SOME THOUGHTS ON THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

Giuseppe Tesauro, Naples

When talking about the Charter of fundamental rights of the EU adopted in Nice[1], the first question which typically comes up is the problem of the Charter's legal status; but this question is directly related to the role played by the EC Court of Justice in this matter. This is why I will focus my presentation on the legal protection that the EU system has built up with respect to fundamental rights; and I seize also the opportunity to discuss the evolution of the EU legal system over the time with reference to such a specific aspect.

Undoubtedly one needs to start from the fact that within the founding Treaties of the EC (in particular the Treaty of Rome of 1957) fundamental rights did not find any room. In fact the Treaty of Rome contained a reference to the principle of equality of treatment, which was in turn connected to the free movement rights, in particular equality based on nationality; incidentally, this is still a milestone of the Single Market, i.e. equality between undertakings, equality of salaries between workers, and in more general terms equality between all those subject which are engaged in intra-Community economic activities in the name of the principles of the common market.

In more general terms, there was virtually no direct reference in the founding Treaties to the legal protection granted to individuals by virtue of Community rules, although some provisions were directly addressed to them.

And yet, when looking at the *acquis communautaire*, we come to realise that the rate of protection of fundamental rights within the Community system is quite high, so as to be compared with Strasbourg standards as well as with those of Member states' legal systems. And if, in particular, attention is paid to the level of protection of fundamental rights secured by the EC Jurisdictions despite the striking silence of the Community legislation, at least till Maastricht, we can better understand what value should be attached to the Charter of Nice.

First of all, if by legal status we have in mind a binding force, this is not the case. The Charter of fundamental rights is not legally binding, nor was it meant to be so in the intentions of the Member States representatives who were gathered in Cologne and then in Nice.

But also the European institutions (the Council, the Commission and European Parliament) which have officially endorsed the Charter, had in mind an inter-institutional agreement based on the model of other Community acts, rather than a conventional international agreement.

Having said that, the lack of binding force of the Charter says little of its real implications, in so far as the Community legal system has already succeeded in securing effective

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1 *Charter of fundamental rights of the European Union*, OJ 2000, n. C 364, p. 1.

protection of fundamental rights even absent an explicit provision in the founding Treaties. Later, then, there also been some sort of recognition of such principles in the Treaties further to their amendment, in particular as a result of the Treaty of Amsterdam. By that time, however, the case-law was already well established.

On the other hand, one can foresee, based on the past experience, that the Charter of Nice will soon become a standard of constitutional legality which both EU and national institutions are due to respect, as well as the citizens of the EU. If anything, there is a very simple reason why this will happen, that is the content of the Charter largely corresponds with the *acquis communautaire* which has been elaborated by the Court of justice in this field. It is interesting, in this respect, to briefly review the most important achievements of the Court case-law starting from the seventies'.

After some initial hesitations, due to the need to assert the supremacy of Community law over domestic law, in the famous judgments *Stauder*[2] e *Internationale Handelsgesellschaft*[3] in 1970, the Court acknowledged that the protection of fundamental rights form an integral part of the general principles of law, whose observance the Court ensures, and this protection, while being grounded into constitutional traditions common to Member states, needed to be also guaranteed in accordance and within the objectives of the Community.

Later, in the case *Nold*[4] the Court asserted that for the purpose of securing the protection of fundamental rights, the international Treaties relating to the protection of human rights were also relevant; and in *Rutili*[5], the Court explicitly quoted articles 8, 9, 10 and 11 of the European Convention of human rights (ECHR) as well as article 2 of the protocol n. 4 of the same Convention, stating that restrictions applicable to strangers for reasons of public security cannot go beyond what it is necessary for the purpose of pursuing such objectives in a democratic society.

This is the way undertaken by the Court case-law in a period of time relatively short. The principles inspiring the Court when securing respect of fundamental rights are quite straightforward: constitutional principles on one hand, European Convention of human rights on the other hand.

Equally unambiguous is the scope of protection that these rights have been granted in the case-law of the Court. The case-law has unequivocally clarified that the Court scrutiny involves: Community acts adopted by Community institutions in the exercise of their functions; national acts enacted to implement Community acts[6]; justifications which are claimed by a Member State to justify a state measure otherwise held incompatible with Community law[7]. The latter case depends on the fact that lacking such a control, there could be a violation of fundamental rights upheld by Community law. Only those national provisions lack-

2 Case 29/69, 1969, ECR 420.
3 Case 11/70, 1970, ECR 1125.
4 Case 4/73, 1974, ECR 491.
5 Case 36/75, 1975, ECR 1219.
6 Case 5/88, *Wachauf,* 1989, ECR 2609.
7 Case C- 260/89, *Elleniki Radiophonia Tileorasi AE,* 1991, ECR I 2925.

ing any form of connection with Community law remain outside the scope of the EC Court review in this field[8].

Illustrative are those rulings of the Court whereby it explicitly refers to provisions of Rome Convention as well as to case-law made in Strasbourg. In the judgment Hauer[9], relating to property right and the right to perform a liberal profession, the Court did not restrain itself to generically quote the principles of the Convention, but it interpreted article 1 of protocol to ECHR, as it were a provision of the Community legal order, and not simply an expression of those general principles which complement Community law to the end of extending the protection of fundamental rights.

The Court has also dealt with the topic of procedural guarantees, stating with respect to the due process, that these guarantees must be equivalent to those provided by article 6 ECHR[10]. For example, it has also been clarified that this provision does not apply to administrative proceedings in the field of competition conducted by the EC Commission, as the latter cannot be regarded as a judge in the proper sense[11]. More recently, the Court has ruled, with respect to judicial proceedings before the Court of first instance, that the right to obtain a judgment within a reasonable time applies as well in the case of a judicial challenge of a Commission decision finding a violation of competition law and inflicting a fine[12]. Furthermore, the Court has ruled that the principle of non retroactivity of penal law is enshrined in article 7 ECHR, as well as being a principle common to all Member States legal systems[13]. The same has been said of rights of defence[14].

In the same vein, the Court has also recognised the respect of privacy, ruling that this right is guaranteed by the Community system as much as article 8.2 ECHR[15]. And it is worth noting that when the Court excluded the application of this provision with respect to commercial premises, it did so referring to the fact that this provision aimed at protecting the personal freedom of a human being, and in addition there was no reference whatsoever in the case-law of the European court of human rights in Strasbourg.

As already mentioned, the Court has also assessed the legality of derogations to Community rules by reference to fundamental rights. In particular the Court has applied article 10 of ECHR to a case in which a Member State justified a measure having equivalent effect to quantitative restrictions based on the need to secure protection of fundamental rights, such as media plurality[16].

The general principle of effective judicial protection in Community law deserves also a

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8 Case C-299/95, *Kremzow,* 1997, ECR I-2695.

9 Case 44/79, 1979, ECR 3727; see also *Wachauf*, *Nold* and *Hauer,* cited supra; case 154/78, *Valsabbia,* 1980, ECR 907; joint cases 172 e 226/83, *Hoogoeven Groep,* 1985,ECR 2831.

10 Case 98/79, *Pecaisting,* 1980, ECR 681.

11 Case 209/78, *Van Landewyck,* 1980, ECR 3125; see also joint cases 100 -103/80, *Pioneer*, 1983, ECR 1825.

12 Case C-185/95 P, *Baustahlgewebe c. Commissione,* 1998, ECR I-8417.

13 Case 63/83, *Kent Kirk,* 1984, ECR 2689.

14 Case 46/87, *Hoechst/Commission,* 1989, ECR 2859; see also, case 85/87, *Dow Benelux/Commission,* 1989, ECR 3137, and case 97/87, *Chemical Iberica/Commission*, 1988, ECR 3165.

15 Case 136/79, *Panasonic,* 1980, ECR 2033; case 145/83, *Stanley Adams,* 1985, ECR 339.

16 Case C-368/95, *Vereinigte Familiapress,* 1997, ECR I-3689.

specific mention. This principle was at the outset drawn from articles 6 and 13 of ECHR, but then has been substantially extended, up to play a crucial role in the development of the Community legal system. Reference can be made in particular to: i) the obligation in Community law to duly motivate any decision[17], ii) the principle of transparency to which Community and domestic Administrations alike are due to comply with, iii) the right for individuals to have their legal positions fully and effectively protected[18]; the principle of the liability of a Member State for breach of Community law[19].

Regarding, more specifically, the effectiveness of the judicial protection in the EC system, the case-law has developed such a principle in view of the need to secure across the Community a uniform standard of protection of Community rights. On this front, the judgements of the Court have played a fundamental role in trying to build a level playing field, so to secure a minimum standard of substantive judicial protection of Community rights across the EU. In particular, the Court has asserted what remains a founding principle of the EC legal system, namely that national judicial remedies must be adequate, and any impediment to Community rights being enforced effectively should be removed in the name of the supremacy of Community law[20]. In this regard, I refer to a number of famous judgements in which the EC Court of Justice has made clear the principle of the "effectiveness of the judicial protection of Community rights". According to this case-law, while Community rights are to be enforced through the procedural actions and instruments provided by National judicial systems, they have nonetheless to be secured an effective protection[21].

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17 Case 222/86, *Haylens*, 1987, ECR 4097; case 109/88, *Danfoss,* 1989, ECR 3199.

18 Case 70/77, *Simmenthal,* 1978, ECR 1453; case C-213/89, *Factortame,* 1990, ECR I-2433.

19 Case C-6-9/90, *Francovich*, 1991, ECR I-5357; case C-46/93, *Brasserie du Pecheur*, 1996, ECR I-1029; cases C-46/93 e C-48/93, *Factortame III* 1996, ECR I-1029.

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21 In this line of jurisprudence, there are landmark rulings whereby the Court has established novel remedies aimed at securing full protection of individual rights stemming from Community provisions. See, inter alia, case 213/89, *Factortame*, ECR (1990), p.2433, whereby the Court stated that in presence of a flagrant violation of Community rights resulting from a National legal provision (in that case some provisions of the British Shipping Act were inconsistent with the Community freedom of establishment and services), Community law empowers a National Court to grant an interim relief suspending the effect of such provision even when this power does not exist under national law. See also case 143/88, *Zuckerfabrik*, 1991, ECR 4189; case C-465/93, *Atlanta*, 1995, ECR 3761. Most recently, the Court has upheld the principle that an individual can sue for damages a Member State which has acted in breach of Community provisions having direct effect. See, in particular, the well known judgements *Francovich* and *Brasserie du Pecheur* cited supra. In *Francovich*, the Court has stated that an individual can sue for damages a Member State that has not implemented within the prescribed deadline a Directive whose provisions provide for an unequivocal right in favour of that individual. In *Brasserie du Pecheur*, the Court has recognised that the same principle applies whenever A Member State acts in breach of a Community rule having direct effect. In the latter judgement, the Court has even specified the conditions under which damage liability is deemed to exist.

As regards more specifically procedural issues, the Court has upheld the principle of the *procedural autonomy* of each Member State, while setting at the same time some substantial limitations. The EC case-law has thus typically stated that it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for protecting rights which individuals derive from Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community Law. In essence, with a view to harmonising the minimum level of judicial protection across the EU, the Court has established: *i)* the principle of *equality of treatment*, according to which the judicial protection provided by a National system to an individual right stemming from a Community rule could never be lower to the protection secured to an equivalent individual right based upon an internal provision; *ii)* the principle *of the minimum standard of protection*, according to which in any event national judicial rules cannot render practically impossible the enforcement of Community rights[22].

The result has been the creation of higher standard of judicial protection stemming from Community law, through the introduction within domestic legal systems of novel legal remedies more protective of individuals[23].

Finally, it is worth reminding the tendency of the Court to consider the most important provisions of the Treaty as an expression of fundamental rights. In essence the Court has qualified as fundamental rights those provisions establishing the fundamental freedoms of the Treaty, in so far as instrumental to the economic objectives of the Treaty.

An illustrative example of such an approach can be found in the way the Court has interpreted the principle of equality of treatment which is acknowledged in the Treaty of Rome with respect, *inter alia*, to workers of different sex. The latter principle has been substantially extended, so to become a comprehensive principle of equality of treatment covering any possible discrimination arising in the working environment, including the sacking of a trans-sexual based on the change of sex[24]. On that occasion, while stating that equality in the working conditions is an expression of the general principle of non discrimination, the Court has also referred to the respect of dignity and freedom.

In more general terms, the principle of equality has been applied to a wide range of cases which go well beyond what was established in the Treaty of Rome, as it appears clearly from the Court case-law in this matter. The general principle of equality of treatment, whose the prohibition of any discrimination based on nationality is simply a concrete example[25], has thus become a fundamental principle of Community law[26].

In all these developments, as already noted, it is clear that the Court has extensively relied upon the Convention of Rome. In other words, the Court has systematically drawn inspiration from the Convention to identify those fundamental rights which are protected at Community level. And this is so because the Convention contains a list of fundamental

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22 See, on these points, inter alia, *San Giorgio*, case 199/82, 1983, ECR 3595.
23 Case C-188/95, *Fantask,* 1997, ECR I-6783.
24 Case C-13/94, 1996, ECR I-2143.
25 Case 59/93, *Biovilac,* 1984, ECR 4057; Case C-27/95, *Woodspring District,* 1997, ECR I-1847.
26 Case C-175/88, *Biehl* 1990, I-1778.

rights which are recognised by all Member States[27]. By contrast, constitutional principles of each Member State imply necessarily a comparative research much more complex.

More importantly, not only has the Court case-law filled the gap in this field, but also, in over forty years of case-law, there has been no divergence between the Court and Member States constitutional Courts, which have always claimed the power to assess the compatibility of Community law with fundamental rights enshrined in their Constitutions.

At the beginning it is true that the Court did not take position on the relevance of fundamental rights in the Community system, but this was for the purpose of asserting the supremacy of Community law over domestic legislations. By contrast, both the German and the Italian constitutional Courts expressed some doubts vis-à-vis the EC Court as long as it did not secure full protection to fundamental rights. However, once the primacy was established, the EC Court came back on the issue and asserted its competence to assess the compatibility of Community acts and national acts resulting from Community acts with fundamental rights. The constitutional Courts in turn, reasserted their power to verify the compatibility of Community law with fundamental rights recognised in their constitutions. This statement is relevant in theoretical terms, but so far has had no practical implications.

Nor a conflict has been recorded with the Court of Strasbourg, although theoretically, there was potential for conflict. Suffices to remind the case of the abortion in Ireland. Nor does it make sense quoting the case *Matthews/UK*, whereby the Court of Strasbourg held that the decision of 1978 establishing the election of European Parliament was contrary to ECHR as citizens of Gibraltar were excluded from such a vote. This case to my mind deserves special attention as the Court of Strasbourg states that, following Maastricht, European Parliament can be considered equivalent to national Parliaments, namely a legislative power in the meaning of the Convention. This implies in turn that the deficit of democracy which has been criticised for long, has eventually been filled.

These thoughts should help us to overcome a philosophical problem so to speak, which has been often raised about the legal status of the Convention within the Community system. In this regard, it has been said that the Convention is nothing else than a source of inspiration similar to other international conventions or general principles of law common to all Member State; or it is binding vis-à-vis the Community. Both explanations end up disregarding the simple fact that in practice the Convention has already acquired a function equivalent to a Chart of rights formally recognised. Even in the event one would go for the minimalist approach and consider that the Convention is just a factual source of inspiration for the Court, there remains the fact that these principles are applied within the Community system. In sum, the provisions of the Convention constitute a standard of legality that Community provisions as well as national provisions stemming from Community legislation have to comply with.

This means that the court case-law has succeeded in making up for the absence of a formal reference in the Treaties to such rights, as well as for the failure of the Community to become a member of the Convention. Incidentally, it is worth reminding that the idea of the Community joining the ECHR has been cherished for long by the Commission. And

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[27] Case C-309/96, Annibaldi, 1997, ECR I-7493.

also the Council, although not unanimously, was in favour of this move, at such a point that some time ago it required an opinion to the Court over the competence of the Community to join the ECHR, as well as over the compatibility of such a possibility with the other Community provisions[28].

While turning down the first question based on lack of sufficient information on the content of the Agreement conducting the Community to join the ECHR, on the second question the Court has denied such a power. in particular, absent a provision in the Treaty conferring to the Community institutions a general power to sign agreements in the field of human rights, the question comes up of whether, in order to fill this gap one can resort to article 308 (former 235) of the EU Treaty[29]. In this respect, the Court however has ruled that this provision cannot serve to extend the scope of the powers of the Community beyond what the provisions of the Treaty have established. In any event article 308 cannot be used to amend the Treaty instead of the standard procedure of revision which is explicitly provided in the Treaty to this end. As a consequence, while fundamental rights form integral part of general principles of law which are enforced within the Community system by the Court, joining the Convention would imply a substantial change in the current structure of the system of protection of human rights, as this would entail joining a system of international law, with implications of constitutional relevance, which could take place only by virtue of a revision of the Treaty in accordance with the procedures explicitly provided.

If the Court has played a major role in the recognition of such rights, the other institutions have been involved in such a process much later. In particular, only with the Declaration on 5 April 1977, Parliament, Council and Commission undertook to respect, in the exercise of their functions, fundamental rights resulting from the constitution of member states as well as from the Convention of Rome[30]. A similar declaration, devoid of binding force, can be found also in the Single act. A more important achievement is article F of the treaty of Maastricht, according to which the Union complies with fundamental rights of ECHR, as well as the constitutions of Member States, in so far as they constitute general principles of Community law.

Finally, with the treaty of Amsterdam, the wording of article F is further developed (article 6), as the compliance with fundamental rights becomes pre-condition for accession to the EU. In addition, there are also some forms of guarantees which are introduced with a view to securing a more effective respect of the convention.

Turning finally to Nice, it is certain that thanks to the Charter of fundamental rights, which at this stage has not yet acquired a clear legal status, these rights will gain new momentum in the case-law of the Court, as well as they will be novel source of inspiration for

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28 Opinion 2/94, 28 Mars 1996, ECR 1759.
29 See Opinion 2/94, p. 20-22.
30 OJ 1977, n. C 103, p. 1.

the future case-law[31]. This is why in my view the Charter will further contribute to push further the process of integration among member states.

I am less convinced, by contrast, that to date Member States are as eager as they used to be once to pursue along the road of the integration, in particular when it comes to fundamental values of the human being. There are some signs in the current debate over the future of the EU, which disguise, quite awkwardly, I must say, the temptation to stay more within the boundaries of the international cooperation. And the Enlargement in this respect, will further exacerbate these conservative tendencies. Against this background, my wish is that the new impetus that fundamental rights have gained following the Charter of Nice will compensate for the little enthusiasm that Member States have recently shown with respect to integration. This can appear a small achievement, but it is something not to be overlooked, and it is in tune with the lesson that we have learned from the founding fathers of the Community, that is the ultimate objective of integration will be reached by small steps.

[31] In fact, this is already taking place at a considerable speed. There are a number of opinions and judgements of the Court of justice whereby explicit reference is made to the Charter of Nice, besides the typical quotations of the Rome Convention. See in this respect, opinon of A. G. Tizzano, in case C-173/99, *BECTU v Secretary of State and Industry*, 2001, ECR I 4881; opinion of A. G. Jacobs in case C-50/00P, *Union pequenos agricultores v Council*, 2002; opinion of A. G. Léger in case C-353/99P, *Council v Heidi Autal*, 2001; case T-112/98, *Mannesmannrohren-Werke AG v Commission*, 2001, ECR II 729; case C-377/98, *Kingdom of Holland v Commission*, 2001, ECR I 7079; cases C-122/99P and C-125/99P, *Kingdom of Sweden v Council*, 2001, ECR I 4319; case T-177/01, *Jego et Cie SA v Commission*, 2002.