchr.ch/udhr/.

[6] The preamble of the Charter contains the provisions that the EU is founded on the universal and indivisible values of human dignity, liberty, equality, and solidarity, the rights that it "reaffirms . . . result . . . from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention . . . [on] Human Rights . . . , 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." Charter, *supra* note 1, at 8.

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importance. Specifically, the latter might include remedying the defects of the present system of rights protection, and, most importantly, laying the foundations for a future constitution of the EU. Of course, viewing the Charter from the interpretive perspective of these two policy goals does not exhaust the analytic possibilities. However, in my opinion, they inform the point of view that is most relevant at this moment in the process of European integration, and such is the approach I have adopted in this article. Thus, in sections 2 and 3, I begin by briefly recalling the origins and the current situation of the EU's system for the protection of fundamental rights, its basic characteristics, and the criticisms leveled against it. In section 4, I succinctly describe the reasons why the Charter is viewed as the appropriate instrument to repair the defects of the system, and, at the same time, the foundation upon which to build a future European constitution. After summarizing the content of the Charter in section 5, in the final section, I lay the bases for doubting the Charter's utility in this regard.

2. The jurisprudential invention of rights

To ask why the founding fathers of European integration failed to include a charter of rights in the treaties of Paris and Rome[7] would be unreasonable, both theoretically and historically; the possible reasons are many and substantial. In European constitutionalism, in contrast to its North American counterpart, the formal declaration of rights has not been considered, until recently, an indispensable condition of the validity of those rights.[8] But it is not necessary to resort to this distinction to explain what only an ahistorical standpoint could consider a gap. Nothing in the treaties of Paris and Rome raised a fear that the discretion allotted to the communities would pose

[7] Consolidated Version of the Treaty Establishing the European Community, 1997 O.J. (C 340) 173 [hereinafter TEC], *available at* http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf. The only norms of "fundamental rights" found in the treaty are those that prohibit discrimination on the basis of nationality (art. 12, originally art. 6) or sex (art. 141, originally art. 119). I do not discuss here the "fundamental" character of the four Community liberties.

[8] The difference between the European and North American approaches, however, should not be exaggerated, given that the desire to ensure the protection of rights was neither the sole nor principal motivation for the incorporation of the first ten amendments into the U.S. Constitution. In the words of a well-known author, "The history of the framing and ratification of the Bill of Rights indicates slight passion on the part of anyone to enshrine personal liberties in the fundamental law of the land. . . . Our precious Bill of Rights, at least in its immediate background, resulted from the reluctant necessity of certain Federalists to capitalize on a cause that had been originated, in vain, by the Anti Federalists for ulterior purposes. The party that had first opposed the Bill of Rights inadvertently wound up with the responsibility for its framing and ratification, whereas the people who had at first professedly wanted it discovered too late that it not only was embarrassing, but disastrous for their ulterior purposes." Leonard W. Levy, Origins of the Bill of Rights 43 (Yale Univ. Press 1999).

a threat to the rights guaranteed in the constitutions of the member states. Moreover, no one at that time would have doubted—if this improbable danger were to become a reality—that the states themselves would take responsibility for the protection of their own citizens.[9] This straightforward assumption remains alive today, but it is difficult to reconcile with the need for the uniform interpretation and equal application of Community norms by the member states' national judges. The desire to overcome this apparent contradiction has provided the impulse for the construction of an admirable jurisprudential doctrine whose very survival may be called into question by the Charter that is meant to remedy its defects.

The European Court of Justice (ECJ) took upon itself the task of controlling Community norms from the point of view of rights, not because of a need to guarantee the protection of individual rights vis-à-vis the powers of the communities, but in order to remove from national judges the function of protecting rights. Naturally, given the treaties' silence on this issue, the Court had to "discover" those rights. Community law was conceived as a new international order, one whose norms could be invoked directly by the citizens of the member states before their own courts and which were to be applied by those courts as if they were norms of internal law, though still superior to internal law.[10] This same concept implies that the control of the validity of Community law is thus reserved to the ECJ, and is to be carried out in accordance with the norms of Community law. The judges of the member states are obliged to refrain from applying national laws that are contrary to Community law without first using the procedures they would be obligated to follow if the invalidity of the law derived from its contradiction with their own constitutions.[11] However, judges are denied the possibility of declaring invalid or inapplicable the norms of European law when they contradict their own constitutions. This latter loss is difficult to justify both in theory and in practice, particularly in those cases where states rely on constitutional courts to ensure that all institutional powers (including the legislature) respect the constitution and the rights guaranteed therein. The judicial and political bodies of the member states are responsible for applying Community laws. Therefore, denying their

[9] On this subject, see Hjalte Rasmussen, On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking 390 (Kluwer Academic Publishers 1986); Joseph H. H. Weiler, *Methods of Protection: Towards a Second and Third Generation of Protection, in* European Union—The Human Rights Challenge Vol II: Human Rights and the European Communities: Methods of Protection 555 (Antonio Cassese et al. eds., Nomos Verlagsgesellschaft 1991).

[10] *See* Case 26/62, Van Gend en Loos v. Ned. Tariefcommissie, 1963 E.C.R. 1, [1963] 2 C.M.L.R. 105 (1963), and Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 1141, [1964] 3 C.M.L.R. 425 (1964).

[11] Case 106/77, Amministrazione delle Finanze dello State v. Simmenthal SpA, 1978 E.C.R. 629, [1978] 23 C.M.L.R. 263 (1978). In this decision, the ECJ invalidated an attempt by the Italian Constitutional Court (Case 232/1978, *Industrie Chemiche Case*) to apply the Italian procedure for handling unconstitutional laws to a contradiction between its domestic norms and Community law.

constitutional courts, and, by extension, the rest of the country's judges, the ability to verify that Community norms conform with fundamental rights suggests that states have broken free of the limitations of their own constitutions, and, in doing so, have lost the basis for their legitimacy. The only way to avoid such a conclusion is to accept that those constitutional limits, that is, the fundamental rights, are implicitly incorporated into the treaties of the EU, so that by interpreting and applying the treaties, the ECJ guarantees their full force.

The ECJ did not hesitate to develop this idea of the implicit incorporation of rights. Indeed, it constructed a bold and ingenious doctrine that introduced—under the rubric of the "general principles" of Community law[12]—fundamental rights derived from both the constitutional traditions common among member states and the international treaties ratified by member states, such as the European Convention on Human Rights (ECHR).[13] The application of this

[12] This appeal to "general principles," which forms the basis of the ECJ's doctrine, can be traced—albeit with some effort—to one reference in the TEC (art. 288, originally art. 215), or to the idea that the basic law of the European Community can be found outside the foundational treaty. About the same time the ECJ was developing this doctrine, the French Constitutional Council stated that "the fundamental principles recognized by the laws of the Republic" were included among the norms it would consider when evaluating the constitutionality of a law: Decision 71-44, July 16, 1971, D. 1972 685, *available at* http://www.conseil-constitutionnel.fr/decision/1971/7144dc.htm. For an analysis of this point, see Louis Favoreu & Loïc Philip, Les grands decisions du Conseil Constitutionnel [Major decisions of the Constitutional Council] 239 (11th ed., Dalloz 2001). Within French law, however, there exists another legal doctrine with greater similarity to the ECJ's doctrine that was better known and more celebrated, in the early 1970s, than the French Constitutional Council's doctrine. From the beginning of the 1950s, the French Conseil d'État used the idea of "general principles" as a norm to check the validity of regulations, a practice initiated during the Vichy era to stop authoritarian excesses but remaining long after those circumstances had dissipated. The appeal to general principles has been a frequent practice of continental jurists, at least since the codification movement, to give the judge more flexibility under the rule of law.

[13] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 005, 213 U.N.T.S. 221 [hereinafter ECHR]. The Court embarked on this path with a case that involved no violation of fundamental rights. *See* Case 26/69, Stauder v. City of Ulm—Socialamt, 1969 E.C.R. 419, [1970] 9 C.M.L.R. 112 (1970). The leading case in this area is Case 11/70, *Internationale Handelgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, [1972] 11 C.M.L.R. 255 (1972), in which the Court unequivocally laid out the connection between its two foundational decisions, where it (1) denied the national courts competence to ensure the protection of fundamental rights in the new European order, and (2) gave itself that competence on the basis of its "discovery" of the fundamental rights hidden in this European order. After stating that "the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure," 1970 E.C.R. ¶ 3, the decision maintains that "an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions

doctrine over more than thirty years[14] has allowed the ECJ to broaden the list of fundamental rights in force in the European system, and to enlarge the ambit of acts subject to its jurisdiction.[15] In spite of the gigantic dimensions of this undertaking, whose study has generated an already extensive literature,[16] the doctrine has become the subject of criticism, and efforts have multiplied to find other methods to ensure the protection of rights in the process of European integration.

3. The system for the protection of rights: Inadequacies and proposals for reform

Within the EU, the judicial origin of a system of rights, whose intrinsic rationality has not been altered or added to by its "constitutionalization," decisively conditions the system's entire structure—the type of rights to be included in its catalogue, their content, and the scope of the protections guaranteed by the ECJ.

common to the Member States, must be ensured within the framework of the structure and objectives of the Community." 1970 E.C.R. ¶ 4.

The reference to international treaties, including the ECHR, as a source of inspiration for the ECJ in the area of fundamental rights appears for the first time in Case 4/73, *Firma J. Nold v. Commission*, 1974 E.C.R. 491, [1974] 2 C.M.L.R. 338 (1974).

[14] However, the doctrine was formally incorporated into the treaties only in 1992. Article F of the Treaty of Maastricht, now article 6(2) of the Treaty on European Union, [1997] O.J. (C 340) 145 [hereinafter TEU], literally incorporated the formula adopted in the jurisprudence of the Court. The Amsterdam text includes that article among the group of norms the Court should take into account to judge the legitimacy of the decisions under its control, which now also include, in a limited fashion, police and judicial cooperation in criminal matters (TEU, art. 46(b) and (d)).

In addition to paying greater attention to the fundamental rights of EU citizens, the Treaty of Amsterdam contains a norm linking, for the first time, EU law with human rights, a connection from which one can extract very important consequences. Respect for "human rights and fundamental freedoms," (TEU, art. 6(1)), is one of the principles on which the EU is based, and, therefore, a necessary condition for integration into the EU (TEU, art. 49), one of the stated aims of the EU's foreign policy and security policy (TEU, art. 11), and an influential factor in its development policy (TEC, *supra* note 7, art. 177(2)). Finally, the serious and persistent violation of these rights (as with the rest of the principles) can lead to very serious sanctions (TEU, art. 7).

[15] Beginning in 1998, the ECJ has extended its jurisdiction to include acts committed by states when applying Community law. *See* Case 5/88, Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, 1989 E.C.R. 2609, [1991] 1 C.M.L.R. 328 (1991), and Case 260/89, Elliniki Radiophonia Tiléorassi AE v. Dimotiki Etairia Pliroforisis, 1991 E.C.R. I-2925, [1994] 4 C.M.L.R. 540 (1994).

[16] For a collection of this literature, see THE EU AND HUMAN RIGHTS (Philip Alston ed., Oxford Univ. Press 1999), and RÉALITÉ ET PERSPECTIVES DU DROIT COMMUNAUTAIRE DE DROITS FONDAMENTAUX [REALITY AND PERSPECTIVES ON COMMUNITY LAW ON FUNDAMENTAL RIGHTS] (Frédéric Sudre & Henri Labayle eds., Nemesis-Bruylant 2000) [hereinafter REALITY AND PERSPECTIVES].

In the first place, this catalogue can only include "classic" rights: that is, those that secure limits on power or determine the manner in which power is exercised, not rights that impose positive obligations, especially the distribution of goods or services, the content of which cannot be determined by a judge. In addition to equality, liberty, and procedural rights, the catalogue may include rights that guarantee that the state will create and maintain certain normative frameworks (in older terminology, "institutional guarantees"). These include, for example, along with the right to property, the rights that enshrine basic labor law principles (pertaining to unionization, striking, collective bargaining, maximum legal working hours, weekly rest, and the like). But this purely negative delimitation of the right that are susceptible to enforcement by the ECJ is not sufficient to achieve the desired goal: that the member states leave in this supranational Court's hands the protection of the fundamental rights enshrined in their own constitutions. It is also necessary for the Community's "bill of rights" to coincide with those of the member states. Finally, in order for the replacement of jurisdictions to occur without a diminishment of rights, it is equally necessary that the level of protection offered by the ECJ be similar to that offered by national courts. This is an even more difficult requirement, and, consequently, one for which it is possible to find only approximations in actual practice.

The formula forged by the Court, and now spelled out in article 6(2) of the Treaty on European Union (TEU),[17] attempts to make the EU legal order satisfy the first two of the following three conditions.

The first condition—that only judicially enforceable rights be included among the table of rights of the EU—has been accomplished with a reasonable degree of success, thanks to the otherwise puzzling affirmation that the EU will respect those rights as "general principles" of Community order. Within the Community, as in any other legal order, general principles cannot be "protected" or "developed" by the political organs; rather, they must be "respected" by those bodies. These principles are unwritten norms that only judges can define and utilize as the basis for their decisions, although they should also be taken into account by the lawmaking institutions so as not to infringe on them. General principles are norms of control, not of authorization or mandate, and thus only include rights that limit power.

The attainment of the second condition—to correlate the EU's catalogue of rights with the rights guaranteed by the internal laws of the member states—is less certain. The connection between the two has been established to some degree, at least to the extent that the rights respected by the EU are derived from the common constitutional traditions and from the ECHR. Yet this connection alone is insufficient to guarantee that the Union will respect *all* justiciable fundamental rights as guaranteed by *all* member states, as logical rigor would require. Rather, the connection indicates the contrary, given that

[17] TEU, *supra* note 14, art. 6(2).

the ECJ uses as its inspiring source only those rights common among states.[18] The refusal of national courts to guarantee that the state will respect all of the fundamental rights consecrated in its own constitution when applying Community law, means that the peculiar rights of each state, namely, those not common to all members of the Union, are left totally devoid of protection. Although this refusal implies a formal infringement of the state's constitution, its practical implications are limited, and almost imperceptible, because the catalogue of actionable rights of each state is not so much the result of the text of constitutional provisions as much as it is of judicial interpretation, and such interpretation leads to a compendium of fundamental rights that is practically common to all countries.[19]

The third condition the ECJ has set for itself cannot be accomplished by the texts or the declarations of the Court alone. It consists of ensuring the equality between the level of protection offered by the ECJ and the national courts, so that these entities have similar conceptions of the same rights, their scope of protection, permissible limits, and so forth. This condition is extremely important because, in practice as well as in theory, it is impossible to keep a rigid separation between the jurisdictions of these bodies. When national courts apply Community law, Community norms become inextricably interwoven with norms exclusively internal to the member states. More important, it is simply impossible to maintain two distinct working concepts of rights within one unified legal order. Status rights, being what they are, must be equal for all persons, regardless of whether or not their activity has repercussions for the Community. Basically, when a state applies Community norms, it acts within the boundaries of its domestic legal order, because this includes Community norms, despite the fact that the ECJ (and not the state's highest courts) has the ultimate responsibility to interpret these norms definitively. This is surely the system's weak point, producing among national constitutional courts an acceptance of the above doctrine but accompanied by reservations and conditions that cast doubt on the system's stability, and thus generating in academia the most severe criticisms.

[18] As is obvious, the use of both common traditions and the ECHR as the relevant sources, reinforces the thesis that the only rights respected by the EU are "classic" rights. As is argued in this article, using general principles as a source of rights leads to a similar result.

[19] Thus, in the French doctrine, the inviolable rights of domicile, secret communications, personal and familial privacy, derive from the right to individual liberty. In the Spanish Constitution, they are considered separate rights. German law has derived the freedom of enterprise, a freedom also expressly mentioned in the Spanish Constitution, from the freedom to elect one's profession or occupation. Other examples can be found on both sides of the Atlantic. The effective coincidence of prevailing rights in all constitutional democracies—which itself serves as another reason to identify these rights as general principles—has sometimes been achieved, in the U.S., say, only by stretching to the limit the letter of the Constitution, as well exemplified by the U.S. Supreme Court's interpretation of due process.

Although the ECJ's use of the fundamental rights it "discovers" as the general principles of European law (rooted in common constitutional traditions or the ECHR) has been the subject of reproach for many different reasons—including, for example, the fact that stricter criteria are applied in judging states than in judging the Community—the most substantial criticisms are those arguing that the guarantee of rights offered by the ECJ is necessarily defective and insufficient. This is not because of the Court's incapacity, but because of the deficiencies inherent in the system itself. A compendium of rights that does not appear in declarations but simply lies latent among a collection of norms and traditions, all with imprecise boundaries, makes it almost inevitable that a court charged with the duty of applying these rights will vacillate, albeit unintentionally, between passivity and excessive activism. And even leaving aside this risk, any such court's control would be inevitably superficial and crude, since the rights surface only in relation to concrete cases, and the court is powerless to establish with precision the intangible content and the permissible limiting conditions of the rights.[20]

To remedy these defects and to resolve the problem that could arise if there were a divergence between the two courts (the ECJ and the European Court of Human Rights), where both have competency to keep watch over the respect for rights, and, at the same time, to establish an "external control"[21] of Community actions, the European Commission has supported—since 1979—the Community's membership in the ECHR. This project was turned on its head, however, at the moment it appeared most likely to succeed, when the ECJ

[20] A synthesizing and sharply critical exposition of these reproaches, developed in the German doctrine, can be found in Armin von Bogdandy, *Grundrechtsgemeinschaft als Integrationsziel*, 56 Juristenzeitung x, 162–68 (2001), where the author counters the proposal of Alston and Weiler that became the basis for the Agenda of Human Rights for the Year 2000, which I mention *infra* note 22. More detailed criticism can be found in The EU and Human Rights and Reality And Perspectives, *supra* note 16. In Spanish, the best version of this criticism is found in Luis Maria Diez-Picazo, *¿Una Constitución sin declaración de derechos?: Reflexiones constitucionales sobre los derechos fundamentales en la Comunidad Europea*, 11(32) Revista Española de Derecho Constitucional (R.E.D.C.) 135 (1991).

[21] The phrase "external control" that the European Commission has repeatedly used appears in its two reports on the Charter, the Commission Communication on the Charter of Fundamental Rights of the European Union, October 11, 2000, and Commission Communication of the Legal Nature of the Charter of Fundamental Rights of the European Union, September 13, 2000, both *available at* http://europa.eu.int/comm/justice_home/unit/charte/en/communications.html. The use of this phrase appears to be inspired by the practice of private business and thus seems surprising and hardly adequate in the present context. Perhaps the phrase has been chosen to avoid the expression "international controls," which would seem paradoxical if one understands that the EC, despite its peculiarities, is an organization of international law. In any case, the need for an "external control" to ensure that the Community will adequately respect fundamental rights seems incompatible with a desire to give the Community, or the EU, the job of guaranteeing that the member states will respect those rights—a desire that, as I argue in the paper, the supporters of the Charter probably have.

declared, in response to consultation sought by the European Council, that the Community's membership was not possible without prior reform of the treaty.[22]

4. The Charter of Fundamental Rights and an EU constitution

It was only at this moment that the Commission and the Council embraced the possibility of adopting a charter of rights, a notion supported for years by certain political forces that had even produced a bill approved by the European Parliament in 1989. This change in posture has both strategic and tactical importance, because those who had supported the adoption of a charter of rights of the EU for so long had not done so only, or even principally, because they saw it to be the proper instrument to remedy the defects of the ECJ-created system of rights protection. Rather, they envisioned the Charter as a critical step toward a European constitution. Although neither the Cologne Council, which decided to undertake the process of elaborating the Charter, nor the Nice Council, which solemnly declared the Charter's existence, expressly established the connection between the Charter of Rights and a constitution,[23] it would be absurd to think that they did not have it in mind, given that the issue was already explicit in the German debate from which the idea for a charter emerged.[24] It seems probable, moreover, that it is this function of the Charter, as the nucleus of a constitution, that has led some to assign the Charter a more immediate end—that of making Europeans more acutely aware of their rights, or perhaps more precisely, of constructing

[22] Opinion 2/94 of the Court of March 28, 1996. Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759. It is possible to argue that this was only a temporary defeat because in its two Communications on the Charter, *supra* note 21, the Commission forcefully and repeatedly insists on the possibility and the appropriateness of membership as an additional protection to that offered by the Charter. In support of membership, one also finds the *Agenda of Human Rights for the European Union in the Year 2000*, prepared by a "committee of experts" designated by the Commission and presented in Vienna in October 1998, *reprinted in* THE EU AND HUMAN RIGHTS, *supra* note 16, at 919. In the work of Alston and Weiler, which clearly served as the basis for the *Agenda*, no reference is made to the eventual Charter. In the opinion of these two authors, such membership in the ECHR does not require a prior modification of the treaties because the reasoning of the ECJ in its 1996 decision on the subject "is not persuasive." *See* Philip Alston & J. H. H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy, in* THE EU AND HUMAN RIGHTS, *supra* note 16, at 3.

[23] In fact, at the Laeken Council (Dec. 15–16, 2001), a future EU constitution was discussed simply as a possible consideration. *See* Laeken Declaration on the Future of the European Union (Dec. 15, 2001), *available at* http://european-convention.eu.int/pdf/LKNEN.pdf.

[24] The motivating impulse for a charter of rights of the European Union can be found in one of the points of the Green Party's program, incorporated into Gerhard Schröder's coalition government.

a "European" consciousness of rights, which, until now, we have only experienced as the rights guaranteed by our respective states.

It is not easy, however, to determine precisely what exigencies this new goal creates for the Charter. On the one hand, this is because the concept of a constitution, of which the Charter will form part is still nebulous, and can be clearly defined only negatively. On the other, a charter-inspired constitution is additionally difficult to grasp because the notion of the fundamental rights proclaimed by the Charter is understood in Europe in various ways and retains an ambiguous relationship with another similar notion, human rights, with which it is frequently identified.

Logic forces one to conclude that those who believe the moment to constitutionalize the EU has arrived also assume that it has not yet been constitutionalized. As a result, the constitution they put forward must be something different from the constitutional law whose existence the ECJ affirmed in 1986 and put into the record on many other occasions, when it defined the treaty as "basic constitutional law"[25] responsible for producing derived law and serving as the norm for resolving questions of a law's validity or invalidity. The majority of those who would pursue a constitution—perhaps even all of them—also seem to agree with the idea that the EU must refrain from transforming itself into a state, and, therefore, its constitution must be something very distinct from the member states' constitutions.

Beyond these two negative stipulations, however, what seems obvious is that a European constitution should include a clearer delimitation of the competencies of the EU and its constituent states, and maybe a more agile and (perhaps) more expeditious decision-making procedure. But a tacit question remains. Since such changes could only be obtained through a new treaty, it is not easy to understand why what is legally still a treaty should be considered a constitution, the legal consequences of which—as large as they may be—can hardly be greater than the consequences of allowing the emergence of a new legal order, independent of the order of the member states. The answer is probably that a new named constitution will represent a political, if not legal, change. But even if we admit the separation between the political and legal realms, the change appears unjustified. Thus, in the German debate, which is of central importance here, the defenders of a European constitution view the Charter as an instrument to construct a European political unity, not as the projection of an already existing unity based on national, cultural, or some other sort of sentiment. In the celebrated speech of Joschka Fischer at the Humboldt University of Berlin, the "constitution" or "constituent treaty," which "will be the precondition for full integration," is the symbol of "enhanced co-operation," and the product of a new "centre of gravity," created by member states firmly committed to the European ideal and capable of

[25] Les Verts v. Parliament, 1986 E.C.R. 1339, [1987] 2 C.M.L.R. 343 (1987).

advancing political integration.[26] For others, including Jürgen Habermas, what is important is not so much the final result—namely, the constitution itself—as the path that leads to it, that is, the capacity of the constitutive process to create the sociological preconditions that the existence of a European constitution requires, including citizen sentiment, public opinion, and so forth.[27]

This diversity of views, although not mutually exclusive, raises the suspicion that there are different versions of the argument that the Charter must be an essential part of a future European constitution. And it seems probable that the "constitutional" function assigned to the Charter is also determined by the varying modes of conceiving of rights. Yet the argument itself, regarding the central importance of the Charter, is popular among nearly all the supporters of a future constitution, from the political and academic world equally.

If the rights of the Charter are identified with values, as discussed in Lionel Jospin's widely-disseminated and celebrated speech of May 2001,[28] the Charter's function will become one of simply declaring values, not enunciating binding legal rules. In other words, the Charter will be seen as laying out the ideals that characterize the European conception of society and orienting the actions of states that form the EU, and, therefore, the actions of the EU itself. It will not determine the limits of state and Community powers, the concrete objectives that these entities should pursue, or the legal safeguards of each; and even less, will it establish the competency of the EU to ensure that the member states respect those limits or pursue those objectives. Although, politically, the Charter's function can be of the utmost importance in emphasizing the concurrence of values that makes the EU possible, its legal meaning is null. The Charter becomes little more than a hortatory preamble to the normative text that establishes a system of relationships between the EU, its citizens, and its component states.

The only perspective from which it makes sense to analyze a charter destined to form part of the constitution is one that understands the rights enunciated in that charter to be not simply an expression of values but rather as concrete instruments with which to check state and Community power, and as tools that legally require certain actions or omissions from the states and

[26] Joschka Fischer, From Confederacy to Federation: Thoughts on the Finality of European Integration, Speech at Humboldt University, Berlin, Germany (May 12, 2000). *See also* What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer (Christian Joerges, Yves Mény, J. H. H. Weiler eds.), *available at* http://www.jeanmonnetprogram.org/papers/00/symp.html.

[27] As he explained in his lecture entitled Warum braucht Europa eine Verfassung [Why Europe Needs a Constitution], given at the University of Hamburg on June 26, 2001, Habermas refers us to the originating function of the debate, a particularly important point when studying the functionality requirements of a constitution. Jürgen Habermas, *Warum braucht Europa eine Verfassung* [*Why Europe Needs a Constitution*], 27 Die ZEIT 12 (2001), *available at* http://www.zeit.de/2001/27/Politik/200127_verfassung_lang.html (in German).

[28] Lionel Jospin, Speech at the Center for the Reception of Foreign Press in Paris (May 26, 2001).

the EU. In this conception, the underlying values remain implicit while the specifically legal content of the enunciated rights—the definition of which represents the protected scope and objective of the rights—rises to the forefront.

The first obligatory step for this analysis is to determine what rights are referred to in the Charter. In current European doctrine, the subject "rights" is generally accompanied by one of two different adjectives, "fundamental" or "human," that sometimes are used interchangeably and, at other times, denote distinct species of the same genus. Frequently, the adjectival descriptors are even richer, as, for example, in the speech previously mentioned in which Fischer argues that the constitution should focus on "basic, human, and civil rights."[29] The distinction between fundamental rights and civil rights, like other distinctions that we will take up later, comes from the nature of the protected good, and, eventually, from the type of protection. For the moment, we will leave this issue aside, and focus on the contrast between fundamental rights and human rights, the terms employed in the first two sections of article 6 of the TEU, whose interpretation will reveal several points relevant to our discussion.

Consider these formulas: "[t]he Union is founded on the principles of... respect for human rights and fundamental freedoms..."[30] and "shall respect fundamental rights, as guaranteed...."[31] These sentences are so imprecise and the wording so similar that it is not surprising that the differences between the two are often lost; overemphasizing them brings with it the fear of succumbing to the sort of legal nitpicking that transforms the jurist into a pettifogging lawyer. Nevertheless, the differences do exist and require some sort of explication. The fundamental rights accepted as general principles of the Community order do not encompass all of the elements under the general rubric "human rights and fundamental freedoms," but, rather, only those rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms and derived from common traditions. The collection of human rights, the protection of which forms the basis for the EU, is determined from outside the EU. It is a legal datum that the EU must accept or reject in toto and without modification.

Fundamental rights, in contrast, are a category from which the EU can select those rights that it agrees to respect. Certainly, it is not easy to understand the difference that exists between the declaration that the EU "is based on the respect" of some rights and the declaration that it "respects" others.

[29] Fischer, *supra* note 26. The German expression that Fischer used—"die Verankerung der Grund, Menschen- und Bürgerrechte" [the Incorporation of Fundamental, Human, and Civil Rights]—summarizes the German version from the Cologne Council.

[30] TEU, *supra* note 14, art. 6(1).

[31] TEU, *supra* note 14, art. 6(2).

And the two groups are not closed to each other. But one cannot ignore the shades of difference between the two sets of rights, a difference reinforced by the fact that the treaty refers, in article 6(1), to human rights (not fundamental rights) to govern the relationship between the EU and its current members (art. 7(1) and (2)) or aspiring members (art. 49).[32] In the TEU, as in common usage, human rights are moral rights, a weakly legalized category within international law, while fundamental rights form part of the positive internal law of the specific community within which they operate. The content of both types of rights are, for the most part, the same, but the arena in which each type is invoked and its strength deployed is distinct. Fundamental rights are, in principle, the rights of the citizens (or, more broadly, of the people subjected to the laws of the state) vis-à-vis the political community of which they form a part; it is the community's constitution that gives these rights their positive legitimacy. On the other hand, "legalized" human rights constitute part of an international order, which defines their content and force; they function within the world of international relations, where individuals may take part only in the most exceptional cases. Being moral rights, human rights are similar to the old natural rights, which the state must both respect and enforce among society.

Although a few of the Charter's precepts lead one to think that, perhaps, its authors have not always had the distinction between human and fundamental rights clear in their minds (deliberately or not), the Charter declared at Nice is a charter of the EU's fundamental rights, not an (impossible) charter of human rights. Even named and defined in this manner, the Charter's text must continue to include rights of different types, not only because the class of fundamental rights includes very diverse kinds of rights depending on its content, but also because European legal and political language operates with two distinct concepts of such rights, at the least. Fundamental rights are sometimes understood to mean rights that derive directly from a constitution, that can be readily invoked before courts, and whose violation by any power—including the legislature—is susceptible to judicial remedy. On other occasions, fundamental rights refer to all those rights enunciated in the constitution, independent of the system of their enforcement, whether directly, before courts, or indirectly, by virtue of the laws enacted by the legislature. These two types of fundamental rights—which the doctrine frequently distinguishes through the use of explanatory adjectives (fundamental rights, in a legal or formal sense, as opposed to fundamental rights, in the political or moral sense) and which some constitutions, such as the Spanish,

[32] The state actions that can unleash the sanctions envisioned in art. 7 of the TEU are *serious and persistent* (emphasis mine) violations of human rights, a notion that is coherent with the moral nature of those rights. The respect for human rights is also a state objective of common foreign and security policy, (TEU, *supra* note 14, art. 11) along with the cooperation in development of the EC (TEC, *supra* note 7, art. 177(2)–(3)).

mention in different chapters—obviously have distinct relationships with power and perform very different functions. The role of fundamental rights, in a strict sense, is to establish limits on power, while fundamental rights in a broad or material sense, set the necessary goals for the exercise of that power, that is, the objectives that must be pursued.[33] In commissioning the drafting of the Charter, the Cologne Council referred to both types of fundamental rights without distinguishing the two. It is vital to take note of this fact in order to fully understand the Charter's impact on the relationship between the EU and the member states—i.e., its constitutional role.

5. The content of the Charter

According to the mandate of the Cologne Council, any charter that would bring together and highlight the prevailing fundamental rights of the EU should include the rights of liberty and equality, and the fundamental principles, such as those recognized in the ECHR and in the common constitutional traditions, as well as the basic rights that belong to the citizens of the Union. The drafters were also instructed to take into consideration economic and social rights, of the same style that are in the European Social and Economic Charter and in the Community Charter of the Fundamental Social Rights of Workers (TEU, art. 136).[34] The execution of this mandate—which entailed an all-encompassing conception of fundamental rights and was ambiguous with regard to social, economic, and cultural rights—was given to an independent body, commissioned by the Council, that completed its work within the time allotted and then disappeared, without any further participation in the Charter. During the four years between the declaration of the Charter and the 2004 meeting of the Intergovernmental Conference (where the states decide what to do with it), the Charter will remain in legal limbo, solemnly declared but without obligatory force; subject to political and academic criticism, but immutable.

Perhaps because the bizarre procedures described above permitted the drafting body to act without assuming any responsibility over the future of its

[33] The distinction between rights as "limits" and rights as "goals" generally corresponds to the usual differentiation between "classic" rights (civil and political rights), and "new" rights (social, economic, and cultural rights); but, at least in Europe, these comparisons are not entirely analogous. In Continental doctrine, mostly due to German influence, a different notion has become widespread: namely, that "classic" rights—as "objective elements" of a legal order (or by virtue of their "objective aspects")—impose positive obligations on the state to ensure the protection of the underlying values in relationships among individuals in society. From this point of view, these classic rights are also rights as goals, although in this case what the state must create is a normative framework. *See, e.g.*, Robert Alexy, Theorie der Grundrechte [The Theory of Basic Rights] ch. IX, part 2 (Nomos Verlagsgesellschaft 1985). For the English version of the book, see Robert Alexy, A Theory of Constitutional Rights (Julian Rivers trans., Oxford Univ. Press 2002).

[34] TEU, *supra* note 14, art. 136.

work, the self-described "convention" interpreted its mandate in a very lax way, operating according to political, and not technical, criteria. Even though the drafters made a commendable effort to demonstrate that all of the Charter's precepts are founded on pertinent texts,[35] it did not hesitate to look for them wherever it could, without strictly following the Council's instructions, and in such a way that it becomes evident that the identification of sources serves to justify their decisions, not to explain them. As could have been expected given its composition, the convention did not endeavor to "summarize" the prevailing rights but, rather, to produce the Charter of Rights that, in the opinion of the majority of its members, the EU needs.

The text appears organized according to what the preamble identifies as the "indivisible, universal values of human dignity, freedom, equality and solidarity,"[36] each of which respectively heads one of the first four chapters of the Charter. Following these four are three additional chapters: the fifth, dedicated to citizens' rights; the sixth, to justice; and the seventh, to general provisions;[37] which is crucial because it explains the reach and effects of the proclaimed rights. Included within this framework are all of the rights commonly found in recent constitutions, in Europe or Latin America, and even some rights that have yet to be recognized by any constitution, involving the prohibition of eugenic practices, the trafficking of human bodies and body parts, and the reproductive cloning of human beings.[38] The doctrinal debate

[35] The indications of the sources of various rights are contained in the "Explanations relating to the Charter." *See* CHARTE 4473/00. CONVENT 49, *also available at* http://www.europarl.eu.int/charter/convent49_en.htm.

[36] It seems evident that even though it is desirable for a political community to strive to attain respect for universal values, it cannot found itself on those values, given that those values, by definition, do not separate the members of that political community from all other people. However, the preamble does not offer any indication of which elements single out Europe from the rest of humanity. It does allude, in vague terms, to the EU's awareness of its spiritual and moral heritage. Yet, given that it also underlines the diversity of cultures and traditions among the peoples of Europe, it is unclear whether its heritage holds anything specific and common to Europeans, and if so, what. To make the situation still more ambiguous, even the characterization of cultural heritage is done in significantly different terms in the different linguistic versions of the Charter. In fact, in most languages, the heritage in question is only "spiritual and cultural," while in the German text, it is "geistig–religiös," an expression that, whatever the correct linguistic meaning, seems hardly congruent with the decision of the convention to remove the allusion to the religious past that appeared in a previous draft. For more on the drafting of the preamble, see Justus Schönlau, Drafting Europe's Value Foundation: Deliberation and Arm-Twisting in Formulating the Preamble to the EU Charter of Fundamental Rights, presented at the Advanced Research on the Europeanization of the Nation States (ARENA) Workshop on the Charter of Rights as Constitutive Instrument, (June 8–9, 2001).

[37] Charter, *supra* note 1, ch. 1–4, 5, 6, and 7.

[38] It is evident that, although the moral intuition may make sense, the inclusion of a right involving prohibitions introduces some curious, dogmatic problems. The right is not so much a prohibition on the state, but a mandate to establish a prohibition. It is a right that places limits not on the power of the state, but on the freedoms of civil society.

over the inappropriateness of including rights that lack any relationship with the competency of the EU had a limited effect at the heart of the convention, where the majority decidedly favored an all-encompassing Charter, even though what seems to have been the key argument in favor of this position—the categorical differentiation between rights and competencies—is logically very weak.[39]

The rights in the Charter have very diverse structures, so much so that only an extremely broad definition of the category of "fundamental rights" could include all of them. First, there are pure rights, which clearly bind all the powers of the state, including the legislature. Other rights are stated as principles whose future form is left in the hands of a legislator (state or Community), who apparently enjoys total liberty to complete this task.[40] In yet other cases, even the content of the right itself is entrusted to each state's own legislation and practices, and in such a way that the Charter only ensures the principle of equality.[41] In addition, the Charter contains precepts that describe responsibilities that have no correlation with any right whatsoever,[42] and, finally, there are statements that express feelings of benevolence and moral support for certain human aspirations but whose legal content is indiscernible. Take for example, the moving article 25, which announces to the universe that the EU recognizes and respects the rights of the elderly to live a dignified and independent life, and to participate in social and cultural activities.

Although the final phrase of the preamble mentions "rights, freedoms and principles" as apparently separate categories, these are, from a normative point

[39] This argument, which the Secretary-General of the convention deduces from the ECJ's Declaration on the EU's membership in the ECHR, is circular. *See* Jean-Paul Jacqué, *La démarche initiée par la Conseil européen de Cologne* [*The process initiated by the Cologne European Council*], 12 Revue Universelle des Droits de l'Homme (R.U.D.H.) 3 (2000). This issue of the R.U.D.H. collects the works—many authored by members of the convention—presented at the Symposium on the Charter organized by the Institute of High European Studies of the University of Strasburg.

It is evident that behind the doctrinal arguments, there exists a difference of political postures. Those who oppose the inclusion of rights unrelated to the competencies of the EU fear that including such rights will expand the competencies of the EU, a fear not felt by those who would like to see those competencies broadened, regardless of whether or not they believe the risk exists. The inverted postures of the Constitutional Convention of Philadelphia and the convention in Brussels are curious. If, at the former, it was the Federalists (led by Hamilton) who opposed the proclamation of rights that did not correspond to competences of the Union, in Europe, this position has more support among the Antifederalists.

[40] For example, the freedom to create teaching institutions (art. 14(3)), the freedom of enterprise (art. 16), workers' right to information (art. 27), the right to collective bargaining (art. 28), etc. The reference made in all of these articles not only to the legislation of the states but also to the "practices" is genuinely disconcerting, and not only because of the enigmatic concept of a "practice." *See* Charter, *supra* note 1, arts. 14(3), 16, 27, and 28.

[41] *See, e.g.*, Charter, *supra* note 1, arts. 34 and 35.

[42] *See, e.g.*, Charter, *supra* note 1, arts. 37 and 38.

of view,[43] divided into only two groups: rights, in the strict sense of the word, and "principles." The first group places limits on the power of the institutions and organs of the EU, and even on the power of the states in applying Community law, since both entities are required to respect these rights. In contrast, the "principles" impose an obligation to "observe . . . and promote the application thereof in accordance with their respective powers."[44] The exact content of this obligation is not easily defined, but, given its nature as a positive obligation, it will likely have an effect on the division of competencies between the EU and the states, in spite of the emphatic affirmation that "the Charter does not establish any new power . . . or modify powers and tasks defined by the treaties."[45]

On the other hand, the purely negative obligation of respecting rights is not neutral either, with regard to the distribution of competencies among the EU and its members. Article 52 authorizes the institutions and organs of the EU and the states to establish legal limits on rights yet specifies that those limits will be considered legitimate only when, in light of the principle of proportionality, they are necessary to protect the rights and liberties of everyone else or to "genuinely meet objectives of *general interest recognised by the Union*."[46] In this way, the EU's supervisory power is extended from certain concrete subjects to all areas of state decisions.

The vagueness described above becomes even greater when one considers the following omission: the Charter does not offer any indication of what should be the criteria that distinguish rights from principles, a question that cannot be solved by resorting to academic doctrine, where there exist many different concepts of principles.[47] Moreover, the next to last article (art. 53) incorporates a common norm of international human rights treaties, and the

[43] Charter, *supra* note 1, art. 51.

[44] Charter, *supra* note 1, art. 51(1).

[45] Charter, *supra* note 1, art. 51(2).

[46] Charter, *supra* note 1, art. 52. Emphasis mine.

[47] Guy Braibant, the vice-president of the convention was apparently responsible for the decision to introduce "principles" into the Charter. *See Conclusions de Guy Braibant*, 12 R.U.D.H. 66 (2000) (where he argues that principles can be identified with positive rights). This can also be deduced from the convention document in which this term is first mentioned. *See* CHARTE 4316/00. CONVENT 34. An important aspect of this doctrine, which considers "principles" to be the norms that impose responsibilities without correlative rights (for example, articles 37 and 38 of the Charter), instead views positive rights as a *tertium genus*, a group of rights conceptually between social rights and principles. *See, e.g.*, Olivier De Schutter, *La contribution de la Charte des droits fondamentaux de l'Union européenne à la garantie des droits sociaux dans l'ordre juridique communautaire* [*The contribution of the Charter of fundamental rights of the European Union to the social rights guarantee in the community judicial order*], 12 R.U.D.H. 33, 43–44. There also are many scholars who understand principles to be norms of a certain structure, regardless of their content. Given this definition, one cannot use the category alone to establish distinctions based on content.

results are absurd and contradictory in a charter of rights that forms part of the internal law of a fixed political community. Basically, article 53 guarantees that the protection of rights granted by the EU cannot be understood as damaging to, or restrictive of, the protection of rights granted by international law and "by the *Member States' constitutions*."[48] Elementary logic, therefore, leads to the conclusion that in judging acts of member states according to the law of the European Union, the ECJ must, at a minimum, grant the same level of protection to the rights in question as that granted by the member states with the highest protection of those rights; this must be done in order to ensure a uniform interpretation and application of EU law throughout its entire territory. Since the level of protection for a right, whichever right that may be, inevitably influences the level of protection for the remaining rights, and an equilibrium among them can be reached only when taking into consideration the whole group of rights, an absurd situation emerges in which it becomes impossible for the ECJ to maintain a coherent doctrine of rights protection. The principle of minimum protection of rights, which makes sense for human rights in international law, lacks any meaning when one tries to apply it to fundamental rights in internal law.[49]

6. Conclusion: The dubious utility of the Charter

Since the Nice Council in December 2000 left the final decision concerning the Charter's legal meaning in the hands of the conference to be held in 2004, it is not yet possible to firmly judge the Charter's utility in reaching its projected goals. Yet given that the basic options are limited in number, one can still venture to make some advance judgments which, though hypothetical, are nonetheless both founded on facts and relevant to the debate about the future of Europe.

Although we can imagine an intermediate solution, one that would establish distinct forms of legal enforcement for the different sections of the Charter, there are basically two possible answers to the question, "What will be the Charter's obligatory force, its legal efficacy?" These options are, simply, either to deny or give the Charter such force. The latter option could be instituted, variously, either by directly integrating the Charter's text into the treaties,[50] or by indirectly including the Charter within the TEU's reference,

[48] Charter, *supra* note 1, art. 53. Emphasis mine.

[49] A more complete analysis of this question can be found in the excellent work of Jonas Liisberg, who was awarded the 2001 Mancini Prize. *See* Jonas B. Liisberg, Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? *available at* http://www.jeanmonnetprogram.org/papers/01/010401.html.

[50] Direct integration could also happen in several diverse and not exactly equivalent forms; for my analysis here, however, I have eliminated these different variations.

in article 6(2), to common constitutional traditions and the ECHR. I will consider these separately, and, therefore, will speak of three possible options.

The first option—leaving the Charter in its present state of limbo, as no more than a "proclaimed" document—would deprive it of utility for either remedying the defects in the system of rights protection or advancing toward a future European constitution. With respect to the first of the two goals, it is clear that leaving the text as is would not only fail to improve Europeans' knowledge of their rights but would lead, rather, to our further confusion. The rights declared in the Charter only have legal meaning if they already existed before the Charter collected them, and then only by virtue of this prior existence, not their appearance in the Charter. It seems improbable that any citizen from any member country would have discovered, thanks to the Charter, rights already granted to her by her own constitution.

A charter that is merely a declaration cannot hope to contribute much to the creation of a future European constitution. Perhaps those who believe that the principal meaning of the Charter lies in its capacity to make common values explicit will be satisfied that this goal has been achieved by the mere proclamation of the Charter. But those values do not become immediately apparent in the text of the Charter, which was drafted with other purposes in mind; nor are these values specific to the EU, or even to Europeans. The Charter's statement of rights, which includes all the reservations and inevitable references typical of legal texts, uses general formulas whose content can be injected with diverse values and which, in many cases, reiterate a corresponding formula of the national constitutions, themselves quite similar to other Western constitutions. It seems disjointed to assign the job of setting forth the European social model to a charter that, in announcing a right to social protection, to organized labor, and to free education (the rights Jospin singled out in his previously cited speech),[51] refers to the legislation and the practice of each country. I note these difficulties, only in passing, and without entering into yet another problem, which I shall take up below: Can rights that limit power found the creation of a new power?

However, it is hardly likely that the Charter will remain indefinitely in the limbo of being a mere declaration, if only because of the energy with which the European Parliament is demanding its incorporation into the treaties.[52] As mentioned previously, such incorporation could occur by two different methods whose usefulness in relation to each of the goals of the Charter are, not coincidentally, in perfect opposition to each other. The method of direct incorporation, by integration of the Charter into the treaties, is the only method that could serve as a basis for a future constitution, but it is seriously disturbing for the system of rights protection. The latter would be better served

[51] *See supra* note 28.

[52] See its resolution of Nov. 30, 2000, on the preparation of the Nice Council, EUR. PARL. DOC. (COM 596) (2000).

(or at least less harmed) by the method of indirect incorporation, which is absolutely useless for a potential constitutionalization of Europe.

The explicit enumeration in the Charter of the prevailing fundamental rights of the EU can help the ECJ construct a more complete jurisprudence concerning these rights and apply a more refined method to enforce these rights. It is not certain that the incorporation of the Charter into the treaties will be enough to generate these changes, which are actually more theoretical than practical. Perhaps, in this way one could guarantee that the rights protection offered by the ECJ is equivalent to that dispensed by national courts (which was, as previously mentioned, the third of the three conditions necessary for the equilibrium of the system that I described in section 2). However, even if these benefits were certain, and even if they promised to ensure the rights of the citizens of the EU, they could be attained only at the cost of gravely damaging other essential elements of the system. In particular, there is a risk of destroying the other two conditions of equilibrium, now reasonably fulfilled. The necessary nexus between the catalogue of rights protected by the EU and those ensured by the member states would be broken. Moreover, by "substantiating" the protected rights, those rights could be understood not only as limits on acts of power but also as the foundation of that power, an implicit authorization of competency. This is even more applicable where a charter, like the one discussed here, includes numerous rights of social welfare.

The disturbing effects that would result from a direct incorporation of the Charter into the original law of the EU (by way of integration into the treaties) become quite attenuated if the incorporation is done indirectly—by including the Charter among the sources of rights, referred to by article 6(2) of the TEU, considered repositories of the "general principles" of the Community order. This indirect incorporation provides sufficient binding force to the few rights included in the Charter that do not figure, in one way or another, into the common constitutional traditions and ensures the proper connection between the Community and national orders. Above all, indirect incorporation maintains the characterization of the rights as general principles, and their value as norms of control, not of empowerment or authorization.

Undeniably, placing the Charter of Rights of the EU together with an international treaty (the ECHR) to which the member states (but not the EU) are party, along with the existence of an undefined group of common constitutional traditions, creates a somewhat confusing situation. The utility of the Charter is reduced because the ECJ would find itself unable to employ the Charter as a basis for constructing its own doctrine of rights, in the same way (theoretically) that the national tribunals would employ their respective constitutions. The idea that the table of rights of national constitutions determines the doctrine of those national courts is, however, an illusion. The catalogue of rights, effectively protected in a concrete legal order along with the content of such rights, depends very little on the literal meaning of

the corresponding declaration, and almost entirely on judicial interpretation. Such interpretation is determined, first, by the dominant ideas in the cultural space in which the system operates, and, second, by the particular concepts of the political community prevailing within that order.[53] That is why the rights protected in the different states are so similar, notwithstanding the literal meaning of their respective constitutions. And that is why it is difficult for each state to renounce its own conception of the appropriate balance between the levels of protection of the different rights. From this point of view, the peculiar structure of the EU poses a problem whose solution does not fit in any theory, neither at the present moment nor in the foreseeable future. Rather, the solution must be searched for through practice, without any other guide than prudence.

Each national order remains divided, from the point of view of rights protection, into two differentiated sectors: the first, comprising acts with no relationship whatsoever to the law of the EU, where the protection of rights remains exclusively in the hands of national courts; and the second, where the protection of rights falls to the ECJ. Since it is evident that the unity of the system requires that the content and the level of rights protection be the same in all cases, regardless of the sector of activity, both the ECJ and the national courts are equally obligated to act in a coordinated fashion. The ECJ cannot attend only to a specific interest in ensuring integration, while the national courts cannot dispense with that interest in favor of defining a national conception concerning the equilibrium between the different rights. To complete this difficult task, the relative lack of definition of the rights protected by the EU is not an inconvenience, but an advantage.

As indicated earlier, the indirect incorporation of the Charter into the law of the EU, the method least disturbing for the system of rights protection, is nonetheless totally useless as a stepping stone toward a European constitution. A future constitution will be served only by a Charter that has been integrated into the treaties, preferably in some distinguished place within them. What remains unclear, as expressed previously, is how such an integrated Charter will serve the constitutionalization of Europe.

If the idea behind providing an integrated Europe with a constitution is to create a new European political community with goals distinct from those of its member states, as seems to be the reasoning of its supporters, one must suppose that the integration of rights into the treaties arises out of the belief that the desired end of all political association is to serve the natural and inalienable rights of men and women. But if this is so, those who argue for the integration of rights into the treaties are badly mistaken. The rights whose

[53] Along these lines, see Jochen Abr. Frowein, *Wesentliche Elemente einer Verfassung* [*Essential Characteristics of a Constitution*], *in* L'ESPACE CONSTITUTIONNEL EUROPÉEN, DER EUROPÄISCHE VERFASSUNGSRAUM, THE EUROPEAN CONSTITUTIONAL AREA 71 (Roland Bieber & Pierre Widmer eds., Schulthess Polygraphischer Verlag AG 1995).

protection justifies the exercise of a political community's power over its members are not rights that place limits on power (which would be absurd), but rather are those that private individuals have against each other, rights that the political community will make effective through the creation and application of positive law.[54] The creation of a political community is a function of its objectives or goals, and not of its limits, which only operate as a condition placed upon that community.

In order for the Charter of Fundamental Rights to act as foundation for the future European constitution, it is necessary to see in those rights not conditions superimposed on the exercise of the EU's powers, or limits that have to be respected, but rather objectives to be attained. Since, with a few insignificant exceptions, those rights appear precisely defined as citizens' rights vis-à-vis state or institutional power, to understand them as objectives of the EU leads to the conclusion that the purpose of the EU, its raison d'être, is to guarantee that the member states respect those rights. This would make the delimitation of competencies between the EU and its members even more obscure and difficult, while leaving intact the apparatus in charge of its governance. It would be a leap into nothingness, a leap that, fortunately, is impossible from a political point of view.

In present-day Europe, those who resist increasing the powers of the EU at the expense of the states are called "Euroskeptics," while those who hold the opposite view are known as "Euroenthusiasts." The author of this paper is sincerely convinced that it is necessary to strengthen the EU, but that the best way to do so is not to endow the EU with a constitution in name only, but by confronting its real and serious problems head on. Among these, for example, and apart from the problems associated with a system of governance that has exhausted its possibilities, is the total incapacity of the EU to redistribute income or to execute a foreign policy of its own.

[54] So as not to engage in a longer explanation, I refer the reader to article 2 of the French Declaration of the Rights of Man, *supra* note 4, or articles 1 and 2 of the Virginia Declaration of Rights (United States) (1776), *available at* http://www.archives.gov/exhibit_hall/charters_of_freedom/bill_of_rights/virginia_declaration_of_rights.html, or to the U.S. Declaration of Independence (1776), *available at* http://www.house.gov/house/Declaration.html.