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"HUMAN RIGHTS AND TRANSFERS OF SOVEREIGNTY IN THE EUROPEAN UNION: CONSEQUENCES FOR THE DEFINITION AND DEVELOPMENT OF HUMAN RIGHTS"

by

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INTRODUCTION

What human rights regimes are to be discussed?

When we talk about human rights in the Union we must draw a distinction between the internal aspect of these human rights, that is to say, the principles and rules which are binding on the institutions and the Member States in the field of Community law, and the external aspect of human rights, namely the action of the EU in that sphere in its relations with non-member States. These two aspects of human rights raise quite separate issues in their relationship with sovereignty and are subject to very different legal regimes. Emphasis will also be given, in that regard, to the paradox linked with the fact that, while human rights are expressly stated to be an objective of the Union's foreign and security policy, or of the Community's development cooperation and technical and financial assistance policy, the same cannot be said of the action developed by the Community and the Union vis-à-vis their member States. The absence of any express reference to the idea that human rights may constitute an objective or an object of closer union between member States makes it impossible to conclude that the EU has a general competence in matters relating to human rights.

Beyond the guarantee of human rights afforded by Community law, there is clearly the guarantee of human rights ensured by the member States' human rights protection systems. This guarantee, which concerns what is called the "autonomous action" of the member States, subsists in so far as the guarantee afforded by Community law concerns only the action of the States in relation to the implementation of Community law.

The expression "transfer of sovereignty" should be abandoned

Rather than transfer of sovereignty, it seems more desirable to refer to the concept of transfer of competence, and even, rather, that of integration.

Transfer of sovereignty cannot be satisfactory, since sovereignty is indivisible (even if it is possible to envisage limitations of sovereignty or even transfers of sovereign rights) and because, of course, the "political object" which the Union constitutes, even if it is not identified, cannot be sovereign, either at internal level or at international level, within the sense normally understood by lawyers, whether specialists in internal law or in international law. The former will prefer, rather, the argument that the Union is not competent to determine its own competence, while the latter will argue that there is no monopoly of constraint over the territory and the population in international relations.

Although it is frequently used in Community law, the concept of transfer of competence is scarcely more satisfactory, a point which has been perfectly demonstrated by certain writers.[1] The transfer of competence, in so far as it is characterised by a strict identity of the competence transferred and at the same time by the relinquishment of competence by the State, cannot in itself sum up the details of the division of competences between the Union and its member States. The division of competences, as we know, conforms to a polymorphous and complex "distributive system of competence" where the competences attributed to the organisation are not necessarily reflected in the relinquishment of competence by the member States. The latter forms part of a particular "background", that of the ever-closer union of the member States which calls, **in particular**,[2] for the method of integration.

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[1] See V. MICHEL, *Recherches sur les compétences de la Communauté,* l'Harmattan, Paris, 2003; V. CONSTANTINESCO, *Compétences et pouvoirs dans les Communautés européennes, contribution à la nature juridique des Communautés,* Paris, LJDJ, 1974, p. 249.

[2] It is important here to bear in mind that this method is certainly not exclusive, for a number of reasons: first, because it is not absolute in the Treaty of Rome on the Economic Community, which claims to have its roots in

The substitution of the idea of integration for that of transfer of sovereignty

If we refer instead to the concept of integration, understood in the broad sense, that is to say, dissociated from exclusive recourse to the integrated method, and understood rather from the aspect of ever-closer union, by virtue of a highly refined system of division of competences, it is still necessary to define its outlines.

What closer union are we talking about: is it economic or political? In fact, the problem of the definition and the development of fundamental rights seems to be remarkably different, depending on whether it is placed under the auspices of the Community or under those of the Union.

What division of powers are we referring to? Is it the so-called vertical separation between the organisation and the member States? Is it the so-called horizontal separation between the institutions, in which several legitimacies coexist: the legitimacy of the Governments of the member States within the Council, the legitimacy of the peoples within the Parliament, or indeed the legitimacy of the Commission, which is much more difficult to characterise? So many players, who may well not have the same vision with respect to the definition and development of human rights from both the internal and the external aspect.

Thus, the European Parliament, which must not be overlooked in a discussion of the sovereignty of the peoples, sometimes struggles to find its place in the definition and the development, in the Community legal order, of the legal corpus of human rights. At the internal level, it is not a real player in the definition of primary law, except in what is known to be the marginal situation in which the convention method is employed in the revision of the founding treaties.[3] In the framework of the legal corpus proper to secondary law its “maximum efficiency” should be confined to the hypotheses of co-decision. None the less, as specialised writers have observed, accession to the status of co-legislature is undoubtedly less comfortable than that of a “mobiliser” of public opinion, and leading organiser of resolutions which, while certainly imaginative, are too far removed from the Realpolitik.

Ultimately, and no matter what is sometimes said, it is undoubtedly in the external aspect of human rights that the Parliament has been able to develop the most active “power of influence”, by setting itself up as the standard bearer of the community of values. It plays that role both “against” the Council, in order to denounce its overcautiousness, and against non-member States, which it may, for example, deprive of the benefit of a cooperation agreement (and the financial manna which it represents!) by refusing its consent.

At the same time, integration may be defined by reference to its object, and clearly the definition and development of human rights within the Union refer to what is called “normative” integration, which is known to be part of the very specific context of monism with primacy. Thus the co-existence between the European corpus of human rights specific to the construction of the Community and the body of national systems of human rights bathes in a very particular ambience of articulation which goes beyond the usual question, which is that of public international law, on the convergences or differences between international instruments and national regimes on human rights.

Furthermore, an examination of the impact of the Community construction confined to

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the method, and, second, because it is deliberately omitted from the Maastricht Treaty on the Union.

[3] It will be noted that the convention method, used in 1999 for the preparation of the Charter of Fundamental Rights and in 2003-2004 in the preparation of the Constitutional Treaty, seems to be perpetuated by Article 48(3) TEU, in the Lisbon version. That article envisages the convention method as a sort of ordinary procedure (which may none the less be disapplied). Recourse to the convention method favours a greater association of the representatives of the European peoples in the revision of the treaties and, consequently, in the definition of the legal corpus of fundamental rights specific to primary law.

the sole basis of the definition and development of human rights would legitimately lead to the question of the implementation of those rights being ignored.

More particularly, the question of their application by the Community judicature would be disregarded. Two main reasons, of unequal explanatory value, may lead there.

The first is that, according to a prudent and orthodox vision of the objection to "government by the judges", the Community judicature should be merely a very indirect actor in the definition of human rights, since it should endeavour merely to declare the existence of such rights by reference to the general principles of law, to explain the content of those rights in the exercise of its role of interpreting the principle or the rule relied on, or, last, to resolve any conflicts that may arise between those rights. [4]

The second reason is that the seminar programme has made provision for returning to that judicial dimension of the definition and development of human rights on the occasion of their implementation by the court. There is no doubt that on that basis Community law offers a vast scope for discussion which greatly exceeds the modest ambition of this contribution, which focuses **not on the implementation** of those rights but rather on **their definition**. I shall note, as a matter of interest, a number of recent decisions which have aroused the interest of writers dealing with the new issue known as "conflicts" between human rights and the economic freedoms guaranteed by the Treaty of Rome. They singularly renew the traditional "positive interaction" approach, according to which human rights play a part in the achievement of the fundamental freedoms of the internal market. [5] It is the well-known situation in which human rights are invoked in support of the exercise of economic freedoms. The situations of negative and conflicting interaction with which the Community Courts have had to deal more recently are quite different. A first category of these is the situation in which the member State relies on human rights (freedom of expression, human dignity) in order to justify the obstacles which it places in the way of freedom of movement. Last, in other cases it is not the States, but private individuals, who rely on human rights as against other individuals, in order to oppose their exercise of their economic freedoms as guaranteed by the Community Treaty.[6]

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[4] The Community case-law contains a number of cases in which the Community Courts have resolved conflicts, either between a fundamental freedom (the free movement of goods) and a fundamental right (the right to demonstrate) (judgment of 12 June 2003 in Case C-112/00 *Schmidberger*) or between a fundamental freedom (freedom to provide services) and a fundamental right (human dignity) guaranteed by a national Constitution (judgment of 14 October 2004 in Case C-636/02 *OMEGA*), or between two fundamental rights guaranteed by Community law (intellectual property right and the right to private life and to the protection of personal data) (judgment of 29 January 2008 in Case C-275/06 *Productores de musica de España*). For a detailed treatment of the question of conflicts of norms in relation to fundamental rights and the relevant Community case-law, see C. GREWE, *Les conflits de normes entre droit communautaire et droits nationaux en matière de droits fondamentaux*, in "L'Union européenne et les droits fondamentaux", Brussels, Bruylant, 1999; J.P.JACQUE, *Vers une nouvelle étape dans la protection des droits fondamentaux dans l'Union européenne*, La France, L'Europe et le monde, Mélanges en l'honneur de J. CHARPENTIER, Paris, Pedone, 2009, in particular pp. 355 -361; Ch. KADDOUS, *Droits de l'homme et libertés de circulation, complémentarité ou contradiction?* in "Mélanges en hommage à Georges VANDERSANDEN, Promenades au sein du droit européen", Brussels, Bruylant, 2008, pp. 563-591.

[5] For the positive interaction of human rights and free movement of goods, see judgment of 11 July 2005 in *Cinéthèque*, where the freedom of expression guaranteed by Article 10 of the European Convention on Human Rights is invoked in support of the free movement of video cassettes; for the positive interaction between human rights and the freedom to provide services, see judgment of 18 June 1991 in *ERT*, where a member State's reliance on its right to derogate from freedom to provide services is appraised against the yardstick of freedom of expression guaranteed by Article 10 ECHR; for the positive interaction between human rights and free movement of persons, see the judgment of 11 July 2002 in Case C-60/00 *Carpenter*, where the right to respect for family life guaranteed by Article 8 ECHR is invoked by a Philippine national threatened with deportation in support of the freedom to provide services of her British husband (who could be deprived of that freedom as a result of his wife's deportation); for the positive interaction between human rights and the free movement of capital, see judgment of 25 January 2007 in Case C-370/05 *Festersen*, where the right to the free choice of residence guaranteed by Protocol No 4 to the European Convention on Human Rights (Article 2) is invoked in support of the free movement of capital. For a detailed analysis of those cases, see Ch. KADDOUS, *op. cit*.

[6] In both Case C-438/05 *Viking Line* 11 December 2007 and Case C- 341/05 *Laval* 18 December 2007 the Court of Justice, in adjudicating, after balancing human rights (the right to take collective action) against economic freedom

Faced with the many, indeed with too many, opportunities to examine the impact of the Community construction on the definition and development of human rights, I hope that I shall be forgiven for restricting my discussion to human rights in the Community and Union system and for referring only very indirectly to the problem (covered by other contributions) of the national systems of the member States. By refocusing my analysis on the particular scope of the definition and development of human rights by and for the system of the Union, I propose to discuss three main key ideas.

1/ the definition and development of human rights in the Community system have undoubtedly suffered, in the history of the construction of the Community, from a certain restrictive and mercenary vision specific to the Europe of merchants.
2/ the definition and development of human rights in the Community system frequently remain entangled in the obsessions with the division of competences.
3/ the definition and development of human rights are sometimes stimulated by integration (including economic integration), which may speed up the recognition of human rights.

I. THE DEFINITION AND DEVELOPMENT OF FUNDAMENTAL RIGHTS, SET BACK BY THE RESTRICTIVE VISION OF INTEGRATION

On many occasions writers have endeavoured to emphasise the consequences which the original and restrictive vision of the construction of the Community had for the internal system of protection of human rights (A). That system has reached maturity only relatively recently, an event which owes much "to the turning point of the Treaty of Amsterdam." (B)

A/ The lack of vision of the Europe of merchants

Beyond the political ulterior motives, which have prompted the not irrelevant assertion that the construction of the Community was primarily a political project, the initial years of the construction of the Community are marked by an economic Union conceived as an "investment fund" which is difficult to envisage as a common fund of values.[7] Thus, it is hard to imagine the "Europe of merchants" as a destroyer of freedoms or again as the herald of fundamental rights. The prevailing general context for fundamental rights is therefore that of a kind of "free union" [8] and of mutual confidence between the organisation and the member States which see no need to enter into formal commitments in the sphere of fundamental rights.

The consequences of that relative indifference to human rights on the part of the organisation and its member States are well known. They affect the completeness of the protected fundamental rights, the status conferred on them by the Treaties and also the function assigned to them. It also gives rise to a "sometimes biased culture" of human rights which has an impact on their definition and their development.

1/ The incompleteness of fundamental rights

The absence in the Treaties establishing the European Communities of formal commitments for the protection of fundamental rights cannot be assimilated to a real legal void. There is in fact a legal corpus of fundamental rights, but one that is restricted, as it relates to those

(freedom of establishment under Article 43 TEC in *Viking Line*, freedom of establishment under Article 49 TEC in *Laval*), in favour of freedom of movement, revived the controversy on "the subordination of human rights" to the requirements of economic integration. For a detailed analysis of those cases, see Ch. KADDOUS, *op. cit.*

[7] The metaphor is taken from G. BRAIBANT, *Les enjeux pour l'Union*, in "Vers une charte des droits fondamentaux pour l'Union", Regards sur l'actualité, special no. 264, Paris, La documentation française 2000.

[8] Cf. C. FLAESCH MOUGIN, *Vers une Union entre les peuples européens libre et démocratique*, in "Liber Amicorum en l'honneur de J. GEORGEL", Ed. Apogée, Rennes 1998.

economic freedoms which were expected to fashion the common market. The main principles of freedom thus enshrined in positive law concern free competition (Article 85 TEC), free movement of goods (Articles 30 to 37 TEC), freedom of movement for workers (Articles 48 to 51 TEC), freedom of establishment of independent professions (Articles 52 to 58 TEC), free movement of services (Articles 59 to 66 TEC) and free movement of capital (Articles 67 to 73 TEC). There is no need to underline here the tenuous link which those freedoms have with human rights, with the doubtless exception of freedom of movement for workers. The Treaties are also clearly concerned with the prohibition of discrimination, in its many and varied forms, although they are limited to discrimination on the basis of nationality.[9] Last, since the original version of the Treaty there has been a principle of equality between men and women, which was, however, initially limited to remuneration.[10]

2/ The heterogeneous nature of fundamental rights

In addition to the very incomplete definition *ratione materiae* of fundamental rights proposed by the Treaty of Rome in its initial version, it is also the diversity of status which it confers on rights and freedoms that characterises its first restrictive approach. Certain freedoms are thus simply mentioned without being seen as elements of positive law. That is the case, for example, of freedom of association, which was already mentioned in the ECSC Treaty, or again certain rights and freedoms of a social nature, in respect of which the Treaties merely call for cooperation between States for their development[11] under the auspices of the Commission. Conversely to that restrictive status calling for mere promotion, the rights and freedoms which contribute to the structure of the internal market, such as freedom of movement and free competition, are given the status of positive law and are sources of obligations which are actually binding on the States and also on their economic players. The definition of these obligations underwent constant development in the history of the construction of the Community, as a consequence of the revision of both primary and secondary law, and as a result of the case-law.

3/ A biased culture of human rights

Writers are virtually unanimous in underlining that “biased culture” of fundamental rights and freedoms which prevailed in the early stages of the construction of the Community and which sometimes continues even today, notably in the external aspect of fundamental rights.[12] This

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[9] The Treaty of Rome does indeed establish a principle of non-discrimination, but one which is limited in scope: Article 7 (now Article 12) prohibits, within the scope of application of the Treaty, any discrimination on grounds of nationality. In addition to that general principle, the Treaty contained a number of special provisions, of more limited scope, prohibiting discrimination based on nationality: for example, Article 48(2) in relation to freedom of movement for workers or Article 37(1) in relation to the establishment of national monopolies. Only when the Treaty of Amsterdam was adopted was the prohibition of discrimination extended to discrimination based on other criteria (race, ethnic origin, religion or belief, age, sex or sexual orientation (Article 13 of the EC Treaty).

[10] It was necessary to await subsequent developments of the Treaty of Rome in order to see the emergence of a principle of equal treatment and equality of opportunities for men and women, whereas the 1957 version of the Treaty guaranteed only equal remuneration. This example reflects the relationship between the definition of fundamental rights and their development, which may be analysed either as the creation or new rights or as the extension of the guarantee provided by rights which were already recognised.

[11] For a detailed analysis of the differences in legal status conferred on human rights by the original version of the Treaties, reference can usefully be made to J.F. AKANDJI KOMBE, *Le développement des droits fondamentaux dans les traités,* in "L'Union Européenne et les droits fondamentaux", L. LECLERC, J.F. AKANDJI KOMBE, M.J REDOR, dir., Bruylant, Brussels 1999, in particular p. 35.

[12] J.F. FLAUSS, *Droits de l’homme et relations extérieures de l’ Union européenne,* in "L'Union Européenne et les droits fondamentaux", L. LECLERC, J.F. AKANDJI KOMBE, M.J. REDOR, dir., Brussels, Bruylant, 1999, pp.137-172. M. CANDELA SORIANO (dir), *Les droits de l’homme dans les politiques de l’UE,* in particular Section III on external relations, with contributions by I. GOVAERE and A. VAN BOSSUYT, F. HOFFMEISTER, Larcier, Brussels, 2006.

neologism of “biased culture of human rights” is employed in an attempt to highlight what is frequently an economist reading of human rights.

This particular vision is essentially the consequence of the fact that the development of fundamental rights at internal level is primarily dependent on the particular objectives of integration. First among those objectives are economic integration and the requirements of the construction of the single economic area, the common market and the internal market. Thus the Community judicature has no hesitation in making the protection of fundamental rights subject to the requirements of the general interest specific to the construction of the Community. In the second place are the objectives of normative integration and of the assertion and the consolidation of the primacy of the Community legal order over national laws. There is no need to dwell excessively on the formidable influence developed by certain Constitutional Courts in order to “put pressure” on the Community system and to force it, first of all by means of judicial decisions and then by the revision of the Treaties, to develop a vision in which human rights enjoy greater autonomy, with the clear objective of neutralising any assaults on the primacy of Community law. In each case one finds the well known analysis of a form of subordination of fundamental rights to the specificity of integration and closer union between member States.

The absence of genuine autonomy of human rights can also be seen in the external relations, since it was when the Community entered into economic and cooperation arrangements that the instruments of the external aspect of the defence and promotion of human rights were first introduced. That is the case of the political conditionality [13] which accompanies the cooperation agreements and the principal technical and financial programmes like PHARE, TACIS, MEDA or CARDS. By that conditionality, the Community makes the establishment or the pursuit of economic cooperation conditional upon respect by its partner for human rights which in many cases can be seen to have what is frequently an economist vision. Thus one may recall the example, which I am led to emphasise, of the women’s rights which the Union attempts to promote.[14] Most frequently seen (in accordance with the initial internal Community logic) from the economic aspect of gender equality, they find it difficult to attain a logic of fundamental right linked with the dignity of the person. That is a matter for regret when it is known that, in certain States partners of the Union, women are the daily victims not only of discrimination but also of serious violence. This violence, which is harmful both to their physical integrity and to their dignity, cannot be stemmed by the restrictive approach relating to gender equality.

B/ Access to maturity owing to the turning point of the Treaty of Amsterdam

The Maastricht Treaty did admittedly make its own indirect contribution to the development of the legal corpus of fundamental rights, notably through the introduction of European citizenship, which thus permitted a significant extension of the freedom of movement of persons by severing the link with its initial reference to economic integration and the requirements of the internal market. However, European citizenship, which differed on many points from the human rights based approach, was not sufficient to exhaust it. It was therefore indeed the Treaty of Amsterdam that constituted the “veritable accelerator” of progress in the definition and development of human rights in the Community system, an acceleration which prefigured the subsequent consecration achieved by the Charter of Fundamental Rights (see III, below). In addition to strengthening the protection of fundamental rights, the Treaty of Amsterdam

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[13] C. SCHNEIDER, E. TUCNY, Réflexions sur la conditionnalité politique appliquée à l’élargissement de l’Union européenne aux pays d’Europe centrale et orientale, Revue d’études comparatives Est ouest, 2002, vol.33, no. 3, pp.11-44. C. SCHNEIDER, “Réflexions sur le rôle de la conditionnalité politique dans l’affirmation de l’UE comme acteur global” in C. FLAESCH MOUGIN and C. SCHNEIDER, (dir.), L’Union européenne acteur global dans le nouvel ordre mondial, Académie européenne d’été (action J. Monnet Recherche de l’UE) de Grenoble et de Rennes **(**September 2005) interactive digital publication “Droit in situ”, Paris, 2006. C. SCHNEIDER, Au cœur de la coopération internationale de l’union européenne: quelle stratégie à venir pour la conditionnalité politique? Mélanges en l’honneur du professeur Jean Touscoz, France Europe éditions, Nice 2008, pp. 750-778.

[14] Cf. ROLLINDE (M), *Le partenariat euro- méditerranéen et les droits fondamentaux »,* in BERRAMDANE (A), “Le partenariat euro-méditerranéen à l’heure de l’élargissement de l’Union européenne”, Karthala, Paris, 2005.

promoted respect for those rights to the status of "founding principles of the Community system". It thus achieved an inversion of the functionality of human rights which had hitherto characterised the Community integration.

1/ The consolidation of the legal corpus of human rights

An important example of the strengthening of the legal corpus of human rights is the entry into primary law of social rights as a general category of fundamental rights. Social rights are explicitly mentioned in the amended Preamble[15] to the Treaty on European Union, by virtue of a reference which the Preamble makes to the 1961 Council of Europe European Social Charter and the 1985 Community Charter of Fundamental Social Rights. In addition, certain social rights which were already protected, such as equality between men and women, received an enhanced definition, as may be seen from, in addition to the example already given of its extension to areas other than remuneration, the introduction of positive discrimination in the name of the promotion of that equality.[16] Last, the most significant contribution concerns the prohibition of discrimination proposed by the new Article 13 of the Treaty on the European Community, which supplements Article 12 (formerly Article 6), which authorised the Community to legislate to prohibit discrimination on grounds of nationality. Article 13 extends the Council's legislative power to the prohibition of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Clearly, Article 13 belongs to those special or particular competences (see II above) according to which the Community does not have *ab initio* a "general and direct legislative power" to regulate that fundamental right. It is only within the scope of its competences that the Community can adopt such measures.[17] The development introduced by the Treaty of Amsterdam with respect to the legal corpus is therefore as much concerned with the introduction of new reference rights as with the extension of rights which were already protected. However, it is the inversion of their functionality that has had the most marked impact on specialist writers.

2/ The inversion of the functions assigned to the protection of human rights

The Treaty of Amsterdam gives new momentum to the cause of protection of human rights specific to the construction of the Community through the assertion of the "constitutional anchorage" of respect for those rights.[18] Henceforth, by virtue of the new Article 6 TEU (a revised version of the former Article 7 of the Maastricht Treaty), respect for fundamental rights is presented not only as the basis of the system of government of the member States but indeed as a "founding principle" of the European Union, implying that the Union and its member States are thereby under an obligation to comply with that principle. Thus new mechanisms have been devised for *a priori* and *a posteriori* control of respect for that obligation. The revised Article 49 of the Treaty on European Union introduces into positive primary law a political conditionality of accession, borrowed from the law of the Council of Europe, and which in

[15] This reference is also explicitly made in the new Article 136 of the Treaty on the European Community (former Article 117) on social policy, according to which the Community and its member States are to set themselves as objectives the promotion of employment, improved living and working conditions, proper social protection and also dialogue between management and labour and the development of human resources. Article 137 TEC provides that the Council may adopt, by means of directives, "minimum requirements". However, the assertion that national diversities are to be taken into account is omnipresent in the mechanism of the Community social policy, which presents itself primarily as a mechanism to support the action of the member States which is incompatible with the removal of their competence (see below).

[16] See Article 141(4) TEC, which makes it lawful for a member State to maintain or adopt positive discrimination designed to make it easier for an underrepresented sex to pursue a vocational activity.

[17] When we say that the Community, acting through the Council, may take measures necessary to combat discrimination, we are reminded that the institutions cannot be criticised for having failed to act.

[18] CONSTANTINESCO (V), *Le renforcement des droits fondamentaux dans le traité d'Amsterdam,* in Le traité d'Amsterdam: réalités et perspectives, Pedone, Paris, 1999.

Community law had only the status of "soft law".[19] An *a posteriori* control of respect for human rights is provided for in Article 7 TEU, which establishes a new mechanism designed to punish a member State found to have committed a serious and persistent breach of fundamental rights.[20]

If the brief look at the broad stages in the development of fundamental rights has enabled us to highlight the procrastinations essentially linked with the restricting vision of the Europe of merchants, it seems to me that this development has particularly suffered from the obsession with the division of competences that characterises Community integration.

II. THE DEFINITION AND DEVELOPMENT OF HUMAN RIGHTS TAKEN HOSTAGE BY THE "OBSESSIONS" WITH THE DIVISION OF COMPETENCES

The objection might admittedly be raised that the question of the division of competences cannot be the monopoly of that Community integration which I have conceived in the broad sense, that is to say, dissociated from the exclusive reference to the Community method alone. That question, which is very much present in the constitutional law of Federal States, may even arise sometimes in the law of classic international organisations unconnected with integrated cooperation. None the less, the specificity of that question in the construction of the Community cannot be denied. The *sui generis* model of the unidentified political object leads to very diverse forms of the removal of competence from the member States without calling in question the principle of their sovereignty. In reality, it is only in what is, moreover, the quite rare situation in which the Community has exclusive competence[21] (which does not arise in the field of fundamental rights) that one is closest to the existence of a genuine removal of competence from the State.[22] In any event, whatever the precise nature of the competence attributed to the Community, the obsession with the division of competences is omnipresent and the question of the definition and the development of fundamental rights cannot escape that obsession, illustrations of which are to be found in the internal aspect and the external aspect of those rights (A). In the context of the internal aspect, it has become particularly widespread because certain writers have sought to assert a general competence on the part of the system in relation to fundamental rights, an assertion which positive law has denied (B).

A/ The omnipresence of obsession with the division of competences

Admittedly, this obsession with the division of competences is very much in evidence in the internal aspect of the protection of fundamental rights. However, it is impossible to overlook the fact that it has in many regards marked the external aspect, that is to say, the "policy of the defence and promotion of human rights" of the Union in its relations with non-member States.

1/ The obsession with the division of competences in the internal aspect of human rights

[19] See Copenhagen Declaration of 1973.

[20] This mechanism of imposing a sanction for a serious and persistent breach of human rights by a member State was later supplemented, by the Treaty of Nice, by a mechanism of prevention and alert in the event of a risk of a breach (see Article 7(2) TEU). The current positive law of Article 7 is thus subdivided into a sanction mechanism limited to the exceptional circumstance of a serious and persistent breach and a preventive and "monitoring" mechanism in the event of a simple risk, the determination of which is no longer "bound" by the requirement of unanimity, as in the context of a finding of a serious and persistent breach.

[21] Examples of exclusive competence are rare in Community law: they are to be found, for example, in the commercial policy or the fisheries policy.

[22] Being the closest does not, however, mean that every exclusive competence necessarily entails the complete removal of competence from the State. That may be explained by the fact that while the Community has not exercised that exclusive competence, action by the member States remains possible, which is a perfectly understandable solution if all risk of a legal void is to be avoided.

Faced with certain writers who, in the name of the community of values, were in favour of accepting that the Community had a general competence for fundamental rights, the States increasingly denied that this was so and took greater precautions to contain any broad interpretation of the special competences recognised to the Community. The member States are thus not prepared to sacrifice on the altar of integration and the community of values their own systems of protection of fundamental rights, an integral part of their constitutional pact with respect to which they are scarcely inclined to accept interference by the Community and Union system.

Many more examples could be given of this reluctance on the part of member States with respect to the possible instrumentalisation of the cause of the Community protection of fundamental rights to the detriment of their own competences. They all reflect of that difficulty in combining the development of fundamental rights by and for the Community legal order with respect for the sovereignty of the member States.

A first example, which might nowadays be considered relatively obsolete, is provided by the Regulation of 29 April 1999[23] relating to the development and consolidation of democracy and the rule of law and respect for human rights, in which the Council (and therefore the member States) reduced the Commission's proposals to just Community action for the benefit of non-member States, and thus solely to the external aspect, to the exclusion of the internal aspect, of human rights. Thus the States opposed any possibility for the EU to take action to promote fundamental rights within the EU. It was ultimately necessary to wait until, owing in particular to instruments such as the network of independent experts or the European Agency for fundamental rights, that new vision, so claimed by certain writers, of the transition from a negative concept (the monitoring of breaches) to a more positive concept of human rights (an objective to be achieved) was asserted. [24]

[23] (29 April 1999, OJ 1999 L 120, pp. 1 and 8).

[24] P. ALSTON and J.H.H. WEILER,*Vers une politique des droits de l' homme authentique et cohérente pour l' UE,* in P. ALSTON (dir), L'Union européenne et les droits fondamentaux, Bruylant, Brussels, 2001, pp.1-68.

A second illustration of the States' restrictive strategy may be found in the works which preceded the adoption of the Charter of Fundamental Rights of the Union. Thus, the preamble to the Charter emphasises that "[t]his Charter reaffirms [fundamental rights], with due regard for the powers and tasks of the Union and the principle of subsidiarity". Likewise, Article 51 on the scope of the Charter was amended on the occasion of the IGC which led to the final adoption of the Charter. Article 51(1) provides that the Charter is to apply to the member States only when they are implementing Union law. The member States are thus to respect the rights and observe the principles of the Charter in accordance with their respective powers and with regard for the limits of the Union. Paragraph 2 of that article states that the Charter "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties". A trace of this virtually obsessive concern, with rigorously identical formulations, can also be found in declaration no. 1 relating to the Charter, adopted within the context of the IGC. Certain writers have stated that these redundancies, which were introduced in order to respond to the "determination of certain member States", formed part of a "hammering",[25] so much did the relationship of Community protection of fundamental rights to the distributive system of competence already benefit owing, in particular, to the contribution of the case-law, from those well known reserves of respect for national competences.[26] At the most, it should be emphasised that these "hammerings" form part of those legal techniques sometimes described as the "petrifaction of competences". They are widely used by States to consolidate the principle of speciality in the allocation of competences to the Union and to limit broad interpretations of the allocated competences.

A final example may again be found in the discussions leading to the definition of the status of the European Union Agency for Fundamental Rights, the establishment of which was determined by Council Regulation (EC) No 168/2007 of 15 February 2007.[27] The Agency certainly could not be an authority for the definition of human rights. None the less, its general task of defending and promoting human rights is clear and, there again, has not failed to raise questions which effectively dispel any doubt as to that "Community obsession with the division of competences". Controversy quickly arose as to whether the Agency to be set up should be "merely [a] Community [agency]" or, on the contrary, an agency of the Union. Such a choice was of cardinal importance. In addition to what was already the very important question of whether it would be able to extend its activities to the particular sphere of freedom, security and justice, the freedom-destroying risks of which were often emphasised, was the even more fundamental question of the consultative competence of the new agency for control of respect by member States of their obligations under Article 7 TEU. In the context of that provision, "it is indeed all the actions of the member States, including their autonomous actions, that is to say, those unconnected with the mere implementation of Union law, that may be evaluated against the yardstick of their compatibility with the requirements of human rights".[28] It therefore came as no surprise when, on the occasion of the adoption by the Council of the regulation on the status of the agency, the Commission's proposals along those lines disappeared. "The mill of the obsessions of competences" had done its work.

2/ The obsession with the division of competences in the external aspect of human rights

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[25] See X. PRIOLLAUD and D. SIRITZKY, *Le traité de Lisbonne, texte et commentaire article par article des nouveaux traités européens (TUE-TFUE),* La documentation française, Paris, 2008, pp. 454-455.

[26] See Case C-249/96 *Grant*, judgment of 17 February 1998, and Case 5/88 *Waschauff*, judgment of 13 July 1989.

[27] OJ 2007 L 53; see also Opinion of the European Economic and Social Committee of 14 February 2006, OJ 2006 C 88; Opinion of the Committee of the Regions of 6 July 2005.

[28] See C. SCHNEIDER, *L'Agence européenne des droits fondamentaux, promesse ou illusion pour la protection non juridictionnelle des droits fondamentaux?* Mélanges en l'honneur de Jean CHARPENTIER, Pedone, Paris, 2009, p. 485.

The defence and promotion of human rights are expressly stated to be an explicit objective of the external relations of the Community: the policy on development cooperation (Article 177(2) TEC) and the policy on economic, financial and technical cooperation (second subparagraph of Article 181a(1) TEC) use the same form of words, according to which each of those policies "shall contribute to … the objective of respecting human rights and fundamental freedoms". On the other hand, there is no such reference in the commercial policy, and that is relevant to the delimitation of Community competences between that policy and the others. Last, with respect, this time, to the common foreign and security policy (CFSP), the Treaty on Union includes in Article 11, among the objectives assigned to that policy, the objective of respect for human rights. This shows that one of the main instruments of cooperation in the sphere of foreign policy is that of institutionalised political dialogue between partners. This institutionalisation at all levels, whether at ministerial level or senior official level, often takes the form of special committees which frequently include a committee on human rights.

The fact none the less remains that differences as to the precise scope of those competences of the Community or of the Union were able to arise between the organisation and its member States, the latter claiming that the Community lacked competence. Thus certain States have maintained the argument, not accepted by the Court of Justice, that the introduction of a political dialogue in a commercial agreement must have the consequence that, for the conclusion of that agreement, recourse to the legal basis of the commercial policy (where the Community has exclusive competence, a type of competence where the removal of competence from the member State is naturally the most marked) is prohibited.[29]

As for political conditionality, it too has been at the origin of a dispute over the division of competences between a member State and the Community: from a case brought by Portugal in 1996[30] it could be inferred from the case of 3 December 1996 that the introduction of a conditionality clause in an economic agreement (in this particular case between the EU and India) did not render the agreement a mixed agreement. Securing the characterisation of a mixed agreement is important for a State: the State is in effect a party, on the same basis as the Community, to the agreement, which can become binding only when it is ratified by all member States.

In the same case, the Court held that a conditionality clause does not mean that human rights are established as a specific field of cooperation between the Community and its partner.[31] There is certainly, in that decision in *Portugal* v *Council*, a vision identical to that in Opinion 11/94 on the accession of the Community to the European Convention on Human Rights: the obligation placed on the EU to respect human rights, as the objective assigned to certain of its external policies of promoting respect for human rights in the international field are not capable of being assimilated to a general competence of the Union in those fields.

B/ The absence of general competence of the Union in the matter of fundamental rights

That is a fact that is difficult to dispute. Admittedly, the member States are prepared to accept that human rights should be safeguarded by Community law when it is the Community system that acts. Likewise, they accept that Community law on human rights should apply where the member States implement Community legislation. However, the belief that the member States

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[29] ECJ, Case C-70/94 *Werner*, judgment of 17 October 1995: in that case the Court recalled that even the very political purpose of a measure (in this case the introduction of the CFSP instrument of political dialogue into an economic and commercial agreement) cannot in itself affect the exclusive competence of the Community in commercial matters, in the light of Article 113.

[30] ECJ, Case C-268/94 *Portugal* v *Council*, judgment of 3 December 1996.

[31] Thus, such a clause could not serve as the legal basis for a Community decision specifying the criteria of eligibility for cooperation projects: in the Court's view the sole purpose of a conditionality clause is to provide a legal basis for the right to suspend cooperation in accordance with the law of treaties.

are prepared to accept that the protection of fundamental rights is an object of the Union and thereby confers on the Union an unrestricted right to legislate is a myth sustained by a number of points of confusion.

The first of these, clearly highlighted by Opinion 2/94 on accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedom, consists in confusing an obligation to respect human rights with competence in that sphere. As has been pointed out by writers on many occasions, that does not amount to saying that the Community must respect a particular human right when it legislates in its sphere of competence, and that it is competent to regulate it by, for example, harmonising the relevant national laws. It is important to point out here the contribution made by Opinion 2/94, where the Court rejected the Commission's argument that it was permissible to infer from the numerous references to human rights in various Community and Union policies that a horizontal objective existed which allowed, in particular, the use of Article 308 as a legal basis for accession.[32]

In the same way, it is doubtless that difficulty in understanding precisely the relationship between fundamental rights and competence and the necessary distinction between competence and the obligation to respect those rights that gave rise to the discussions which were evident on the occasion of the drafting of the Charter on Fundamental Rights. Why, asked certain members of the convention, introduce into the Charter the affirmation of rights considered to be alien to the sphere of competence of the Union? That question was discussed with respect to the prohibition of the death penalty. While it seems actually difficult to accept, as positive law now stands, that the EU could "legislate" in that sphere, there is nothing to prevent the idea that, in the context of its competences, it might adopt a measure contrary to the prohibition of such a penalty.[33]

A second source of confusion is the consequence of the clearly horizontal nature of the obligation placed on the Union and its member States to respect human rights when they act. There again, however, such a horizontal obligation cannot be confused either with an express general competence to legislate in that sphere or with a horizontal objective permitting, for example, recourse to Article 308 of the Treaty of Rome, a form of insidious revision of that Treaty.

In conclusion on this complex issue of the relationship between human rights and competence specific to Community law and its system of allocating competence, it will be recalled that the fact that the Union does not have a general competence to act and legislate in the sphere of fundamental rights cannot be assimilated to the exclusion of all competence. These competences of the Union exist for many reasons, including that specific to a form of dynamic integration, including economic integration. In certain respects, economic integration may induce the Union to define and develop fundamental rights for the purpose of attaining its objectives.

III. THE DEFINITION AND DEVELOPMENT OF FUNDAMENTAL RIGHTS STIMULATED BY INTEGRATION AND BY THE PROGRESS OF THE CONSTRUCTION OF THE COMMUNITY

Integration, including economic integration, proves to be a source of the definition and development of fundamental rights when it is noted that the Community develops specific and

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[32] While Community law gives a certain place to those horizontal objectives applicable to all policies, it never does so implicitly, but explicitly, as may be seen in, for example, Article 3(2) TEA for equality between men and women.

[33] See J.P. JACQUE, Droits fondamentaux et compétences internes de la Communauté européenne, Mélanges en hommage au Doyen G COHEN JONATHAN, Bruylant, Brussels, 2004, Vol. II, pp.1007-1028. After referring to the existence of a comparable debate for the adoption of the Bill of Rights, the author relies, in the case of the Charter of Human Rights, on the example of the agreement on extradition and mutual assistance concluded between the EU and the United States after the attacks of 11 September, which precludes extradition involving the risk of capital punishment for the individual extradited.

special competences in that field in order to achieve its aims, particularly the aim of an unified economic area (A). Furthermore, the progress in political integration has led it to reflect and to deal with the freedom-destroying risks linked with the progress of closer political Union (B) and, last, in this brief account of the dynamics of integration the major support consisting in the adoption of the Charter of Fundamental Rights must not be overlooked (C).

A/ The definition and development of fundamental rights stimulated by the requirements of the unified economic area

Certain competences of the Union in relation to human rights do exist. Marked by the seal of the principle of speciality, they have their origin in the needs of economic integration, the attainment of the objectives of which in a certain way stimulates the intervention of the system to define and develop human rights. Some of these competences are direct when their very object is to ensure and develop equality between men and women or to prohibit discrimination. Others are much more indirect and are expressed in the form of regulations designed to safeguard human rights in the exercise of specific economic competences.

1/ The dynamics of the direct protection of fundamental rights

It has already been emphasised that the Treaties attribute specific direct competences in the field of human rights, as, for example, Article 13 TEC relating to the prohibition of discrimination, or Article 3(2) TEC relating to equality between men and women. There are other examples, such as that provided by Article 286 TEC, introduced by the Treaty of Amsterdam, which deals with protection of personal data.[34] It seemed important at a certain point in the construction of the Community to define the rules applicable to data held by the Community institutions and to ensure that they were consistent with respect for private life. These examples, which form part of a genuine aim of protecting and developing human rights, must be distinguished from those relating to the special indirect competence recognised to the Community.

2/ The dynamics of indirect protection

These hypotheses concern the Community system's right to act, based on a particular type of competence which is not the protection of fundamental rights. Put simply, the Community, by virtue of its obligation to respect human rights, will have to pursue a twofold objective; it will first of all have to ensure that the measures which it adopts in the context of its competences, in particular on the basis of economic Union, contain no provision contrary to human rights. In the second place, it will have to ensure that the measures which it adopts are not capable of harming those same rights. This refers to the situation in which a Community measure which has been adopted, without being directly incompatible with a particular right or freedom, may harm such a right or freedom when it is implemented. The Union is therefore under an obligation to take, within the framework of its special competence (freedom of movement or free competition), all the provisions necessary to prevent it.[35]

In order to guarantee this Community protection of fundamental rights, the Union may employ the technique of interpretation clauses. That is so, for example, in the case of the regulation

[34] As J.P. JACQUE, *op. cit.*, quite rightly points out, "there was no legal basis for specific obligations for the processing of data held by the institutions, whereas Community law had made it possible to establish a system applicable to the member States on the basis of Article 95 (harmonisation of the laws of the member State) but which can intervene only if differences in legislation constitute an obstacle to the common market".

[35] It is clear that the basis of Community competence to act is indeed that of its special competence, which, where the Community exercises it, must respect fundamental rights, and not a hypothetical and utopian general competence in relation to fundamental rights.

adopted on 7 December 1997[36] in order to ensure the free movement of goods or services endangered by protest movements by producers. This regulation, which fixes the obligations of member States to restore movement in the event of obstacles of this type, stipulates in its operative part that it must not be interpreted as affecting the exercise of fundamental rights as protected by member States. It is clearly the rights to take collective action and in particular the right to strike that are at issue. This example is singularly emblematic when it is known that Article 137, on social policy, which provides that the Community is competent to adopt directives laying down minimum requirements, explicitly excludes from its scope the right to strike and the right to impose lock-outs. The Community is indeed not competent to legislate in that field, but it may use its harmonisation competences to prevent those fundamental rights from being breached.

In other situations the Community's action is further reinforced in so far as the Community rule is not confined to mere interpretation clauses but introduces derogating rules whose very purpose is to permit a freedom to be attained. That will be the case of a Community act adopted in the context of the internal market relating to national monopolies[37] on the slaughter of animals which introduces exceptions to the rules which it lays down for the slaughter of animals in order to take certain religious practices into account. It will not escape the informed observer that legislation whose object is to avoid the distortion of competition and which provides for derogations in order to respect religious freedom cannot be assimilated to legislation the object of which is to define and regulate religious freedom.

Last, in a third series of hypotheses, it is possible to find Community acts which in themselves propose a regulation of fundamental rights that is adopted in order to prevent differences between the regulations of member States from constituting obstacles to the objective of a single economic area. This leads to the development of specific legislation, which does indeed concern fundamental rights but which is built on the legal basis of the harmonisation of laws. Put simply, its aim is not to harmonise fundamental rights (and, consequently, to substitute a Community definition for the national definitions), but to prevent the differences in definition provided by the national laws from constituting an obstacle to economic integration.

Examples include the Directive of 3 October 1989, known as the cross-border television directive, which is based on freedom of establishment (Article 52 TEC, now Article 43), or the directives on the protection of personal data. The first, the object of which is to abolish barriers to the free broadcasting of television, endeavours, in order to avoid the perverse effects of an exacerbation of the logic of the market which would favour entertainment programmes to the detriment of information programmes and also excessive concentrations or advertising methods that would destroy freedoms, to provide, in the name of freedom of expression and pluralism of ideas, limitations and indeed prohibitions on advertising.

The directives of 24 October 1995 [38] and 12 July 2002 [39] are even more significant, in so far as

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[36] See Regulation (EC) No 2679/98, sometimes know as the "Strawberry Regulation" by reference to its origin, connected with the movements of French farmers intercepting Spanish lorries in order to destroy their cargoes.

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[38] See Directive 95/48/EC of 24 October 1995.

[39] See Directive 2002/58/EC of 12 July 2002, which has the same objective in the field of electronic communications. It is often analysed as leading to a significant strengthening of fundamental rights: **in fact it was adopted following a co-decision procedure, which enabled the Parliament to increase pressure to that effect**. It is aimed at freedom of telephone communications and protects these communications from interception, while making provision for exceptions for the purpose of the protection of public order and security. However, these restrictions on the right to private life are determined with a level of precision which highlights the lacunae in the first directive of 1995: the restrictions must be necessary, appropriate and proportionate in a democratic society. The grounds used to justify such a limitation (national security, defence and public security, the prevention, investigation, detection and prosecution of criminal offences) are much more precise. Last, the restrictive measures can be adopted only for a specific period.

their very object is to achieve harmonisation of national laws on the protection of personal data. However, the origin and the purposes of the Community intervention are indeed those of the requirements of the proper functioning of the internal market. The differences between national legislations as regards the definition of the right to protection of personal data may prevent the free movement of those data and distort competition. It is therefore on that basis, and not on the basis of any general competence in relation to fundamental rights, that the Community acts.

B/ The definition and the development of fundamental rights stimulated by the progress of political Union

The construction of the area of freedom and security and the developments of the CFSP provide examples of the reinforcement of human rights which they have initiated in order to ensure that in its action the Union does indeed respect fundamental rights.

1/ The stimulation of fundamental rights and area of freedom of security and justice

The functional inversion achieved by the Treaty of Amsterdam of the functions assigned to human rights is at the origin of a genuine change in paradigm of the Justice and Home Affairs (JHA) policy, renamed the Area of Freedom, Security and Justice, to better assert that the action of the Union developed with respect to the requirements of security and justice cannot be detrimental to respect for fundamental rights. As informed observers have pointed out, "the sword and the shield of criminal law" must be joined together.[40] Thus the Third Pillar of the Union contains many of the techniques referred to above, which are so many interventions of the Union suitable for implementing its obligation to respect fundamental rights.

It is worth mentioning, in that regard, both the principle of mutual recognition of judicial decisions[41] between member States and its limits. As regards the principle, its revolutionary nature has often been emphasised, since a national court is precluded from opposing the enforcement of a judicial decision delivered in a different member State on the ground that it is not compatible with its own legal order. Does not the recognition of such a principle imply, in the name of integration, a kind of mutual confidence in the fact that, in spite of the diversity of the national legal systems, human rights are also protected? At the same time, this principle of mutual recognition has limits which the Union itself has defined, albeit imperfectly.[42] It is precisely those limits that allow the enforcing court to object to the recognition and enforcement of a judicial decision if that decision gives the impression that fundamental rights may have been breached.

In the same way, the Union, through the Commission, rapidly became aware that such a principle called for a minimum harmonisation of criminal law, which led, for example, to a proposal for a framework decision on the procedural guarantees to be granted to accused persons in criminal proceedings. It is easy to see on the occasion of that particular example that there exists, in the name of integration and its particular intensification (here the Area of Freedom, Security and Justice) a sort of "forced couple" between, on the one hand, the obligation to respect human rights and, on the other, their definition and development at Union level. This "forced couple" must find its voice between the different instruments represented by

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[40] G. DE KERCHOVE*, Respect des droits fondamentaux, contrainte ou condition de réalisation de l'espace européen de liberté de sécurité et de justice ,* in CANDELA SORIANO (dir), *op. cit.*, pp. 269-278, note 9.

[41] See Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant; see Framework Decision 2003/577/JHA of 22 July 2003 on the execution of orders freezing property; see Framework Decision 2005/214/JHA of 24 February 2005.

[42] See G. DE KERCHOVE*, op. cit.*, who points out that the exception to enforcement based on breach of fundamental rights is defined in an outrageous manner by the framework decisions, which make provision for that exception only for the mutual recognition of financial penalties.

mutual recognition and the harmonisation of laws.[43]

Another illustration of the contribution of the Area of Freedom, Security and Justice to the definition and development of human rights may be found in the definition of the principle of availability, according to which the data gathered by the police must be made available without barriers to all the services of the member States. There again the assertion of such a principle is necessarily accompanied by an action of the Union designed to provide itself with harmonised legislation on the protection of personal data with the intention of controlling the exchange of police and judicial data.

While it is difficult, moreover, to take the view that there is now a genuine external policy of the area of freedom, security and justice, it is undoubtedly possible to point to certain of those premisses which may also affect the definition and development of human rights. One example is those clauses designed to afford protection against the imposition of the death penalty which the Union attempts to promote in the agreements on extradition and mutual judicial assistance which it concludes with its partners. [44]

2/ The stimulation of fundamental rights and the CFSP

In addition to the example already given of the action of defence and promotion of fundamental rights through political dialogue, the CFSP relatively recently proposed a novel development of a "human rights"-centred concern of its external political action. This development was to apply in the spheres of so-called "smart sanctions"[45] whereby the Union, either in application of a resolution of the Security Council, or acting autonomously, more particularly in the context of the fight against terrorism, decides to impose sanctions on individuals or groups of individuals, for example by freezing their financial assets.

The question quickly arose as to respect by the Union for the fundamental rights of the persons targeted by such measures. This gave rise to proceedings before the Court, which were more unexpected[46] because the Treaty on the Union lays down the principle of judicial immunity of acts adopted in the context of the CFSP. It is important to note here that a sphere of action like the CFSP, which had been set up against a general background of judicial immunity, is in a way "caught" by the requirements based on the obligation to respect human rights, which include the rights of the defence, private property, freedom of expression or again freedom of association. It is also important to bear in mind that it is that protection initially developed by the Court that was in a way "constitutionalised". The Treaty establishing the Constitution, like the Treaty of Lisbon, expressly introduced the obligation placed on the Union to ensure that acts containing restrictive measures include the necessary legal safeguards (Article 215(3) TFEU). It is likewise expressly provided (Article 275 TFEU) that the Court has jurisdiction to review the legality of such acts.

C/ The "coronation" of the Charter of Fundamental Rights

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[43] As informed observers have emphasised, mutual recognition and harmonisation are not alternatives, since they pursue different aims. Harmonisation makes it possible to avoid the differences in legislation of which those who have committed misdemeanours and crimes might seek to take advantage. However, it cannot be undertaken on a large scale without jeopardising the principle of subsidiarity. As for the principle of mutual recognition, while it seeks to make the national systems coincide while preserving their differences, it cannot be instrumentalised to prevent or delay harmonisation.

[44] The type of clause sometimes described as a "Lithuanian" clause, and which the United States did not succeed in having removed from the two agreements which it concluded with the European Union on 25 June 2003.

[45] They are so-called in order to distinguish them from State sanctions the practice of which has demonstrated the perverse effects and in particular the harm caused to populations innocent of the crimes with which their totalitarian governments are charged.

[46] See the remarkable summary of these cases offered by A. RIGAUX and D. SIMON *in Johannis-Andrae TOUSCOZ amicorum discipulorumque opus,* Nice, France Europe éditions, 2007, pp. 779-804.

There is no need here to overemphasise the extent to which the Charter of Fundamental Rights constitutes an essential step in the definition and development of fundamental rights in their somewhat uneven history within the Union.[47] While it has not escaped the disagreement over the division of powers, it none the less shares that increase in importance of the political Union which, in the eyes of some, legitimately called for the constitutionalisation of its system. However, that constitutionalisation cannot do without a "declaration of human rights" of its own. I make no claim to deal exhaustively with such a text, which has been the subject of numerous studies. I shall therefore choose, in a very subjective manner, a number of the aspects which affect the definition of the rights protected by the Charter. This definition shows a certain modernity. At the same time, the Charter also reflects an intention on the part of the Union and its member States not to fix definitively the protection of the rights that which it proposes.

1/ The modernity of the definition of fundamental rights protected by the Charter

This modernity follows, in the first place, from the summary which the Charter proposes between all the generations of human rights – civil and political rights, economic and social rights and certain rights that are sometimes called "third generation" rights (the right to the protection of the environment, rights associated with technological evolution, such as bioethics, or the protection of personal data); there is therefore indeed a desire to embrace the entire field of fundamental rights, and this desire for completeness is sometimes accompanied by a form of imprecision as to category, as certain writers, regretting the presence of the chapter on citizenship, have pointed out.[48] Ultimately, and in spite of its "attempting too much and achieving nothing" imperfections, the Charter is a text which may proclaim the indivisibility of human rights defended by certain writers. I am thinking, more particularly, of certain disputes relating to the overlooking of economic and social rights resulting from specific instruments which are the source of reduced guarantees.

[47] C. SCHNEIDER, "Brèves réflexions sur la dialectique de l'ordre et du désordre pour une histoire des droits fondamentaux dans le système communautaire", in *Au carrefour des droits, Mélanges en l'honneur du Professeur L. DUBOUIS*, Paris , Dalloz, 2002, pp. 635-647; C. SCHNEIDER "De quelques nouvelles péripéties de la dialectique de l'ordre et du désordre dans le système communautaire de protection des droits fondamentaux: réflexions sur la charte des droits fondamentaux de l' Union européenne", in J. FERRAND AND H. PETIT (eds), *L'odyssée des droits de l'homme, vol.1, fondations et naissance des droits de l'homme*, Paris, L'Harmattan, 2003 pp. 373-389); C. SCHNEIDER, "Autres systèmes européens de protection", Jurisclasseur Libertés, Vol. 380, point 66 et seq.

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Modernity is also the consequence of the fact that a number of the rights guaranteed are redefined and modernised, most frequently in order to take account of the dynamic interpretations in the case-law or of the evolution of the Community Treaties; the most significant is without doubt that of the right to marry, defined in a way that permits homosexual marriage, where it is authorised under national laws. In this category, mention might also be made of the principle of equality between men and women, which is extended to all areas, as expressly provided for in the Treaty of Amsterdam amending the Treaty of Rome.

Another source of modernity is the result of the distinction which the Charter draws between rights and principles. This distinction reflects the compromise found by the Convention at the initiative of the representative of the French Government, Mr Guy Braibant, in order to escape the deadlock in which it was in danger of being stuck, as a result of the pressure brought to bear by the Germans and the British, who, for very different reasons,[49] were opposed to the introduction in the Charter of certain social rights which were suspected of not being justiciable. The Convention was unable to escape the recurrent discussions of the justiciability of these rights, but was able to overcome them by having recourse to principles, which it distinguishes from rights. Principles call, for their implementation and therefore for their justiciability, on the implementing texts of the States, and are therefore supposed to remove the spectre of those rights/claims placing unbearable financial burdens on the States. To use Mr Braibant's words, principles are less than a classic right, since they require intermediate texts in order to be justiciable, but they are more than a political objective in so far as they benefit from a "normative justiciability" according to which "the right to" entailed by the principle would find its sanction in the prohibition imposed on the public powers (national for domestic law, Community for the Union) on adversely affecting the principles concerned when they engage in their normative activity. Owing to that compromise, the content of the social rights safeguarded by the Charter appears to be very substantial,[50] although it must not be overestimated.[51]

Admittedly, the modernity of the Charter is relative, in so far as, in principle, the Charter does not create new rights[52] and amounts to a mere codification of the *lex lata*. One must merely emphasise the existence of a grey line between the exercise designed to codify rights which already exist and the undoubtedly closer exercise of the codification of the *lex ferenda*, consisting in rewriting them by reference to many sources of inspiration (case-law, various international texts, constitutional traditions of the member States).

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[49] For German writers, only a subjective justiciable right comes within the concept of "rights", whereas for British lawyers there is "no right without a remedy, that is to say, without an [effective] action". It is well known, moreover, that the United Kingdom was particularly hostile to the idea that the Charter might contribute to the development and reinforcement of social rights.

[50] See the examples cited by F.X. PRIOLLAUD and D. SIRITZKY, *op. cit.*: the right of workers to receive and impart information and to be consulted; the right of negotiation; the right to strike; the right of access to placement services; protection in the event of unfair dismissal; the right to fair and equitable working conditions; and the right of access to services of general interest.

[51] See J.P. JACQUE, *op cit.* "in respect of social rights, the Charter almost always follows a reference to the right safeguarded by a reference to national legislation. Where it does not do so, the reason is that the right in question is already the subject of Community rules. In the latter hypothesis, it is the Community rule, and not the Charter, that is the source of the obligation borne by the States, which in their action to implement this fundamental right governed by Community law are obliged to respect it."

[52] This assertion, which merits further discussion, may be inferred from a number of factors: I shall mention, more particularly, the text of the terms of reference given to the Convention responsible for drawing up the Convention, or again the Preamble to the Protocol on the application of the Charter of Poland and the United Kingdom, which states that the Charter does not create new rights.

2/ Maintaining the opening to progressive development of human rights

It would be wrong to think that after it becomes positive law following the entry into force of the Treaty of Lisbon the Charter of Fundamental Rights will be the sole reference source for the protection of fundamental rights in the Union. It will indeed acquire the status of primary law, but none the less it will not entail the disappearance of the other sources of fundamental rights specific to the Community legal order, as confirmed in Article 6 TEU of the Treaty of Lisbon. Article 6 refers, as general principles of law, to the European Convention on Human Rights, but also to the constitutional traditions of the member States. Beyond the examination of the way in which the multiplicity of sources will affect the way in which each will be led to play, one cannot ignore their respective evolutive forces. In addition to being used for interpretative purposes, it is certainly the task of the general principles of law of stimulating the development of the *lex ferenda* of human rights that is of interest. Thus the traditions of the member States are not fixed and both the texts of their constitutions and their constitutional case-law are bound to evolve. Thus, beyond the dynamic future of interpretation proper to the Charter, fundamental rights in the Union will be able to drink from the future of the general principles of Community law and the constitutional principles of the States. Both will either establish new rights or give a new extension to existing rights.

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There is no need to point out at the close of this overview (the restricted nature of which I hope will be excused) of the topic entrusted to me that Community integration has an impact on the definition and development of human rights and the subtle relationship which it has with sovereignty, or rather sovereignties.

Thus the Union has, over the years, been capable of developing a negative integration in relation to human rights, where the definition of those rights is rooted in the prohibitions on action issued against the member States and for which, when all is said and done, they are quite well prepared by the common market and at the same time by their own approach to the protection of human rights.

What is quite significantly different is the question of the positive integration capable of being developed by the Union defined on the basis of constructive measures designed to establish a synergy between all the national policies relating to respect for human rights. Do not the member States and the European peoples then feel themselves more “stressed” in their profound identity, which in certain respects does indeed show the limits of the Community of values? The debate over economic and social rights that “poisoned” the work of the Convention on the Charter of Fundamental Rights provided perfect evidence of the States’ reluctance to allow “rights to” to be defined at Community level. Was not Ireland’s refusal to approve the Treaty of Lisbon based on the anxiety-provoking fear of its people that, in the name of human rights, they would be placed under a positive obligation, namely the obligation to recognise the right to abortion?

There is no doubt that the subtle relationship between the development of human rights and sovereignty in the construction of the Community and its complex system of allocating competences renews, in its way, the conviction borrowed from the moralist La Rochefoucauld, that “our virtues are most frequently vices in disguise”.