

THE EU CHARTER OF FUNDAMENTAL RIGHTS: AN ALTERNATIVE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

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This paper tries to make a critical analysis of whether fundamental rights are adequately protected in the European Union (the "EU"). The topic is of interest in particular because of the continuing debate on the legal status of the EU Charter of Fundamental Rights¹ (the "Charter") both within the Community courts² and among the scholars³. In dealing with these issues, consideration might usefully be divided into three sections. First, a brief account will be given of the historical background of the EU's fundamental rights protection. Next, an examination will be made of the present legal basis for protection of fundamental rights in Community law. And finally, the gaps in the EU's fundamental rights protection will be critically assessed.

1. Introduction

The founding treaties of the European Communities, in their original form, did not contain any express provision concerning the protection of fundamental rights. Although the reason for such a lack is considered by many scholars as the sole economic motive of the Community at its starting point, it appears from the preamble of the Treaty of Paris that the primary objective of the six original Member States was not limited to economic purposes⁴. Similarly,

¹ OJ C 364, of 18.12.2000, p. 5ff.

² See fns 59, 60 *infra*.

³ Analysed in Part III.2 *infra*.

⁴ It is stated in the Preamble of the Treaty establishing the Coal and Steel Community (1951) that the establishment of the Community is considered as a "basis for a broader and deeper community among peoples"

the Treaty of Rome provided for the freedom of establishment for nationals of Member States⁵, the rights for equal payment without discrimination on grounds of sex⁶, and for improved working conditions and a better standard of living for workers⁷. However, there was still no express mention of fundamental rights protection. The main reason for that lack was the originally limited competence – but not the limited objective – of the Community. Because, the areas in which the Community was operating under the original form of the Treaties was considered as inherently likely to violate fundamental rights.

The introduction and the development of fundamental rights standards into Community policies and legal system have been gradually carried out in particular by the European Court of Justice (the “ECJ” or the “Court”), which adopted and applied those rights as ‘general principles’ of Community law⁸. This jurisprudence based evolution of the EU’s fundamental rights profile has been followed by successive Treaty amendments. The Single European Act, in its Preamble, introduced the first direct reference to the fundamental rights protection, and amended the earlier Treaties in a certain number of respects⁹. It followed, two years later, the adoption of the Community Charter of the Fundamental Social Rights of Workers, which was a political declaration referring to the rights contained in the Council of Europe Social Charter and ILO Conventions. The amendments made at Maastricht¹⁰ and Amsterdam¹¹ were other

⁵ Articles 48 to 58 of the Treaty establishing the European Economic Community (1958)

⁶ *Ibid.* Article 119

⁷ *Ibid.* Articles 117 to 122

⁸ Analysed in Part II.1 *infra*.

⁹ The Single European Act provides in its Preamble that “[t]he Union shall respect fundamental rights as guaranteed by the ECHR[...] and as they result from the constitutional traditions common to the other member states as general principles of Community law.”

¹⁰ The Treaty on European Union (1993), concluded at Maastricht, was particularly important for into the body of the Treaties explicit recognition of the concept of fundamental rights. For example, Article F(2) required the Union to respect as general principles of Community law fundamental rights guaranteed by the ECHR and by constitutional traditions common to the Member States.

¹¹ Article 6(1) of the Amsterdam Treaty (1997) declares that the Union “is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”.

cornerstones of the development of Treaty basis of the fundamental rights protection in the EU. Although those successive Treaty amendments were reflecting the principles established by the ECJ's case law, they were not, however, attempting to codify or catalogue the fundamental rights. Consequently, it still remained that nowhere in the Treaties was there a clear enunciation of the content of the fundamental rights underpinning the activities of the Union¹². In 1999, the European Council meeting in Cologne, intending to make the fundamental rights more visible to the Union's citizens, decided to establish a charter consolidating fundamental rights applicable at Union level. Afterwards, the EU Charter of Fundamental Rights¹³, adopted by the European Parliament and approved by the Commission, has finally been signed and proclaimed in Nice, in December 2000.

2. Present Legal Basis For Protection Of Fundamental Rights In The Eu

2.1 Protection through the ECJ's Case Law

The Court of Justice has been the principal actor to monitor the protection of fundamental rights and to determine the scope of that protection in the EU¹⁴, as the founding Treaties contained no specific provisions on fundamental rights¹⁵. As a consequence of the doctrine of supremacy of Community law adopted by the ECJ in the 1960's, even constitutionally protected norms of the Member States,

¹² House of Lords, Select Committee on the European Union, *EU Charter of Fundamental Rights*, Session 1999-2000, 8th Report, § 22

¹³ See fn 1 *supra*.

¹⁴ The ECJ has essentially based its jurisprudence on Article 220 (ex Article 164) of the EC Treaty, which requires the Court to ensure that the law is observed in the interpretation and application of the Treaty; and on the political dimension of the Community, which is grounded in a European model of society, including the protection of fundamental rights recognised by all Member States.

¹⁵ As an expert wrote: "It has been the Court that has put in place the fundamental principles of respect for human rights which underlie all subsequent developments." The European Union and Human Rights: Final Project Report on an Agenda for the year 2000, cited by Jacobs, F.G., "Human Rights in the European Union: the Role of the Court of Justice", (2001) 26 E.L.Rev. at p. 340.

including human rights guarantees, have started to be subordinate to Community law¹⁶. In addition, the ever increasing scope of Community law also led to fears that the potential for human rights violation by the Community institutions or Member States implementing Community law was increasing¹⁷.

The ECJ, in the first few cases, rejected all claims as regards violation of fundamental rights, by stating that its task was simply to interpret the Treaty and rule on the validity of Community instruments¹⁸. In *Stork* and *Geitling* cases¹⁹, for example, the Court rejected the argument that the decisions of the Coal and Steel Community High Authority should respect provisions of the German basic law, the *Grundgesetz*²⁰. However, following the adoption of the principle of supremacy, the Court took the initiative to provide that the fundamental rights are protected in the supervision of Community law by the ECJ. In *Stauder*, the Court made its first reference to the protection of fundamental rights by stating that fundamental rights were enshrined in the general principles of Community law²¹. From that timid²² reference onwards, the ECJ appeared to gradually develop this protection by having recourse to a number of sources, such as “*constitutional traditions common to the member states*”²³, and “*international treaties for the protection*

¹⁶ McCrudden, C., *The Future of the EU Charter of Fundamental Rights*, Jean Monnet Working Paper No.10/01

¹⁷ Meehan, M., “(Un)charted Waters: The Legal Background to Fundamental Rights Protection in the EU”, in Feus, K. (ed.), *The EU Charter of Fundamental Rights*, London, 2000, Ch. 7 pp.77-96, at p. 82

¹⁸ Betten, L. & Grief, N., *EU Law and Human Rights*, Longman, 1998, p. 54

¹⁹ Case 1/58, *Stork v High Authority* [1959] ECR 17 and Joined cases 16 and 17/59, *Geitling v High Authority* [1959] ECR 17.

²⁰ See Lord Goldsmith Q.C., “A Charter of rights, freedoms and principles”, 38 CMLR (2001)P.1202

²¹ Case C-29/69, *Stauder v City of Ulm* [1969] ECR 419.

²² Neuwahl, N.A., “The Treaty on European Union: a Step Forward in the Protection of Human Rights?”, in Neuwahl, N.A. & Rosas, A. (ed.), *The European Union and Human Rights*, 1995, at p. 6

²³ Case 11/70, *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125, in which the Court stated that “*respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structures and objectives of the Community*”.

of human rights on which the member states have collaborated or of which they are signatories”²⁴. After this first reference to the international treaties for protection of human rights, the Court repeatedly referred to specific articles of the European Convention on Human Rights (the “ECHR”)²⁵.

A further crucial step was surely to extend the protection against Member States where they implement Community law²⁶. In other words, the Court has extended the protection of fundamental rights in a way that the powers of the Member States as agents of the Community are effectively controlled as a matter of Community law²⁷. The question, however, arose at that point to what extent the Member States are bound to protect fundamental rights as a matter of Community law. Another set of decisions starting with the *ERT*²⁸ case tried to answer that difficult question of limit, and resulted in a further step forward extending the fundamental rights protection: the Member States measures must be subject to fundamental rights review wherever they derogate from the Treaty or wherever such measures restrict the exercise of a “common market freedom”²⁹.

2.2 *The EU Charter of Fundamental Rights*

The motivation behind the adoption of the Charter was to consolidate fundamental rights applicable at Union level and to strengthen the protection of those rights by making them more visible to the Union’s citizens. The passage from an economic Community to a political Union, whereby the competence of the Union extended into areas which are particularly sensitive to human rights; and the

²⁴ Case 4/73, *Nold v Commission* [1974] ECR 491, § 13

²⁵ Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219; Case 130/75 *Prais v Council* [1976] ECR 1589; Case 44/79, *Hauer v Rheinland-Pfalz* [1979] ECR 3727.

²⁶ It is first in *Wachauf* (Case 5/88) that the Court held that: “the requirements of the protection of fundamental rights in the Community legal order are also binding on the Member States when they implement Community rules.” It then followed two subsequent cases developing the working of that principle: *Bosphorus* (Case C-84/95) and *Ebony Maritime* (Case C-177/95).

²⁷ Jacobs, F.G., “Human Rights in the European Union: the Role of the Court of Justice”, (2001) 26 E.L.Rev. pp. 331-341, at 332

²⁸ Case C-260/89 [1991] E.C.R. I-2925

²⁹ See further Jacobs, F.G., *op. cit.*

need for clarification of 4 the rights protected under the Treaties were also key factors for the adoption of the Charter. However, its drafting process has been a highly ambivalent one in its establishment, its functioning and its aims³⁰.

The scope of the Charter, although it is not limited to civic and political rights, but also 'rights to solidarity'³¹, which comprise the usually referred as 'social and economic rights'³², is expressly limited by Article 51. That restricts the addressees of the Charter to the EU institutions when acting in the sphere of their competence, and to the Member States only when they are implementing Union law. Thus, the Charter does not impose any obligation on the Member States provided that they are acting in the areas of national competence. The involvement of Member States under this condition is simply, as mentioned earlier³³, a reflection of the ECJ's existing jurisprudence³⁴.

The purpose and the status of the Charter are subject to ambiguities and compromises. It is not legally binding³⁵, but it still has legal effects. As McCrudden wrote, there is a significant debate within the ECJ as to whether the Charter has legal effects, and if so, the kind and the extent?³⁶ It is to those ambiguities of the Charter that I will turn later³⁷.

³⁰ De Burca, G., "The Drafting of the European Union Charter of Fundamental Rights", (2001) 26 E.L.Rev. pp. 126-138, at 138. He says that the main discussions during the drafting related to three core points: the legal status of the Charter, the nature and scope of the EU's policy competence in the field, and the extent to which it should be applicable to the Member States.

³¹ Ch. IV: Articles 27 to 38.

³² Menéndez, A.J., *Exporting rights: The Charter of Fundamental Rights, membership and foreign policy of the European Union*, Arena Working Paper WP 02/18.

³³ Part II.1 *supra*.

³⁴ See the *Wachauf* case (Case 5/88), the *Bosphorus* case (Case C-84/95) and the *Ebony Maritime* case (Case C-177/95).

³⁵ Although the Charter is not legally binding, it has been drafted on the assumption that it will have binding legal force. See EU Annual Report on Human Rights, adopted by the Council on 9 October 2000, Luxembourg: Office for Official Publications of the European Communities, 2001, at p. 23

³⁶ McCrudden, C., *op. cit.* at p. at p. 10.

³⁷ Part III.2 *infra*.

3. Inadequacy of the protection of fundamental rights in the EU

3.1 *Deficits of the Fundamental Rights Protection in the EU*

Although the UK Government, in rejecting the option of ECHR accession, has argued that “there is no human rights deficits in the EU”, the protection of fundamental rights in the Union is strongly criticized for containing a considerable number of lacunae making the protection inadequate.

Firstly, the fundamental rights regime of the EU is strongly criticised for the deficits existing in its Treaty basis. Although some improvements have been made in particular with the Treaty of Amsterdam³⁸, there are still considerable lacunae in the Treaties. For example, as the British Institute of the Human Rights³⁹ pointed out, Article 6(2), while making reference to the ECHR, omits reference to other key human rights instruments such as *the International Covenant on Civil and Political Rights*⁴⁰. Moreover, there are a very limited number of rules on third party intervention, and they exclude non-governmental organisations making public interest interventions as it is generally accepted in human rights litigation in other jurisdictions⁴¹. Finally, there is not a comprehensive enunciation of the fundamental rights in the Treaties. It still remains the case even after the adoption of the Charter, as the latter is not incorporated into the Treaties.

A further, but related, criticism of the EU’s fundamental rights protection concerns the lack of structural visibility. In order to ensure that the fundamental rights are adequately protected, those rights have to be clear both to legislators and citizens. However, the fact that the fundamental rights protection has been started and developed by the ECJ’s case law gives the protection its flexible and imprecise character. By relying on ‘general principles’ the judges have given

³⁸ See fn. 11 *supra*.

³⁹ Criticism made by *the British Institute of the Human Rights*, in House of Lords, 8th Report at p.131.

⁴⁰ *The United Nations International Covenant on Civil and Political Rights entry into force* 23 March 1976, available at ‘http://www.unhchr.ch/html/menu3/b/a_ccpr.htm’.

⁴¹ See fn. 39 *supra*.

themselves a certain flexibility as to what rights merit judicial protection and how it will be done⁴². Thus, the way in which the ECJ “discovers” human rights as general principles of Community law is too ambiguous for the general public⁴³. Although it can be argued that the Charter, despite its non-binding status, made those rights more visible to the citizens, the uncertainty and unreliability of the protection due to ECJ’s flexible principles still remain. Because, as the Charter is not directly enforceable, it remains difficult to predict to what extent the Court will take fundamental rights standards into consideration in any particular case⁴⁴, and thus there is an absence of reliable human rights protection in the ECJ⁴⁵. The evolution of the fundamental rights protection in the EU by the ECJ is not only criticised for its invisibility, or making the protection unreliable, but also for favouring Community interests over individuals’ rights. As Meehan wrote, the ECJ may be many things, but it was not established as, and has not become, a Human Rights Court⁴⁶. The EC Treaty provides the ECJ with the Community objectives and criteria to define the general interests of the Community, but these objectives do not always go hand to hand with human right objectives⁴⁷. Moreover, the fact that the decisions of the ECJ are not subject to the review of a Human Rights jurisdiction like the ECHR results in a lack of control, and thus, leaves the Court open to the criticism of favouring Community interests.

Another deficit of the mechanism for fundamental rights protection in the EU concerns the length of time that a case takes before the Community Courts. It generally takes three or four years for the Court of Human Rights and around 20 months for the ECJ⁴⁸.

⁴² Meehan, M., *op. cit.* at 88

⁴³ Criticism made by *The Standing Committee of Experts on International Immigration, Refugee and Criminal Law* (the Meijers Committee), in House of Lords 8th Report at p.191

⁴⁴ Cooper, J. & Pillay, R., “*Through the Looking Glass: Making Visible Rights Real*”, in Feus, K. (ed.), *The EU Charter of Fundamental Rights*, London, 2000, Ch. 9 pp.111-128, at 115

⁴⁵ See for absence of reliable protection in the ECJ Case *SPUC v Grogan* [1991] ECR I-4685, cited by Cooper, J. & Pillay, R., *op. cit.* at 115 and 127.

⁴⁶ Meehan, M., *op. cit.* at 91

⁴⁷ *Ibid.*

⁴⁸ Memorandum from the Confederation of British Industry, in House of Lords, 8th Report at p. 135

The same problem arises in national courts as well. In *Patifis v. Greece*⁴⁹, for example, the ECHR considered the 32 month period that it took for a preliminary ruling to be made as “relatively long.”

A further gap in the EU’s fundamental rights protection regime, according to Boyle, concerns the non-discrimination principle⁵⁰. Although it is one of the basic principles of the Community law, it is criticised for being incomplete as it exists at present. It is mainly argued that this principle does not guarantee equal treatment for all EU citizens in each Member State; instead, it only requires Member States to accord equal treatment as between its own citizens and those of other Member States. With respect to the employment law, for example, an EU state may lawfully discriminate against sections of its own population⁵¹. Although the Charter seems to have filled this gap by guaranteeing equal treatment for all EU citizens within each Member State⁵², the problem is still at issue since it is also questionable whether the status of the Charter obliges the Community Courts to apply those provisions.

A final deficit of the EU’s fundamental rights protection regime relates to the ECJ’s method of interpretation as regards access to justice. The ECJ adopts a very restrictive interpretation of the Treaty requirements of being “individually and directly concerned” in order to have standing to challenge Community measures⁵³. These restriction on individual standing before the ECJ set out a practical limitation on the enforceability of human rights⁵⁴.

⁴⁹ *Pafitis and others v. Greece* [1999] EHRR 566, Judgment of 26 February 1998.

⁵⁰ Memorandum by Alan Boyle, Professor of Public International Law at the University of Edinburgh; in House of Lords, 8th Report at p. 121

⁵¹ *Ibid.*; he further clarifies his point by reference to student fees: “if the Scottish executive wants to accord free university education to all students domiciled in Scotland, it must also do so for anyone domiciled in any other EU member state, but it does not need to do so for anyone domiciled elsewhere in the UK. In the words of Boyle, it is surely anomalous to give equal rights in Scotland to every EU citizens domiciled outside the UK while legally denying them to anyone domiciled in Northern Ireland, England or Wales.”

⁵² Article 20 *et seq.* of the Charter

⁵³ Article 230 (ex 173) of the EC Treaty

⁵⁴ Cooper, J. & Pillay, R., *op. cit.* at 115; see also generally Craig P. & De Burga G., *EU Law, Text, Cases, and Materials*, 2000, ch. 11

3.2 *Critical Remarks on the Charter of Fundamental Rights*

There is no consensus among scholars or politicians on the efficiency of the Charter, and on whether it could fill the gaps existing in the EU's fundamental rights protection regime. From one perspective, it provides "a convenient point of reference to identify what rights are fundamental, to give a lapidary formulation, and to set out the permissible limitations⁵⁵." Thus, it can be considered as making a step forward by comprehensively including many important rights⁵⁶. Additionally, it is up to date in a way which the ECHR even its Protocols cannot be, since it includes, for example, a 'right for access to documents'⁵⁷, i.e. right to access to European Parliament, Council and Commission documents⁵⁸. Many scholars, however, do not consider the Charter as an adequate solution to overcome the shortcomings existing in the EU's fundamental rights standards⁵⁹. It is further argued that the resources being employed in producing the Charter could be more productively employed on "less glamorous but more practical projects"⁶⁰. The Charter is mostly criticised for its legal status. As the Charter is solemnly proclaimed at the Nice Intergovernmental Council Meeting in December 2000, without being included in the Treaty of Nice, it is a political declaration, and not legally binding.

However, there are strong indications to the effect that it is more

⁵⁵ Jacobs, F.G., "Human Rights in the European Union: the Role of the Court of Justice", (2001) 26 E.L.Rev. pp. 331-341, at 339

⁵⁶ According to Lord Goldsmith, the Charter makes "fundamental rights, freedoms and principles more visible", and "for the first time, the peoples of Europe have a clear and valuable statement of the rights, freedoms and principles that the Union's institutions should respect". Lord Goldsmith Q.C., "A Charter of rights, freedoms and principles", 38 CMLR (2001) p. 1216

⁵⁷ This right has already been recognised by the ECJ in Case C-353/99 P *Council v Hautala*.

⁵⁸ Jacobs, F.G., *op. cit.*

⁵⁹ See House of Lords, 8th Report, Memorandums by the British Institute of Human Rights, at p. 133; the International Commission of Jurist, at p. 153; and by The Meijers Committee, at p.190.

⁶⁰ Memorandum by Bar Council International Relations Committee, Bar Human Rights Group and Bar European Group, in House of Lords, Eighth Report, *EU Charter of Fundamental Rights*, Session 1999-2000, at p. 116.

than a political declaration⁶¹. As Eeckhout pointed out, there can be little doubt that counsel of parties involved in litigation with a human rights dimension before the European Courts will try to find support for their case in the text of the Charter⁶². Indeed, the legal enforceability of the Charter, as Menéndez wrote, is grounded on the fact that it consolidates, not innovates, Community law, since it does not alter the substantive law in force⁶³. This consideration is also justified by the practice of the Advocates General of the Court of Justice⁶⁴ as well as the Court of First Instance⁶⁵. Furthermore, the Commission has started to make extensive use of the Charter to determine whether candidate countries or third states comply with the common constitutional traditions of fundamental rights protection⁶⁶. Another criticism of the Charter relates to the legally uncertain provisions that it includes. Under Article 52(1), for example, any limitation on the rights recognized by the Charter must be provided for by the competent authority, subject to the principle of proportionality. It is not clear who applies the proportionality and evaluates the necessity of these limitations. As

⁶¹ Fossum, J.E., *Charters and Constitution-making: Comparing the Canadian Charter of Rights and Freedoms and the European Charter of Fundamental Rights*, ARENA Working Papers, WP 02/8. See also *Intervention made by Lord Goldsmith QC at the meeting of the Convention on 1 and 2 February 2000, Charte 4211/00*; he suggested that “a proclamation of existing rights would have a powerful effect in reinforcing in the minds of administrators, governments, legislators, judges, lawyers and all other citizens the rights they possess and the need to respect them.” Moreover, Advocate General Francis Jacobs argued that, although the Charter is not formally justiciable, it still has a “significant effect”. See in House of Lords, 8th Report at QQ 241, 257

⁶² Eeckhout, P., “The Proposed EU Charter of Fundamental Rights: Some Reflections on Its Effects in the Legal Systems of the EU and of Its Member States”, in Feus, K. (ed.), *The EU Charter of Fundamental Rights*, London, 2000, ch. 8 pp.97-110, at 104.

⁶³ Menéndez, A.J., *Legal status and policy implications of the Charter of Fundamental Rights of the European Union*, Arena Working Paper WP 02/7.

⁶⁴ e.g. Advocate General Jacobs in Case C-C377/98: Opinion of 14.06.2001; Advocate General Stix-Hackl in Case C-49/00: Opinion of 31.05/2001.

⁶⁵ e.g. Case T-112/98 *Mannesmannrohren-Werke AG v Commission*, Judgement of 20.2.2001, at § 76. e.g. Case T-112/98 *Mannesmannrohren-Werke AG v Commission*, Judgement of 20.2.2001, at § 76.

⁶⁶ Menéndez, A.J., *op. cit.* WP 02/7.

Smith wrote, the ECJ is not able to deal with this question⁶⁷, since the Charter is not incorporated into EU Treaties, and thus, there is no court to decide what the scope of the limitations may be⁶⁸. The Charter is also criticised for, while acting as a “showcase” of existing rights, not including all fundamental rights being covered by other international treaties. For example, *the 1961 and 1996 European Social Charters of the Council of Europe*⁶⁹ contain a number of rights which are not dealt with, or less comprehensively mentioned, in the Charter⁷⁰. The right to a fair remuneration, for example, is not as comprehensively protected in the Charter, as it is under Article 4 of the 1961 and 1996 (Revised) European Social Charters. Furthermore, the right to vocational training and guidance⁷¹, for instance, are even not mentioned in the Charter⁷². A further criticism of the Charter concerns the ambiguity between whom it addresses to, and the rights (and obligations as the counterpart of the rights) that it includes.

The Charter is primarily addressed to the Union institutions and the Member States implementing Union law, but it includes rights that clearly do not fall into EU’s competence⁷³. It provides, for example, in Article 2(2) that “*no one shall be condemned to the death penalty, or executed.*” However, as Smith ironically points out,

⁶⁷ However, whether or not the ECJ can refer to the Charter in its decisions is actually a question mark. Although the Court of First Instance and the Advocates General have already mentioned the Charter in their opinions or judgements, the ECJ has not, as to May 2002, referred to it yet.

⁶⁸ Smith, J., “*EU Charter of Fundamental Rights – A Local Government Perspective*”, in Feus, K. (ed.), *The EU Charter of Fundamental Rights*, London, 2000, ch. 6 pp. 59-76, at 72.

⁶⁹ The Revised European Social Charter of the Council of Europe (1996) has not been ratified by all EU Member States yet. Available at ‘<http://conventions.coe.int/treaty/EN/cadreprincipal.htm>’.

⁷⁰ See Betten, L., “*The EU Charter of Fundamental Rights: a Trojan Horse or a mouse?*”, 2001 *International Journal of Comparative Labour Law and Industrial Relations* pp. 151-164, at 160-161

⁷¹ Article 9 and 10 of the 1961 and 1996 European Social Charters.

⁷² See for further criticism of that lack of certain social rights in the Charter Dutheil De La Rochère, “*La Charte des Droits Fondamentaux de l’Union Européenne: quelle valeur ajoutée, quel avenir?*”, 443 *Revue du Marché Commun et de l’Union Européenne* (2000), pp. 674-680, at 677.

“[t]he EU has, within its mandate, some quite tough powers of enforcement, but these do not extend to the death penalty for non-compliance with EC Directives⁷⁴.”

It is obvious that this provision addresses the Member States, but not the Union institutions or the Member States when implementing Union law.

4. Conclusion

Having critically analysed at some length the protection of fundamental rights in the EU, it can be seen that the current position is far from being adequate in many respects. Although appreciating the limited contributions of the Charter, e.g. making rights more visible, it is not, however, an appropriate instrument to overcome the deficits of EU fundamental rights protection examined earlier⁷⁵. The improvement of EU's fundamental rights standards requires more effective means. At this point, the accession of the EU to the ECHR appears as the most effective way, since it could not only fill the gaps in the fundamental rights protection, but could also bring the standards of the protection into line with the national laws of the Member States⁷⁶. Crucial to achievement of this accession is to consider the Charter as a step towards it, but not an alternative to the ECHR or an obstacle before the accession.

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⁷³ Arnall, A. & White, R., *Editorial-A New Human Rights Instrument*, (2000) 26 E.L.Rev. HR at p. 2; see also McCrudden, C., *op. cit.* at p. 9

⁷⁴ Smith, J., *op. cit.* at 71

⁷⁵ Part III.1. *supra*.

⁷⁶ See further Dutheil De La Rochère, “*La Charte des Droits Fondamentaux de l’Union Européenne: quelle valeur ajoutée, quel avenir?*”, 443 *Revue du Marché Commun et de l’Union Européenne* (2000), pp. 674-680, at 679. Cooper, J. & Pillay, R., *op. cit.* at 126

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