

Fordham International Law Journal

Volume 33, Issue 6

2011

Article 5

Challenges for the Protection of Fundamental Rights in the EU at the Time of the Entry into Force of the Lisbon Treaty

Jacqueline Dutheil de la Rochere*

*

Copyright ©2011 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Challenges for the Protection of Fundamental Rights in the EU at the Time of the Entry into Force of the Lisbon Treaty

Jacqueline Dutheil de la Rochere

Abstract

Concomitant with the entry into force of the Lisbon Treaty on December 1, 2009, many of the alleged weaknesses of the mechanisms of protection of fundamental rights are in the process of being addressed: the Charter of the Fundamental Rights of the European Union ("Charter") has acquired binding force, the European Union is due to accede to the European Convention of Human Rights, and the Fundamental Rights Agency ("Agency") has been established as a European Union ("EU") body in charge of monitoring the correct implementation of fundamental rights throughout the Union. This Essay will address three main questions. First, a question of legitimacy: is it of any consequence that the Charter has the same legal value as the treaties but is not part of the treaties? Second, a question of subsidiarity: what is the right level for the protection of fundamental rights? Last, a question of efficiency of the protection of fundamental rights: what role can the European Union Fundamental Rights Agency play?

ESSAY

CHALLENGES FOR THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU AT THE TIME OF THE ENTRY INTO FORCE OF THE LISBON TREATY

*Jacqueline Dutheil de la Rochere**

INTRODUCTION

Concomitant with the entry into force of the Lisbon Treaty on December 1, 2009,¹ many of the alleged weaknesses of the mechanisms of protection of fundamental rights are in the process of being addressed: the Charter of the Fundamental Rights of the European Union (“Charter”)² has acquired binding force, the European Union is due to accede to the European Convention of Human Rights,³ and the Fundamental Rights Agency (“Agency”) has been established as a European Union (“EU”) body in charge of monitoring the correct implementation of fundamental rights throughout the Union.⁴ In the 2009–2014 Commission there is a commissioner, Viviane Reding-Justice, in charge of fundamental rights.⁵ Is the situation now satisfactory? In this new context, what are the challenges still facing the protection of fundamental rights? Obviously the

* Professor and former President, University of Paris II. A similar version of this Essay was presented in Cambridge, England, at a December 2009 conference discussing the Treaty of Lisbon and its aftermath.

1. The Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. C 306/1, at 13 (consolidated version divided into the Treaty on European Union, 2008 O.J. C 115/13 [hereinafter TEU post-Lisbon], and the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47 [hereinafter TFEU]).

2. Charter of Fundamental Rights of the European Union, 2000 O.J. C 364/1 [hereinafter Charter of Fundamental Rights].

3. TEU post-Lisbon, *supra* note 1, art. 6(2), 2007 O.J. C 306, at 13.

4. Council Regulation No. 168/2007, 2007 O.J. L 53/1, at 2.

5. *See, e.g.*, Press Release, European Parliament, Summary of Hearing of Viviane Reding—Justice, Fundamental Rights and Citizenship (Jan. 11, 2010), http://www.europarl.europa.eu/pdfs/news/expert/infopress/20100111IPR67125/20100111IPR67125_en.pdf.

answers depend not only on the constitutional evolution of the European Union but also on various external and complementary factors.

Before trying to propose some elements of an answer, it is important to recall some landmark events on the question of human rights in the EU. As is well known, the EU began as the European Economic Community (“EEC”), totally economically oriented; it was not designed to be a human rights organization. The notion of human rights enshrined in the general principles of European Community (“EC”) law was forged by European Court of Justice (“Court of Justice” or “Court”) case law, inaugurated by *Stauder v. City of Ulm*,⁶ to counteract Germany’s questioning of the supremacy of EC law.⁷ Subsequently, the Court constructed a human rights doctrine in a series of relevant cases, but from a pragmatic perspective, without defining an overall human rights policy.⁸ The EEC did have one specific human rights provision, article 119 of the Treaty establishing the European Economic Community, which required equal pay for men and women.⁹ Further, the EC was relatively quick to develop human rights aspects of its external policy and enlargement policy, with repercussions on its internal policy. The EC moved gradually towards political initiatives as well as economic ones, implying a more direct and substantial concern for human rights, particularly in the context of action taken in the field of Cooperation in Justice and Home Affairs, the so-called third pillar, introduced by the Treaty of Maastricht’s Treaty on European Union (“Maastricht TEU”) in 1993. The initial Treaty on European Union’s article 6 reflected formulas of the Court of Justice’s case law concerning the respect of fundamental rights as general principles of Community law. However, the Court nonetheless held that the Community had no competence to

6. *Stauder v. City of Ulm*, Case 29/69, [1969] E.C.R. 419.

7. See TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* 204–05 & nn.9–11 (1999).

8. *Id.* at 204.

9. The initial Treaty Establishing the European Economic Community article 119 was absorbed into article 141(1) of the Consolidated Version of the Treaty Establishing the European Community, 2006 O.J. C 321 E/37 [hereinafter EC Treaty] (and now is found in TFEU, *supra* note 1, art. 157, 2008 O.J. C 115).

legislate in the domain of basic rights in its well-known Opinion 2/94.¹⁰

EU institutions, particularly the European Parliament, developed concern for human rights issues; but the Cologne European Council's designation in June 1999 of the convention charged with drafting the EU Charter of Fundamental Rights was the first formal initiative aimed at defining proper EU parameters of human rights protection. Until then, the incremental judicial and political developments concerning fundamental rights in the European Union were the product of reaction to historical circumstances, not the result of a thoughtful EU policy on human rights. Due to the difficulty of the new approach, the convention convened in 1999 gave preference to codification of existing practices instead of taking innovative routes. The Charter used the European Convention of Human Rights¹¹ as its main source of inspiration, enriched by provisions of the EC and EU treaties, secondary legislation, and the case law of the Court of Justice, plus some other international sources or constitutional traditions common to the Member States. The Charter's main novelty was its chapter on social rights, the formulation of which borrowed widely from that of the Community Social Charter¹² and EC secondary legislation.

The Charter of Fundamental Rights, proclaimed in Nice in December 2000, subsequently became a master card in the constitutional debate, as a potential bill of rights of the future constitution of the European Union.¹³ The decision to include the Charter *in extenso* as Part II of the draft Treaty Establishing a Constitution for Europe¹⁴ was part of the process of the constitutionalization of the EU. Nonetheless, the substance of the Charter was not discussed at all at the convention of 2002–2003,

10. Opinion 2/94, [1996] E.C.R. I-1759, ¶¶ 27, 33–35.

11. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

12. Community Charter of the Fundamental Social Rights of Workers, Dec. 9, 1989, available at <http://www.aedh.eu/the-community-charter-of.html>.

13. See Tony Joris & Jan Vandenberghe, *The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?*, 15 COLUM. J. EUR. L. 1 (2008); John L. Murray, *Fundamental Rights in the European Community Legal Order*, 32 *FORDHAM INT'L L.J.* 531, 547 (2009).

14. See Draft Treaty Establishing a Constitution for Europe, Part II, 2004 O.J. C 310/1, at 41–54 (never ratified) [hereinafter Draft Treaty].

which prepared the initial draft constitutional treaty, nor at the subsequent Intergovernmental Conference; instead, participants only discussed the question of its possible binding effect and the limits thereof.¹⁵

The adoption of the Lisbon Treaty marks the renunciation of any structuring role the Charter could have played in the constitutional order. The explicit provisions of the new article 6 of the Treaty on European Union¹⁶ (“TEU”) post-Lisbon on fundamental rights have the merit of clarifying sources. However, the Charter is referred to as having the same legal value as the treaties, but is not reproduced in the Lisbon Treaty itself. TEU article 6 only includes the Charter along with the European Convention of Human Rights to which the Union is mandated to adhere (article 6.2) and other fundamental rights not included in the Charter which altogether will constitute general principles of EU law (article 6.3).

Other new TEU post-Lisbon provisions merit attention, which all tend to reduce the significance of the Charter. TEU post-Lisbon article 2 enumerates the values on which the Union is founded, making an express reference to protection of the rights of persons belonging to minorities.¹⁷ A new general obligation to combat exclusion and discrimination is formulated, including solidarity between generations and protection of the right of the child.¹⁸ Further, the jurisdiction of the European Court of Justice is substantially expanded to areas such as police and judicial cooperation in the area of criminal law, which are of clear relevance to the protection of fundamental rights.

15. Council of the European Union, 2007 Intergovernmental Conference [ICG] Mandate, ¶ 9 & n.3 (2007). The working group in charge of the Charter at the convention of 2002–2003 was ready to accept any concession required by the opponents to the Charter (among whom the British were vocal) concerning its scope, the conditions of its interpretation, or the value of explanations referred to in the Charter in order to include it in the draft. The general provisions of the Charter (articles 52 to 54) were adopted in consequence and the Charter became Part II of the draft Constitutional Treaty. See Draft Treaty, *supra* note 14, art. II, 2004 O.J. C 310/1, at 41–54.

16. TEU post-Lisbon, *supra* note 1, art. 6, 2008 O.J. C 115, at 19.

17. *Id.* art. 2, at 17. Minorities are referred to in articles 21 and 22 of the Charter.

18. *Id.* art. 3(3), at 28. Note that the entire article 21 of the Charter deals with non-discrimination.

Additionally, TEU post-Lisbon provisions emphasize democracy, participation, and transparency.¹⁹

At this point in time, it seems interesting to examine to what extent the questions concerning fundamental rights which predated the entry into force of the Lisbon Treaty remain partly unanswered despite (and sometimes because of) various provisions of the treaty.

This Essay will address three main questions. First, a question of legitimacy: is it of any consequence that the Charter has the same legal value as the treaties but is not part of the treaties? Second, a question of subsidiarity: what is the right level for the protection of fundamental rights? Last, a question of efficiency of the protection of fundamental rights: what role can the EU Fundamental Rights Agency play?

I. *THE CHARTER HAS THE SAME LEGAL VALUE AS THE TREATIES BUT IS NOT PART OF THE TREATIES*

A. *Primary Law by Reference*

After the Draft Constitutional Treaty failed in ratification referenda in France and the Netherlands in 2005, the general political reaction to any forms of constitutional symbols affected the Charter. The political leaders considered that the Charter could no longer appear as Part II of the Treaty; if maintained, it would have to have a lower profile. A direct mention in article 6 TEU of the Lisbon Treaty was preferred to a specific protocol. Consequently, the text of the Charter does not appear anywhere in the official primary text of the published treaties. In contrast, Protocol 30²⁰ and Declarations 1, 53, 61, and 62²¹ provide for

19. Broad consultation with concerned parties, including NGOs, is becoming the norm at the EU level. TEU post-Lisbon, *supra* note 1, arts. 11(1), 11(2), 11(3), 2008 O.J. C 115, at 21. *See* National parliaments are equipped with a new role in overseeing EU legislation. *Id.* art. 12, at 21; Protocol on the Role of National Parliaments in the European Union, 2007 O.J. C 306/01, at 148. For the first time in the history of European integration, an instrument of direct democracy is introduced at the EU level. One million citizens who are nationals of a “significant number of Member States” can invite the European Commission to submit a proposal of a legal act. *See* TEU post-Lisbon, *supra* note 1, art. 11(4), 2008 O.J. C 115/13, at 21.

20. EC Treaty, *supra* note 9, Protocol 30, 2006 O.J. C 321 E/37.

21. *See* Council of the European Union, Final Act of the IGC, 2007 O.J. C 306/231, at 249, 267, 270.

restrictions on the application of the Charter of Fundamental Rights, either in general or with regard to specific Member States: the Czech Republic, Poland, and the United Kingdom.

TEU post-Lisbon article 6.1 stipulates: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on December 12, 2007, which shall have the same legal value as the Treaties.”²²

Accordingly, the Charter does not have by its nature the status of primary law; it is primary law only because the TEU accords it “the same legal value as the Treaties.”²³ There is no special dignity given to the substantive content of the Charter, nor does it have a clause of perpetual nature. Incidentally, in the absence of special provisions thereupon, one may wonder how the Charter might be amended in the future. Moreover, the recognition that the Charter should have the same legal value as the treaties is immediately balanced by text limiting the scope of the Charter and its interpretation. Article 6.1 TEU goes on to say:

The provisions of the Charter shall not extend in any way the competence of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.²⁴

There are a number of limiting provisions, some mentioned directly in article 6.1, and others that appear in the general provisions of the Charter and were added to the initial text of the Charter during the elaboration of the Draft Treaty Establishing a Constitution for Europe.²⁵ These general limitations are in addition to the numerous specific limitations inserted in the

22. TEU post-Lisbon, *supra* note 1, 2008 O.J. C 115, at 19.

23. *Id.*

24. *Id.*

25. *See generally* Draft Treaty, *supra* note 14. These limitations refer to the constitutional traditions common to the Member States, national legislation implementing principles contained in the Charter, national laws and practice, and explanations annexed to the Charter providing guidance for its interpretation. Charter of Fundamental Rights of the European Union, arts. 52–54, 2007 O.J. C 303/1, at 13–14.

various substantive provisions of the Charter.²⁶ Further, according to TEU post-Lisbon article 6.3, the “rights, freedoms and principles set out in the Charter” are put on the same level as “fundamental rights, as guaranteed by the European Convention . . . of Human Rights . . . and as they result from the constitutional traditions common to the Member States” which “constitute general principles of Union’s law.”²⁷ This means that the Court of Justice and the Court of First Instance (“CFI”) (now named the General Court) may supplement the substantive provisions of the Charter by using other sources of fundamental rights as long as they qualify as general principles of Union law. At the very moment when the Charter acquires the authority of primary law, that authority is undermined.

To a certain extent, the period that ended with the entry into force of the Lisbon Treaty may appear as the golden age of the Charter, freely used by EU judges as the authoritative instrument of reference concerning fundamental rights. The Charter proclaimed in Nice by the Presidents of the European Parliament, the Council, and the Commission, although not binding as such, has been progressively referred to by the CFI and by the Court of Justice, encouraged in that direction by its Advocates General who considered it as the most valuable expression of general principles of EC/EU law.²⁸ More recently the Court of Justice referred directly to the Charter as a direct source of fundamental rights either because a directive referred to the Charter in its recitals,²⁹ or because of the generally accepted authority of the Charter.³⁰ Because the TEU post-Lisbon has included the Charter among other sources of primary law, the Charter has gained more influence at the level of Member States. But ultimately, the substantive provisions of the Charter have no more authority than any other provision of the

26. *See, e.g.*, arts. 27, 28, 30, 34, 2007 O.J. C 303/1, at 8–9.

27. TEU post-Lisbon, *supra* note 1, arts. 6.1, 6.3, 2008 O.J. C 115/13, at 19.

28. *See, e.g.*, Opinion of Advocate General Tizzano, *The Queen v. Sec’y of State for Trade & Indus.*, Case C-173/99, [2001] E.C.R. I-4881, ¶¶ 26–27.

29. *Parliament v. Council*, Case C-540/03, [2006] E.C.R. I-5769, ¶ 4 (concerning the validity of a directive on family reunification).

30. *See, e.g.*, *Laval un Partneri, Ltd. v. Byggnadsarbetareförbundet*, Case C-341/05, [2007] E.C.R. I-11,767, ¶ 2; *Int’l Transp. Workers Fed’n. v. Viking Line ABP*, Case C-438/05, [2007] E.C.R. I-10,779; *Unibet Ltd. v. Justitiekanslern*, Case C-432/05, [2007] E.C.R. 2271, ¶ 37.

treaties and its scope, encapsulated in written law, is more limited than that of other general principles of EU law.

B. *Scope of the Charter: Fundamental Rights and the Competences of the Union*

When TEU post-Lisbon article 6.1 takes care to underline that the Charter shall not extend the competences of the Union, this is not new—article 51.2 of the Charter heralded this from the origin, and that was subsequently reinforced in the second version (Part II of the Draft Constitutional Treaty and the text proclaimed in 2007).³¹ The purpose of this reservation is to diminish the anxiousness of those who are afraid that the recognition of a right in the Charter could have the effect of engendering an EU competence concerning such right. A number of eminent lawyers have demonstrated that such fear is the result of insufficient understanding of the mechanism of protection of fundamental rights in the Union.³² Fundamental rights limit the actions of the Union; they do not found new competences, as the Court very clearly stated in its Opinion 2/94.³³ For instance, the Union, in the exercise of its own competences, has an obligation to respect freedom of religion; this does not imply in any way that it has competence to legislate on religious matters.³⁴

These fears exist and have existed from the beginning of the discussion of the Charter; it is of the essence of fundamental rights that they relate to the person in his or her entirety while an international organization of the type of the EU has only conferred competences. There exists an essential contradiction between the fundamentality of the Charter rights and the limitations imposed by the Treaties to the scope of their competences. The vicissitudes during the renegotiation of the Lisbon Treaty and its entry into force demonstrate that these

31. The new redaction of article 51.2 of the Charter adds the sentence: “The Charter does not establish any new power or task for the Community or the Union, or modify powers or tasks defined by the Treaties.” Charter of Fundamental Rights, *supra* note 25, art. 51(2), 207 O.J. C 303, at 13.

32. See, e.g., Jean-Paul Jacqu , *Le Trait de Lisbonne une vue Cavali re*, 44 REVUE TRIMESTRIELLE DE DROIT EUROP EN 439, 447 (2008).

33. Opinion 2/94, [1996] E.C.R. I-1759, ¶¶ 27, 33–35.

34. Compare the text of the Charter concerning freedom of thought, conscience, and religion with that of TFEU art. 17, 2008 O.J. C 115, at 55.

fears and contradictions are still there, reinforced by the recognition that the Charter now has the authority of primary law.

If we examine the fears expressed by the President of the Czech Republic concerning the possible effect of the Charter on Beneš decrees dating from the 1940s,³⁵ it is clear his concerns are more political than the result of serious legal advice. However, who can say with certainty that there is no issue concerning the exact scope of the Charter taken together with the uncertain boundaries of EU competences, and that article 6.1 TEU gives a definite answer?

The scope of the Charter is determined in its article 51. This provision establishes that the Charter applies to the institutions and bodies of the Union, with due regard for the principle of subsidiarity and to the Member States “only when they are implementing Union law.”³⁶ Then we turn to the Explanations to the Charter of Fundamental Rights, which according to article 6.1, should be used for the interpretation of the Charter:

As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law. The Court of Justice confirmed this case-law in the following terms: “In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules.” Of course this principle, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.³⁷

35. See Steve Peers, *The Beneš Decrees and the EU Charter of Fundamental Rights*, STATEWATCH, Oct. 12, 2009, <http://www.statewatch.org/news/2009/oct/lisbon-benes-decree.pdf>.

36. Charter of Fundamental Rights, *supra* note 25, art. 51(2), 2007 O.J. C 303, at 13.

37. Explanations Relating to the Charter of Fundamental Rights title VII, 2007 O.J. C 303/17, at 32 [hereinafter Explanations] (citations omitted).

One may note the variation in vocabulary. Article 51 of the Charter says “only when they are implementing Union law.”³⁸ The Explanations speak of acting “in the scope of Union law,” but cite the recent case law which refers to “implementing” Union law. Whatever the imperfection of redaction, the correct interpretation of article 51 would seem to be not what it says but how it has to be understood in the light of the case law, and that means that the Charter might apply to Member States when they are acting within the scope of Union law. But even that remains unclear and uncertain because the boundaries of EU law depend on an evolution of the case law of the Court, which no one can anticipate.

Some critical comments have recently been published concerning the unpredictability of the Court on the question of EU competencies.³⁹ The problem is not that fundamental rights cover wide areas that do not necessarily coincide with the limits of competence of the Union: this is of their very nature as instruments of protection of individuals. The problem comes from the complex system according to which competences are conferred to the Union but are frequently implemented by the Member States. The uncertain limits of the scope of Union law have the consequence that no one can anticipate the possible impact of the intersection between Union law and the rights enshrined in the Charter. The late Judge Pescatore cited the “*surface de contact*” between EC law and human rights.⁴⁰ Political concerns naturally arise, reinforced by the recognition that the Charter has the legal authority of primary law, and not alleviated by the affirmation that the Charter shall not extend the competences of the Union. The Charter may yet have unexpected results when issues arise that were not initially intended to fall within the realm of EU law (for example, family life, patronymic name, and private property). Protocol 30 may

38. Charter of Fundamental Rights, *supra* note 25, art. 51.

39. See e.g., Editorial Comments, *The Court of Justice in the Limelight Again*, 45 COMMON MKT. L. REV. 1571, 1571–79 (2008).

40. Pierre Pescatore, *La Coopération Entre la Cour Communautaire, les Juridictions Nationales et la Cour Européenne des Droits de l'Homme Dans la Protection des Droits Fondamentaux: Enquête Sur un Problème Virtuel* [Cooperation between the Community Court, National Courts, and European Court of Human Rights in the Protection of Fundamental Rights: Examination of a Virtual Problem], 466 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 151, 156 (2003).

prove not to be the shield that Poland and the United Kingdom wanted.⁴¹ The problem does not come from the way fundamental rights are defined in the Charter, but rather from the uncertainty of the scope of EU law which still remains under the Lisbon Treaty.

C. *Interpretation of the Charter: Balance Between Fundamental Rights and Economic Freedoms*

The Charter has the same legal value as the treaties but is not a part of the treaties; it is by a Treaty of Lisbon provision that the Charter acquires a dimension of primary law. This may have unpredictable consequences when the Charter has to be interpreted in case of conflict between provisions of the treaties and rights enshrined in the Charter. The recent decisions of the Court in 2007 in *Viking* and *Laval*⁴² indicate, first, that the Court, after the signature of the Lisbon Treaty but before its entry into force, was ready to accept that the Charter could create legal obligations and, second, that in case of conflict between fundamental rights and fundamental economic freedoms established by the treaties the latter might prevail (the Court's conclusion in *Laval*,⁴³ later reiterated in *Rüffert*⁴⁴). The cases present not so much an issue of rights opposed to principles, or an issue of justiciability under the Charter's article 52.4 or Protocol 30 of the Lisbon Treaty, but rather a question of balance between rights. In *Laval*, for example, the Court analyzed the social right to strike as an exception to the free movement of services, one of the treaty's fundamental economic freedoms.

It is unlikely that under the Lisbon Treaty, the EU will embark on a more human-rights-oriented profile. Although the economic potentialities of the European Economic Community have been more or less exhausted by the completion of the single market and the achievement of the four freedoms (even if many

41. On the interpretation of Protocol 30, see Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 *COMMON MKT. L. REV.* 617, 665–71 (2008).

42. *Int'l Transp. Workers Fed'n. v. Viking Line ABP*, Case C-438/05, [2007] E.C.R. I-10,779; *Laval un Partneri, Ltd. v. Byggnadsarbetareförbundet*, Case C-341/05, [2007] E.C.R. I-11,767.

43. *Laval*, [2007] E.C.R. I-11,767, ¶¶ 103–11.

44. *Rüffert v. Niedersachsen*, Case C-346/06, [2008] E.C.R. 1989, ¶ 44.

fields of possible economic harmonization subsist), the EU, now a hybrid body and a significant world political actor, retains its economic origins. In contrast, in human rights thinking, following the views of the Strasbourg Court of Human Rights, a right-holder is seen as an individual per se and fundamental rights are interpreted and applied objectively. The EU model is very different. Freedom of movement and other EU-based freedoms are firmly attached to EU citizenship; economic freedoms represent the very structure of the Union, while the other fundamental rights—for example, social rights—enshrined in the Charter do not, even if they correspond to competences existing in the treaties (the current TFEU chapter on Social policy).⁴⁵ The European Trade Union Conference's proposed clause in the Lisbon Treaty, which would have set as a principle that fundamental social rights should prevail over the fundamental economic freedoms of the Union, was not adopted.⁴⁶ Therefore we may assume that the Court of Justice will continue to use its discretion in determining the correct balance between economic freedoms and social rights on a case-by-case basis, using various modes of reasoning: proportionality, exceptions, and derogations.⁴⁷ The task of the Court will become more and more difficult with the frequent absence of consensus between the twenty-seven Member States on economic and social questions.

This impression that the present state of affairs should remain unchanged is reinforced by the mention in article 6.3 TEU that general principles of EU law will continue to play their role as a source of fundamental rights in parallel with and as a complement to the Charter and the European Convention on Human Rights. Fundamental rights in the Lisbon Treaty have a restrictive and not constructive function.

45. TFEU, *supra* note 1, arts. 151–61, 2008 O.J. C 115, at 114–19.

46. European Trade Union Confederation, Res. EC.179, (Mar. 4, 2008), 4 (responding to the Court judgments in *Viking* and *Laval*), available at http://www.etuc.org/IMG/pdf_ETUC_Viking_Laval_-_resolution_070308.pdf.

47. See, e.g., Schmidberger v. Austria, Case C-112/00, [2003] E.C.R. I-5659, ¶ 60; Omega Spielhallen v. Bonn, Case C-36/02, [2004] E.C.R. I-9609, ¶¶ 1–2.

II. *WHAT IS THE RIGHT LEVEL FOR THE PROTECTION OF FUNDAMENTAL RIGHTS?*

It seems quite sensible to consider that the respect of fundamental rights should be recognized and ensured at the level where decisions are taken and substantive legislative or regulatory power is exerted. Recent history also adds the experience of mechanisms of supervision at a supranational level, either regional or universal. In the early European Community, the protection of fundamental rights received its initial inspiration not only from the constitutional traditions common to the Member States, but also from principles enshrined in international conventions of which Member States were signatories or parties, principally the European Convention on Human Rights. The question of the relationship between the protection granted by the European Convention of Human Rights and that proper to the EC/EU system has been a permanent feature of the European law landscape that the Lisbon Treaty addresses clearly. But there are other dimensions linked to globalization and the claim for national identity that the new treaty leaves as they stand.

A. *Adherence of the European Union to the European Convention of Human Rights*

The Lisbon Treaty's TEU article 6.2 states that the Union shall accede to the European Convention of Human Rights and, unsurprisingly, that "[s]uch accession shall not affect the Union's competences as defined in the treaties."⁴⁸ Adherence by the EU to the Convention will require negotiation and conclusion in accordance with the provisions of TFEU article 218, which requires unanimity in the Council and the consent of the European Parliament.⁴⁹ The Council of Europe has long foreseen this. Some institutional adaptations will have to be made on both sides, but the result will have two significant advantages. First, powers of action within the EU legal order will become subject to external supervision in the same manner as comparable powers exercised by legislative, administrative, and judicial authorities of the Member States. This will avoid artificial

48. TEU post-Lisbon, *supra* note 1, 2008 O.J. C 115, at 19.

49. TFEU, *supra* note 1, art. 218, 2008 O.J. C 115, at 144–45.

constructions⁵⁰ presented with only mitigated success to the European Court of Human Rights when it has reviewed in recent years the behavior of EU institutions,⁵¹ and will serve to guarantee the application of a common code of fundamental values. Second, this should help to achieve the coherence between the Charter and the Convention that article 52.3 of the Charter addresses. Once the Union is a party to the Convention, the provisions of the Convention, together with the case law of the Strasbourg Court, should serve as a minimum standard. This will not prevent EU law from providing more extensive protection, through either the Court's interpretation of the Charter or the introduction of new general principles of human rights not contemplated at the time of the drafting of the Convention in the 1950s.⁵²

The process of EU accession will certainly take some time. One may also expect problems in achieving ratification. The EU's accession may well increase the burden on the already overloaded European Court of Human Rights, making the modifications introduced by protocol 14 to the Convention even more welcome.

B. *Globalization and Alignment to Universal Standards*

The prevention of terrorism has recently shown that the EU cannot isolate itself from universal human rights constraints. The European Union, to the extent it holds competences previously held by sovereign states and now transferred to it through the combined treaty provisions concerning internal market economic freedoms and the Common Foreign and Security Policy, has to comply with the obligations imposed by UN Security Council resolutions adopted under Chapter VII of the UN Charter.⁵³ However, the *Yusuf*⁶⁴ and *Kadi*⁵⁵ judgments

50. This term refers to the phenomenon that arises from the obligation of victims of a violation of the ECHR by an EU institution to bring a complaint against all the Members States rather than the institutions themselves. Because the EU is not a party to the Convention, there is no way to bring a case directly against EU institutions.

51. See, e.g., *Matthews v. United Kingdom*, 1999-I Eur. Ct. H.R. 251 (1999).

52. This is, for instance, the case as regards article 9 of the Charter of Fundamental Rights as compared with article 12 of the European Convention on Human Rights (the wording concerning family rights has been modernized to cover relationships other than marriage).

53. U.N. Charter arts. 39–51.

demonstrate that the standard of protection of fundamental rights that the Security Council Sanctions Committee considers when deciding on measures that freeze the assets of persons included on a list of presumed terrorists has little to do with accepted European codes of values. Is it possible that such sanctions should be implemented in the European Union, without any margin of discretion, through EU legal instruments such as common positions of the Council and EC regulations? The answer of the CFI in *Kadi* was that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested sanction regulation, since it was designed to give effect to a resolution adopted under a provision of the UN Charter affording no latitude in that respect, could not be the subject of judicial review. However, conscious of the importance of the respect of a minimum standard of human rights, the CFI surprisingly introduced the idea that it could and should examine the compatibility of the contested regulation with the norms of *jus cogens* considered as a minimum standard of human rights protection under international law.⁵⁶ The CFI then concluded that the principles of *jus cogens* had not been infringed.

On appeal, the Court of Justice, in its judgment of September 3, 2008, took a different view.⁵⁷ The Court considered that the judicial review of the lawfulness of the contested regulation in the light of fundamental rights is “a constitutional guarantee forming part of the very foundations of the Community.”⁵⁸ As a consequence, it belongs to the Court “in accordance with the powers conferred on it by the EC Treaty, [to] ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including the review of measures which . . . are

54. *Yusuf & Al Barakaat Int'l Found. v. Council*, Case T-306/01, [2005] E.C.R. II-3533.

55. *Kadi & Al Barakaat Int'l Found. v. Council*, Joined Cases C-402/05 P & C-415/05 P, [2008] E.C.R. I-6353.

56. *Kadi v. Council and Commission*, T-315/01 [2005] E.C.R. II-3649, ¶ 226.

57. *Kadi & Al Barakaat*, [2008] E.C.R. I-6353, ¶¶ 88, 314, 327.

58. *Id.* ¶ 290.

designed to give effect to resolutions adopted by the Security Council under Chapter VII of the UN Charter.”⁵⁹

The issue cannot be presented more clearly: what is the right level for the definition of fundamental rights standards? Should the principle of supremacy of international law prevent the European Union from imposing the respect of its own human rights standards when implementing international sanctions in its own legal system, using its proper instruments of regulation and judicial review? Interestingly, the Commission tried, in its submission to the Court, to defend a sort of “*so lange*” type of reasoning, arguing that so long as under the UN system of sanctions the individuals and entities concerned had an acceptable opportunity to be heard through a mechanism of administrative review, the Court should not intervene in any way whatsoever.⁶⁰ In response, the Court scrutinized the re-examination procedure before the UN Sanctions Committee, and the amendments recently made to it, before holding that the re-examination procedure did not offer sufficient guarantees of judicial protection of rights. Therefore the Court considered that it had a duty to proceed to a full examination of the lawfulness of the contested regulation in the light of fundamental rights, which form part of the general principles of Community law. The Court ultimately concluded that the contested regulation infringed several rights principles (i.e., right to defense, right to be heard, and right of property).⁶¹ A door remains open for reconsideration in the unlikely event that the UN establishes a system of sanctions guaranteeing judicial protection.

At the moment, while the Lisbon Treaty underlines the specificities of EU external action, there seems to exist a certain tendency of the Court to proclaim the EU’s constitutional identity and, accordingly, resist the primacy of international law. Other examples can be cited in the area of trade law or the law of the sea, such as the Court’s judgments in *FIAMM*⁶² and *Intertanko*.⁶³ The debate concerning the respective application of

59. *Id.* ¶ 326.

60. *Id.* ¶ 319.

61. *Id.* ¶ 330.

62. *FIAMM & FEDON v. Council*, Joined Cases C-120–21/06 P, [2008] E.C.R. I-6513.

63. *The Queen, on the application of Intertanko v. Sec’y of State for Transp.*, Case C-308/06, [2008] E.C.R. I-4057.

international standards of protection of human rights in comparison to European ones—henceforth enshrined in the Charter and the other sources referred to in the new article 6 TEU—does not supersede another, more traditional debate on the relationship between European and national level of protection of fundamental rights.

C. *European and National Protection of Fundamental Rights*

This classical theme remains of interest because of some recent developments in national constitutional court case law. Article 53 of the Charter, defining the “Level of Protection,” states that nothing in the Charter “shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their . . . fields of application . . . by the Member States’ constitutions.”⁶⁴ The national constitutional courts did not wait for the Lisbon Treaty to accord the authority of primary law to the Charter. The well-known classical case law of German and Italian constitutional courts concerning their protection of fundamental rights has been enriched by French⁶⁵ and Spanish constitutional courts: respect for the primacy of EC/EU law to the extent it does not interfere with or contradict fundamental rights or fundamental values expressed in the national constitution and constitute an essential element of national sovereignty.

Interestingly, the decision of the German Constitutional Court of June 30, 2009 on the Lisbon Treaty⁶⁶ is centered on the structural problems of the European Union and its democratic legitimacy. The question of fundamental rights arises on two occasions. First, the Court examines the extent to which the right to vote is sufficiently respected, the right to vote being considered equivalent to a fundamental right and anchored in human dignity, a fundamental element of the principle of democracy.⁶⁷ Further, examining the extent of transfer of powers to the European Union, the German Constitutional Court recommends a narrow interpretation of those Lisbon Treaty

64. Charter of Fundamental Rights, *supra* note 25, 2007 O.J. C 303/1, at 14.

65. *See, e.g.*, CC decision no. 2004-496DC, June 10, 2004, O.J. 192, 11,182.

66. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, Entscheidungen des Bundesverfassungsgerichts, ¶ 210 (F.R.G.).

67. *Id.* ¶ 210.

provisions that may have an impact on the citizens' circumstances of life, private space, political action, and social security.⁶⁸ It recommends the same narrow application of the provisions on criminal law and criminal procedure:

To the extent that in these areas, which are of particular importance for democracy, a transfer of sovereign powers is permitted at all, a narrow interpretation is required. This concerns in particular the administration of criminal law, the police monopoly, and that of the military, on the use of force, fundamental fiscal decisions on revenue and expenditure, the shaping of the circumstances of life by social policy and important decisions on cultural issues such as the school and education system, the provisions governing the media, and dealing with religious communities.⁶⁹

The words used by the Federal Constitutional Court remind us of precise cases decided by the Court of Justice. The German court's judgment clearly inspired the Czech Constitutional Court in its decision of November 3, 2009.⁷⁰

No striking conclusion can be drawn concerning the protection of fundamental rights, except that the national courts reaffirm their own legitimate role—the Court of Justice must pragmatically take into account this request for a restrictive interpretation of the Lisbon Treaty when fundamental rights are affected. This is in line with the Lisbon Treaty's TEU article 4.2, which underlines that “[t]he Union shall respect the . . . national identities” of Member States “inherent in their fundamental structures, political and constitutional.”⁷¹ However, it becomes clear that a multilevel system of protection of fundamental rights has to be considered, combining national, regional and universal mechanisms, in reaction to multilevel threats.

68. *Id.* ¶¶ 226, 249.

69. Press Release, Federal Constitutional Court, Act Approving the Treaty of Lisbon Compatible with the Basic Law; accompanying law is unconstitutional to the extent that German legislative bodies have not been accorded sufficient rights of participation (June 30, 2009).

70. Press Release, Constitutional Court, The Treaty of Lisbon is in conformity with the Constitutional Order of the Czech Republic and there is nothing to prevent its ratification (Nov. 3, 2009).

71. TEU post-Lisbon, *supra* note 1, 2008 O.J. C 115, at 18.

III. *EFFICIENCY OF THE PROTECTION OF FUNDAMENTAL RIGHTS: THE ROLE OF THE EU FUNDAMENTAL RIGHTS AGENCY*

As underlined above, the first aim of the European Community legal order was not the protection of an individual's fundamental rights, but rather the construction of an internal market in order to create a common European future. Fundamental rights were only gradually recognized and only to limit the discretion of supranational institutions. The recognized rights took the shape of unwritten general principles used by the Court in its process of judicial review. However, after the Maastricht and Amsterdam Treaties added TEU articles 6 and 7, the concern for fundamental rights contributed to the determination of the Union's objectives and activities, and induced the development of a more constructive policy in that area. In 1993, the European Council set out the well-known Copenhagen criteria, which the then Central European applicant nations had to fulfill before they could join the EU in 2004 and 2007. The first Copenhagen criterion required the applicants to be representative democracies with a respect for fundamental rights. This political policy requirement set by the European Council and enforced by the Commission during the pre-accession period indicated that the monitoring and enforcement of human rights mattered as much as *ex post* judicial review. The view that negative control should be supplemented by positive action, i.e., active political and administrative promotion of fundamental rights, eventually led, after the adoption of the Charter of Fundamental Rights, to the creation of the Fundamental Rights Agency.

In the 1990s, the growing power of xenophobic parties in several Member States⁷² as well as continuing structural problems in the treatment of minorities such as the Roma people in Central Europe⁷³ drove the process for establishing a European

72. Far-right xenophobic parties have achieved significant minorities in national and regional parliaments in Austria, Belgium, France, Germany, and the Netherlands since the mid-1990s.

73. See István Pogány, *Minority Rights and the Roma of Central and Eastern Europe*, 6 *HUM. RTS. L. REV.* 1, 3 (2006) ("Nor have minority rights instruments reversed the escalation in anti-Roma sentiment and violence that has been a feature of the CEE region since the ousting of Communist administrations.").

Monitoring Centre for Racism and Xenophobia (“Centre”), which was created by EC Regulation 1035/97 of June 2, 1997.⁷⁴ The Centre’s prime task was to provide “objective, reliable and comparable data” on the phenomena of racism, xenophobia, and anti-Semitism at the European level.⁷⁵ The Centre was mandated to examine the causes, consequences, and effects of these manifestations, and identify examples of successful counterstrategies. After the adoption of the Charter of Fundamental Rights, the European Council, in December 2003, stressed in its conclusions the importance of human rights data collection and analysis with a view to defining Union policy in the field of human rights. The European Council decided to broaden the mandate of the Centre to become a human rights agency. The EU Agency for Fundamental Rights was established by Council Regulation 168/2007 of February 15, 2007 and commenced its work on March 1, 2007.⁷⁶

The Agency is one of about thirty EU administrative agencies. They carry out administrative tasks, employing observational and scientific expertise that the Commission is not equipped to provide. It is significant that the Agency is not denominated as a “Human Rights” Agency, but as a “Fundamental Rights” Agency. First, this echoes the title of the Charter; the Agency is supposed to become a center of expertise for fundamental rights issues at the EU level, with the aim of making the contents of the Charter more tangible. Further, the term fundamental rights, which was preferred by the Council and the European Parliament to that of human rights, seems to refer, at least in Europe, more frequently to domestic constitutional guarantees while human rights is the term customarily used for international instruments.⁷⁷ The Agency thus aims at the promotion of individual rights through administrative activity in complement to judicial protection. Its scope and influence remain limited.

74. Council Regulation No. 1035/97, 1997 O.J. L 151.

75. *Id.* art. 2.

76. Council Regulation No. 168/2007, 2007 O.J. L 53/1.

77. See J. von Bernstorff & A. Von Bogdandy, *The EU Fundamental Rights Agency within the European and International Rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of Administrative Law*, 46 COMMON MKT. L. REV. 1023–33 (2009).

A. Limited Scope

Pursuant to article 2 of Regulation 168/2007, the Agency's objective is "to provide the relevant institutions, bodies, offices and agencies of the Communities and its Member States . . . with assistance and expertise relating to fundamental rights."⁷⁸ This ambition meets a number of practical limits stemming from its statute: the Agency has no legislative or regulatory powers, no quasi-judicial competence similar to what an ombudsman would have (it cannot deal with individual complaints), and no authority to adopt legally binding decisions with effect upon third parties. The Agency's powers are quite limited in trying to serve as a basis for significant administrative action.

In accordance with article 3(3) of the regulation, the Agency "shall only deal with fundamental rights issues in the European Union and its Member States when implementing Community law."⁷⁹ This is even more restrictive than the Charter, which refers in article 51(1) to the entire field of EU law. Thus, the regulation was not intended to enable any review of activities in the areas of police and judicial cooperation in criminal matters under the TEU,⁸⁰ the so-called third pillar, a field that is particularly sensitive when it comes to the protection of fundamental rights. However, a Council Declaration of February 12, 2007 regarding the consultation of the Agency within the so-called third pillar indicates that "the Union institutions may, within the framework of the legislative process . . . each benefit, as appropriate and on a voluntary basis, from such expertise also within the areas of police and judicial cooperation in criminal matters."⁸¹

Notwithstanding the limitation implied by article 3(3), the French Council Presidency in the second semester of 2008 commissioned an opinion by the Agency on the fundamental rights conformity of a draft framework decision on the use of air Passenger Name Records ("PNR") for law enforcement purposes

78. Council Regulation No. 168/2007, art. 2, 2007 O.J. L 53/1.

79. *Id.* art. 3.

80. Consolidated Version of the Treaty on European Union, 2002 O.J. C 325/05 (as amended by the Treaty of Nice, 2001 O.J. C 80/1).

81. *See* Council of the European Union, Proposal for a Council Regulation Establishing a European Union Agency for Fundamental Rights, Doc. No. 6166/07, 4 (Feb. 2007).

under TEU articles 29, 30(1), and 34(2).⁸² In its opinion, the Agency concluded that part of the draft framework decision violated European fundamental rights standards under the European Convention of Human Rights and the EU Charter of Fundamental Rights and that modifications were therefore necessary.⁸³ The fact that an EU institution presented a specific request made it possible for the Agency to intervene. In the future, the entry into force of the Lisbon Treaty should put an end to the special status of the field of cooperation in police and criminal affairs because the field is now covered by TFEU articles 82 to 89. Note however, that the U.K. and Ireland by Protocol 21 will not take part in such cooperative measures.⁸⁴

Article 3(3) of the Regulation 168/2007 states that the Agency “shall deal with fundamental-rights issues . . . in its Member States when implementing Community law.”⁸⁵ The focus on implementation instead of the broader formulation “within the scope of application of Community law” seems deliberate,⁸⁶ it authorizes the exclusion of cases where Member States derogate from Union law. Yet the more recent case law of the Court of Justice, which expands the concept of implementation, needs to be taken into account although, as mentioned earlier, there is a risk of provoking negative reactions from the part of some Member States’ constitutional courts and political circles.

B. *Preventive Role of the Agency*

The role of the Agency is a preventive one: it functions as an expert network identifying relevant fundamental rights issues with a view toward developing and reforming EU legislation. It may contribute to diminishing the likelihood of subsequent court intervention.

82. See European Union Agency for Fundamental Rights, *Opinion on the Proposal for a Council Framework Decision on the Use of Passenger Name Record (PNR) Data for Law Enforcement Purposes*, (Oct. 28, 2008), available at http://www.fra.europa.eu/fraWebsite/research/opinions/op-pnr_en.htm.

83. See *id.* ¶¶ 4, 10–13, 18–23, 28–31.

84. Protocol No. 21 on the position of the United Kingdom and Ireland in regard to the Area of Freedom, Security and Justice, annexed to the TEU post-Lisbon, *supra* note 1.

85. Council Regulation No. 168/2007, art 3(3), 2007 O.J. L 53/1, at 4.

86. See the discussion concerning the scope of the Charter, *supra* note 15.

The Agency can only give advice. Assistance may be provided to the political institutions where they request opinions, conclusions, and reports from the Agency.⁸⁷ These contributions can have an impact upon the legislative process, but only if an EU institution has requested such an opinion or report.

In the framework of its mandate to disseminate information, the Agency publishes thematic reports based on its analytical research and surveys.⁸⁸ This limitation to thematic rather than particular national topics may be interpreted as preventing the Agency from disseminating information on occurrences in a specific Member State. However, it seems impossible to envisage thematic analysis without reference to the legal and factual situation in the Member States concerned. For instance, the Agency is just starting a survey on violence against women;⁸⁹ facts and figures will be provided by Member States. To the extent it is in position to provide relevant information, the Agency may also become involved in a procedure under article 7 TEU.

The Agency, which is an EU body, was also designed, as the Preamble to Regulation 168/2007 makes clear, in light of a model of specialized independent institutions promoting human rights, developed by the UN.⁹⁰ This model has led to the creation of national human rights institutions in a number of countries. In a 1993 resolution, the UN General Assembly defined principles of independence and pluralism to be applied in the organization and functioning of these bodies (“Paris Principles”).⁹¹ The reference to the Paris Principles in Recital 20 of the regulation suggests that compliance with them should be considered. While pluralism seems to be achieved in the various institutions managing the Agency, there is a serious restriction to its operational independence due to the fact that article 5(1) of the regulation confers upon the Council the competence to adopt the “Multiannual Framework” for the Agency.⁹² The Commission must propose this Framework, after consulting the management board of the Agency when preparing its proposal.

87. Council Regulation No. 168/2007, arts. 4(1)(c)–(d), 2007 O.J. L 53/1, at 4.

88. *Id.* art. 4(1)(f), at 5.

89. Dick Leonard, *The FRA Gets down to Work*, THE EUROPEAN VOICE FOREIGN POLICY CENTRE, available at <http://fpc.org.uk/about/staff/dick.leonard>.

90. Council Regulation No. 168/2007, pmbl., 2007 O.J. L 53/1, at 2.

91. G.A. Res. 48/134, ¶ 2, U.N. Doc. A/RES/48/134 (Dec. 20, 1993).

92. Council Regulation No. 168/2007, art. 5(1), 2007 O.J. L 53/1, at 5.

In brief, the mandate conferred to the Agency and the conditions for its operations are not in line with the idea of an independent human rights institution. The Agency depends on the Commission and the Council for its multi-annual work program.⁹³ The Agency is not mandated to pronounce *ex officio* in the course of legislative procedure, but can only do so upon request of an EU institution. The scope of the Agency is restricted to the implementation of EC law; even if the entry into force of the Lisbon Treaty incorporates cooperation in police and criminal affairs into the scope of the Agency, it remains that the Regulation imposes a restrictive view of the mandate of the Agency concerning monitoring of the respect of fundamental rights in Member States. The Agency contributes to the provision of comparable and reliable information and data at the European level. A grand name for a modest task! It is difficult not to conclude that the mandate of the Agency should be widened in order that the Agency may provide a more effective contribution to the implementation of fundamental rights.

CONCLUSION

The entry into force of the Lisbon treaty has been received with relief by all those who considered that the institutional debate had lasted too long and hampered the progress of European policies. As regards the protection of fundamental rights, the Lisbon Treaty is a landmark, but less significant than it may appear at first. The Charter acquires the authority of primary law, but not that of a bill of rights of the Union; its contribution to the protection of fundamental rights is to be made together with other sources of equivalent value, namely other general principles of Union law. A multilevel system of protection of fundamental rights emerges, made more complex than before by the strong affirmation of the European identity by the Court of Justice, by the strong affirmation of national identity by national constitutional courts, and by the Lisbon Treaty itself. Further, one may doubt the possible efficiency of the Agency of Fundamental Rights as a common instrument of control of implementation. Concerning fundamental rights, there is still much to do and to think about.

93. *Id.* pmb1., at 2.