

Thesis for the Master Programme in International and European Union public law

# The Charter and Creeping Competences

The fear of the Member States for the Charter of Fundamental Rights

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## Introduction

*‘creating an ever closer union  
among the peoples of Europe’<sup>1</sup>*

The Charter of Fundamental Rights of the European Union (hereafter: the Charter or Charter of Fundamental Rights) was solemnly proclaimed in 2000. With that proclamation it did gain authoritative status since all major EU institutions; the European Council, the European Commission and the European Parliament were in agreement. It did not however have any legal status.

Legal status for the Charter was first envisaged when it was included as an integral part of the Treaty for a Constitution for Europe. After the rejection of this treaty by some of the Member States and during negotiations on a new, normal, treaty revision the Charter was deemed too ‘constitutional’ by some Member States and it was removed from the treaty and instead Article 6 TEU was included. Article 6 TEU states that the Charter shall have the same legal value as the treaties, making it part of primary EU law. This new treaty revision has become known as the Lisbon Treaty and it entered into force on 1 December 2009.

In their ‘fear’ of the Charter being too ‘constitutional’ the Member States in a few places, both in the Charter and in the TEU, included articles which had to make absolutely clear that the Charter should not and could not ‘stretch’ the competences of the Union when it comes to jurisdiction over fundamental rights related matters. Furthermore, for three (initially two) Member States these articles were not enough; they decided to ‘opt-out’ from the Charter as a whole.

Considering the ‘fear’ of the Member States, have they succeeded in these efforts?

The first paragraph will give some definitions of competence creep. From these different definitions I will formulate the definition that I will adhere to in this paper.

Paragraph 2 will describe the history of fundamental rights protection in the Community/Union and how this evolved into the non-binding Charter leading to the legally binding Charter with the entry into force of the Treaty of Lisbon.

The road towards a legally binding Charter was not an easy one. Some Member States had certain ‘fears’ or concerns with a Charter that would be on par with the Treaties. These concerns will be addressed in paragraph 3.

Paragraph 4 will discuss whether or not the Member States have succeeded in their efforts to prevent the Charter from, possibly, being used to increase the competences of the Union, the so-called ‘creeping competences’ or ‘competence creep’.

‘s-Hertogenbosch, January 2011

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<sup>1</sup> Article 1, paragraph 2 TEU.

## 1 What is competence creep?

What is a competence creep? In short one could say competence creep is the extension of EU competences by the EU institutions such as the Commission<sup>2</sup> or the Court of Justice of the European Union.<sup>3,4</sup> In the literature on this topic one can come across a wide range of definitions. For instance, competence creep or creeping competences can mean the expansion of competences by the European Commission through the introduction of European legislation and thus reducing the competences belonging to the Member States. However this definition does not bide well with the subject matter at hand because it limits the use of competence creep exclusively to the European Commission and disregards the possibility of, for example, the Court of Justice to engage in the extension of competences of the European Union. For this paper I will use as a starting point the definitions as used by Prechal<sup>5</sup> and Barnard<sup>6</sup> before adopting my own definition of competence creep.

In legal frameworks or in the field of legal matters there are, according to Prechal, two possible definitions for competence creep. The first one concerns positive intervention and can be defined as ‘the liberal interpretation of the legal basis provisions by both the EU institutions and the ECJ’.<sup>7</sup> This form of competence creep usually derives from ‘rather vague and open wording of the legal basis provisions themselves’.<sup>8</sup> This form of competence creep can happen through the exercise of legislative powers, i.e. by positive intervention by the EU institutions, as described above, but also through soft law instruments such as the Open Method of Coordination (OMC), co-ordination, policy development, financial incentives et cetera. This definition is, again, too narrow, it does not take into account the possibility that the Court of Justice engages in a form of competence creep. The other definition defines competence creep in a broader sense. Prechal writes that there is rich case law

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<sup>2</sup> An example would be the Commission’s proposal for a Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, even though this right for family members is not to be found explicitly in the Treaties. The Commission in its explanatory memorandum acknowledges this but places this right in the broader scope of the right of freedom of movement. Commission, Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final of 25 September 2001, Explanatory Memorandum. Other examples can be found in for instance: Case C-240/90, *Germany v Commission*, [1992] ECR I- 05383 in which Germany argued that the Commission did not have competence and where the Court found that the Commission did have competence, based on a Council Decision; or Case C-39/03 P, *Commission v Artogodan*, [2003] ECR I-07885 in which the full Court found that the Commission lacked competence when it adopted the wrong legal basis for its decision whereas the competence in question actually belonged to the Member States.

<sup>3</sup> Hereafter named the Court of Justice, the Court or ECJ.

<sup>4</sup> For instance the Court’s judgment in the *Kadi* case (Joined Cases C-402/05 and C-415/05, *Kadi*, [2008] ECR I-6351); in this case the ECJ ruled that the Union has the competence to impose sanctions on individuals, even though the most specific articles applicable (then Articles 60 and 301 EC) only related to third states. Another example is the groundbreaking *Van Gend en Loos* case (Case 26/62, *Van Gend en Loos*, [1963] ECR 00001) in which the Court created the principle of direct effect. Or the *Costa v Enel* case (Case 6/64, *Costa v ENEL*, [1964] ECR 00585) in which the Court established the primacy of European law, meaning that in case of conflict between Union (then Community) law and national law, Union law prevails.

<sup>5</sup> Since this summer the new Judge in the Court of Justice coming from the Netherlands.

<sup>6</sup> Barnard, p. 267.

<sup>7</sup> Prechal, p. 5.

<sup>8</sup> Ibid.

related to this definition of competence creep in broader sense.<sup>9</sup> This means that EU fundamental rights law ‘applies to the Member States not merely when they are “implementing” EU law, but whenever they are “acting within the scope of Community law”’.<sup>10</sup> This scope includes the general principles of law, of which the fundamental rights form a part through Article 6(1) TEU, and of course the Charter. The problem is that this means that certain limits have to be observed by the Member States and as a result Member States, and their citizens, can perceive such limits as a loss of sovereign powers and of national competences and therefore as a competence creep from the side of the European Union.<sup>11</sup>

Barnard defines competence creep in a slightly different way. According to her competence creep is the situation ‘where national judges might decide to apply the Charter to situations governed purely by national law’.<sup>12</sup> This definition of competence creep, which relates to the action by national organs rather than the EU itself, is the one the United Kingdom was most afraid of during the negotiations on the Lisbon Treaty.

Based on these definitions I will adopt the following definition of competence creep for this paper. Competence creep, or creeping competences, is a situation where the EU institutions, specifically the ECJ and/or the European Commission, create, through case law or policy proposals, an expansion of the competences of the European Union.

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<sup>9</sup> For example on ‘direct taxation, social security, health, education and criminal law’, Prechal, p. 5.

<sup>10</sup> Carozza, p. 43.

<sup>11</sup> Prechal, p. 6.

<sup>12</sup> Barnard, p. 267.

## 2 The road towards a binding Charter

The Charter of Fundamental Rights of the European Union forms part of a long process of fundamental rights protection in the European legal order. This section will describe the historical background of the Charter and how it came into being. First the situation of fundamental rights and their protection in Community law leading up to the Charter in 2001 will be briefly described. Then the coming about of the Charter itself will be described as well as its status at that time, followed by the Charter in relation to the draft Constitutional Treaty of 2004. This chapter will end with a description of the Charter and its status in the context of the Treaty of Lisbon/Reform Treaty.

### 2.1 Historical background

The Charter of Fundamental Rights of the European Union can be viewed as the latest outcome of a long period of fundamental rights protection within the European Union/Community. The European project started out with no fundamental rights enshrined in its Treaties.<sup>13,14</sup> The Treaties did contain the fundamental freedoms<sup>15</sup> but these, as well as the entire Treaties, were aimed at economic cooperation and integration of the Member States, not the protection of fundamental rights. Some authors<sup>16</sup> view the prohibition of discrimination on grounds of nationality and the prohibition of discrimination on grounds of sex as fundamental rights. Dutheil de la Rochère notes that these rights are actually more of a necessary 'condition of free movement of persons (workers), than a fundamental right of non-discrimination'.<sup>17</sup> The areas of economic cooperation and integration seemed not to involve the protection of fundamental rights, at least not at first glance. In the early years the Court followed this approach. In the cases of *Stork*<sup>18</sup> and *Geitling*<sup>19</sup> the Court rejected the argument that the High Authority should take into account the fundamental rights as enshrined in the German Constitution<sup>20</sup> when applying Community law. This rejection, combined with the lack of a fundamental rights catalogue carried with it, according to Lenaerts and De Smijter, the '...risk that the Court would have no fundamental rights standard whatsoever according to which it should judge the legality of acts of the Community institutions or acts taken by the Member States in the framework of Community law'.<sup>21</sup>

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<sup>13</sup> Dutheil de la Rochère, p. 345.

<sup>14</sup> Lord Goldsmith Q.C., p. 1202.

<sup>15</sup> The well known four freedoms: the free movement of goods, the free movement of persons, the free movement of services, the free movement of capital.

<sup>16</sup> Lenaerts and De Smijter, p. 274-275. They argue that as early as 1957 the Treaties contained some fundamental human rights. Most notable in their view is the clause on non-discrimination on grounds of nationality as contained in the Treaty Establishing the European Economic Community (EEC). This clause still forms an essential part of fundamental rights protection in the Union: i.e. without this prohibition it would be difficult, if not impossible, to guarantee the right of free movement of persons or the freedom to provide services within the Union. Another right enshrined in the EEC Treaty was that of prohibition on the grounds of sex.

<sup>17</sup> Dutheil de la Rochère, p. 347.

<sup>18</sup> Case 1/58, *Stork v. High Authority*, [1958-59] ECR 43.

<sup>19</sup> Joined Cases 16 and 17/59 *Geitling v. High Authority*, [1959] ECR 17.

<sup>20</sup> Grundgesetz.

<sup>21</sup> Lenaerts and De Smijter, p. 276.

During the next decades the competences of the Community expanded. This brought to the fore the lack of fundamental rights protection by the Community Institutions. The call for fundamental rights protection grew in those decades. One of the main issues was that the European Community was not a member of the European Convention of Human Rights, as opposed to the Member States, and therefore individuals could not rely on this Convention when they felt fundamental rights were not protected by Community Institutions. The European Court of Justice heard this call and started, in the absence of fundamental rights clearly enshrined in the Treaties or the existence of a fundamental rights catalogue, to expand its case law to include the protection of fundamental rights through a number of groundbreaking cases.<sup>22</sup> In the *Nold* case the Court ‘considered itself bound to draw inspiration both from the constitutional traditions common to the Member States and from the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories’.<sup>23</sup> During the years the Court’s most important and most used international treaty has been the European Convention of Human Rights<sup>24,25</sup> (ECHR) and the Court basically ruled that it would look at the Convention to provide the contents of fundamental rights and as such have it function as a fundamental rights catalogue within the Community legal order.

### **2.1.1 The Single European Act and beyond**

This solution as used by the Court was welcomed by the other Community institutions<sup>26</sup> and eventually by the Member States in the Single European Act.<sup>27</sup> Up until the adoption of the Single European Act in 1986 none of the Treaties contained any direct reference to the protection of fundamental rights. The preamble to the Single European Act changed this. The 3<sup>rd</sup> consideration reads as follows: ‘Determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter...’. With this consideration in the preamble the Member States, the constituent power of the Community, codified the case law of the Court. Mention must be made that this was only a first start. It would take until the Treaty of Maastricht and the Treaty of Amsterdam, before ‘definitive constitutional recognition was achieved’.<sup>28</sup>

The Treaty of Maastricht<sup>29</sup>, which created the European Union, included a provision in Article F(2)<sup>30</sup> TEU which stated that:

*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November*

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<sup>22</sup> E.g. Case 29/69, *Stauder v. City of Ulm*, [1969] ECR 419, para 7, Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125.

<sup>23</sup> Case 4/73, *Nold v. Commission*, [1974] ECR 491, para 13.

<sup>24</sup> Case 36/75, *Rutili*, [1975] ECR 1219, para 32.

<sup>25</sup> Long title: Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

<sup>26</sup> See the Common Declaration of the European Parliament, the Council and the Commission of 5 April 1977 [1977] OJ C103/1.

<sup>27</sup> Single European Act [1987] OJ L169/1.

<sup>28</sup> Lenaerts and De Smijter, p. 276.

<sup>29</sup> The treaty is formally known as the Treaty on European Union (TEU) [1992] OJ C191.

<sup>30</sup> Now, in modified form, Article 6(3) TEU, which reads: ‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.’

*1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*

This clearly is a codification of the Court's case law. It refers to the importance of the ECHR<sup>31</sup> and the constitutional traditions common to the Member States<sup>32</sup> as general principles of Community law.<sup>33</sup> Even though this was a codification of the Court's case law, the Member States apparently did not trust the Court enough and, by inserting Article L TEU in the Maastricht Treaty, excluded Article F TEU from the Court's jurisdiction, thus limiting the impact of Article F TEU and as such making merely symbolic.<sup>34</sup> The Treaty of Amsterdam<sup>35</sup> changed this by amending Article L TEU in such a way that the Court could review Article F(2) TEU 'with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty'.<sup>36</sup>

These past pages have given a very brief historical background of fundamental rights protection within the E(E)C and EU up until the Amsterdam Treaty. It shows that, albeit slowly, the protection of fundamental rights grew from almost non-existent to one of the principles at the heart of the EU. At first the Treaties made no explicit mention of fundamental rights or their protection. The Court played a huge role in developing an unwritten fundamental rights catalogue, or 'unwritten Bill of Rights' as some authors call it, and at the same time guaranteed protection of those rights. The landmark cases that the Court delivered have, over the years, been codified in the Treaties. So in 1997 with the entry into force of the Amsterdam Treaty, the European legal order had developed its own system of fundamental rights protection but without a written fundamental rights catalogue. In the absence of such a catalogue the Court still had to refer to international human rights treaties, chiefly the European Convention on Human Rights.

Effectively the Court with its landmark case law had extended the protection of fundamental rights both *ratione materiae* and *ratione personae*.<sup>37</sup> *Ratione materiae* because the Court has ruled in some landmark cases<sup>38</sup> that it will protect the rights as mentioned in the Treaties or as they result from the constitutional traditions which are common to the Member States and/or international human rights treaties to which the Member States are party.

The landmark case law of the Court in this field can be briefly summarized as follows. The first landmark case was the *Stauder* case. In this case the Court accepted that fundamental rights are part of the general principles of Community law.<sup>39</sup> This case was quickly followed by the second landmark case known as the *Internationale Handelsgesellschaft* case.<sup>40</sup> Here the Court adopted the famous concept that it would apply fundamental rights stemming from/inspired by the common constitutional traditions of the Member States as general principles of Community law. This concept allowed the Court to take into account fundamental rights in its judgments. The concept however did

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<sup>31</sup> The *Nold* case. See *supra* note 23. And the *Rutili* case, see *supra* note 24.

<sup>32</sup> The *Internationale Handelsgesellschaft* case. See *supra* note 22.

<sup>33</sup> The *Stauder* case. See *supra* note 22.

<sup>34</sup> Article L TEU was renumbered to Article 46 TEU and repealed by the Treaty of Lisbon.

<sup>35</sup> Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts of 2 October 1997 [1997] OJ C340.

<sup>36</sup> Article L(d) TEU.

<sup>37</sup> Lenaerts and De Smijter, p. 278.

<sup>38</sup> See *supra* note 22.

<sup>39</sup> Case 29/69, *Stauder v. City of Ulm*, [1969] ECR 419, para 7.

<sup>40</sup> Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125.



not give the Court, and the European Community, a clear definition of those rights. What the Court did, according to Knook, is create a 'judge-made, unwritten Bill of Rights'.<sup>41</sup> However, the need for a written fundamental rights catalogue came to the fore during the different *Solange* cases.<sup>42</sup> The German Constitutional Court (*Bundesverfassungsgericht*) was not convinced by the ECJ's ruling in *Internationale Handelsgesellschaft* and got into a conflict with the ECJ over the ECJ's answer that the German Constitutional Court 'was not entitled to adjudicate on the validity of Community acts even if they contravened the German Basic Law'.<sup>43</sup> The German Constitutional Court's answer to this was that it 'conceded the supplanting of its own jurisdiction "Solange" i.e. as long as certain conditions were met, including rights protection in the European Communities based on a catalogue of rights'.<sup>44</sup> The German Constitutional Court furthermore called for a written fundamental rights catalogue.<sup>45</sup>

It seemed that the Court took note of the opinion of the German Constitutional Court<sup>46</sup> and sort of started to remedy the situation that there was no real fundamental rights catalogue with its judgment in the *Nold* case.<sup>47</sup> In this case the Court 'considered itself bound to draw inspiration both from the constitutional traditions common to the Member States and from the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'.<sup>48</sup> The most important and most used international treaty by the Court has been the European Convention of Human Rights<sup>49,50</sup> (ECHR) and the Court basically ruled that it would look at the Convention to provide the contents of fundamental rights and as such have it function as a fundamental rights catalogue within the Community legal order.

The Court protects fundamental rights *ratione personae* as it will protect EU citizens as well as non-EU citizens when their case relates to Community law<sup>51</sup> as well as extended fundamental rights protection *ratione personae* in relations between private parties when their case falls within Community law.<sup>52</sup> This leads Lenaerts and De Smijter to note that the Charter 'would not be drafted in a local desert of fundamental rights' in the sense that through the case law of the Court there already was a 'forest' of fundamental rights protection in place.<sup>53</sup> The lack of a written 'Bill of Rights' was about to change.

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<sup>41</sup> Knook, p. 368.

<sup>42</sup> BverfG, *Solange I* of 29 May 1974, BverfG *Solange II* of 22 October 1986 which was adapted by the BverfG Maastricht judgment of 12 October 1993. In a judgment of 7 June 2000 the *Bundesverfassungsgericht* lifted its reservations.

<sup>43</sup> Goldsmith, p. 1203.

<sup>44</sup> Ibid.

<sup>45</sup> See the first "*Solange*" judgment, *supra* note 42.

<sup>46</sup> And of the Italian Constitutional Court (*Corte Costituzionale*) which delivered a similar type of judgment in *Frontini*. Judgment of 27 December 1973, No. 183/73 (English translation: [1974] CMLR, 372).

<sup>47</sup> Case 4/73, *Nold v. Commission*, [1974] ECR 491.

<sup>48</sup> Ibid., para 13.

<sup>49</sup> Case 36/75, *Rutili*, [1975] ECR 1219, para 32.

<sup>50</sup> Long title: Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

<sup>51</sup> Case C-100/88, *Oyowe and Traore v. Commission*, [1989] ECR 4284, para 16.

<sup>52</sup> Case C-281/98, *Angonese*, [2000] ECR I-04139, para 36.

<sup>53</sup> Lenaerts and De Smijter, p. 278.

## 2.2 The development of the Charter

It would take more than 40 years after the Treaty of Rome<sup>54</sup> before a concrete step was taken by the, then named, European Union<sup>55</sup> to draft a comprehensive EU fundamental rights catalogue. This first formal step was taken by the European Council meeting in Cologne, Germany on the 3<sup>rd</sup> and 4<sup>th</sup> of June 1999. In Conclusion 44 the Prime Ministers and Heads of State of the European Union stated that they took the view that 'at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident.'<sup>56</sup> Conclusion 45 refers to Annex IV of the Council Conclusions. This annex orders the drawing up of a Charter of Fundamental Rights of the European Union by a body consisting of representatives of the Member States, of the Commission, of the European Parliament and of the national parliaments. The decision furthermore states that members of the European Court of Justice should participate as observers and that representatives of the Economic and Social Committee, the Committee of the Regions as well as social groups and experts should be invited to submit their views. The European Council requires this body to present a draft document of the Charter in advance of the European Council of December 2000. In this decision the prime ministers and heads of state have not decided on the legal status of the Charter. They only state that the Charter should be solemnly proclaimed by the Council, together with the European Parliament and the European Commission and that after that it 'will then have to be considered whether and, if so, how the Charter should be integrated into the treaties'.<sup>57</sup>

Two things are of interest here. First, the Council decided to allow social groups and experts to submit their views to the body that will draw up the Charter. Secondly, it is clear that the Council, at that time, did not want to decide whether or not the Charter should become part of primary EU law and, if so, how.

At the next European Council, held four months later in Tampere, Finland on 15 and 16 October 1999, the Council members decided on the composition and working methods of the body that would be responsible for drafting the Charter. This body later took on the name of 'Convention'.<sup>58,59</sup>

So the purpose of the Charter was to make existing rights more visible. In the view of Lord Goldsmith there were two reasons to do this. The first reason was 'to deepen and strengthen the culture of rights and responsibilities in the EU'.<sup>60</sup> He goes on and writes that by:

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<sup>54</sup> Actually Treaties of Rome (plural), which consisted of the Euratom Treaty and the EEC Treaty.

<sup>55</sup> The European Communities became known as the European Union with the entry into force of the Maastricht Treaty. This treaty created the pillar structure of which the European Community was just one pillar. The three pillars together were known as the European Union. This pillar structure has become obsolete with the entry into force of the Lisbon Treaty.

<sup>56</sup> Conclusions of the presidency at the occasion of the European Council of Cologne (3 and 4 June 1999) on the drawing up of a Charter of Fundamental Rights of the European Union, conclusion 44.

<sup>57</sup> Annex IV of the Presidency Conclusions of the European Council held at Cologne on the 3 and 4 of June 1999.

<sup>58</sup> The bureau of the 'Convention' styled itself with the name 'Praesidium'.

<sup>59</sup> A few years later the drafting body that was tasked with drafting the Constitutional Treaty was named 'Convention'. This body had, in broad lines, a similar composition as the body that drafted the Charter, i.e. consisted of representatives of the Member States, the Commission, the European Parliament and national parliaments. Interesting to note is that Lord Goldsmith writes that 'Some suggest this is a model for future European negotiations. Personally I very much doubt it'. He seems to be proven incorrect and correct; incorrect in that this form was used to draft the Constitutional Treaty, correct in the sense that it seems the Member States have abandoned this type of 'Convention' after the non-ratification of the Constitutional Treaty. The Lisbon Treaty was drafted in the usual way, i.e. through an intergovernmental conference.

*...bringing together into a single document endorsed by the Member States and Community institutions a proclamation of existing rights will have a powerful effect in reinforcing in the minds of administrators, governments and legislators the rights that citizens possess and the need to respect them.*<sup>61</sup>

The second reason was one of clarification. The Charter would clearly define which rights, freedoms and principles the European Union would have to respect.

So the 'Convention' went to work.<sup>62</sup> Civil society took full use of the possibility to submit written observations: over 300 were submitted. During the next year the Convention met 29 times and the Commission published two drafts of the Charter and the European Council approved it on 13 and 14 October 2000 at the Biarritz European Council. The Charter was then forwarded to the European Parliament and the Commission. The European Parliament agreed with the proposed Charter on 14 November 2000, the Commission did the same on 6 December 2000. And so a little over a year later, on 7 December 2000, at the European Council of Nice, France, held on 7 and 9 December 2000, the Charter of Fundamental Rights of the European Union was signed and solemnly proclaimed by the presidents of the Council, the Commission and the Parliament on behalf of their respective institutions.

## **2.3 The Charter and its contents**

So what does the Charter contain? The Charter<sup>63</sup> consists of 54 articles divided over seven chapters. The last chapter deals with general provisions. The other six contain fundamental rights grouped under the headings of dignity, freedoms, equality, solidarity, citizenship and justice. The chapter on dignity contains rights such as the right to human dignity, the right to life and the prohibitions of torture and slavery. The freedoms chapter list rights like the right to liberty and security, respect for private and family life, protection of personal data, freedom of thought, conscience and religion, freedom of expression, of assembly and association and the right to education. The chapter on equality contains rights such as equality before the law, non-discrimination, equality between men and woman and the rights of the child. The solidarity chapter contains rights in relation to workers rights such as the right to collective bargaining, the right to strike, protection of unjustified dismissal and fair and just working conditions. The rights associated with the functioning of a democratic state are found in the citizenship chapter. Think of rights such as the right to vote and to stand as a candidate for elections to the European Parliament and municipal elections. But also the right to good administration and the right to petition can be found here. The sixth chapter on justice contains such rights as the right to an effective remedy and to a fair trial, the presumption of innocence, the right of defence and the principles of legality and proportionality of criminal offences and penalties as well as the right to not be tried or punished twice for the same offence.

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<sup>60</sup> Lord Goldsmith, p. 1204.

<sup>61</sup> Ibid.

<sup>62</sup> Lord Goldsmith notes that the Convention was a body 'which was strong on legitimacy, transparency and openness'.

<sup>63</sup> Charter of Fundamental Rights of the European Union [2000] OJ C364/01.

The final chapter, titled general provisions, contains the horizontal articles of the Charter dealing with the scope of the Charter<sup>64</sup> and the relationship with the ECHR.<sup>65</sup> The scope of the Charter defines as the principle addressees of the Charter the institutions and bodies of the European Union and the Member States only when they are implementing European Union law.<sup>66</sup> Article 51(2) of the Charter states that the Charter ‘does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties’.

According to the Praesidium the:

*Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights.*<sup>67</sup>

Lenaerts and De Smijter rightfully note that ‘not all fundamental rights contained in the EC Treaty or belonging to the Member States’ common constitutional traditions *sensu lato* are reflected in the Charter’.<sup>68</sup>

A reason for this could be that the members of the Convention had to find compromises on which fundamental rights to include in the Charter because they could be considered as already belonging, or potentially belong, to the fundamental rights *acquis* of the EU. Because of this the Charter, according to Dutheil de la Rochère, turned out to be ‘an exercise of objectivization – if one may call it that – of Common European values.’<sup>69</sup> The result of this according to Lenaerts and De Smijter is that the Charter only consists of ‘a sample – albeit a most impressive one – of the total range of fundamental rights whose respect is guaranteed by the Court of Justice’. This leads them to conclude that the scope of application *ratione materiae* of the Charter is actually narrower than the protection of fundamental rights as developed by the Court through its case law.<sup>70</sup> Lord Goldsmith, who was a member of the Convention, seems to agree with the previous authors in the sense that he writes that ‘the end result is inevitably something of a compromise’.<sup>71</sup>

Beside the Charter itself the Praesidium also published explanations to the Charter.<sup>72</sup> These explanations elaborate every article included in the Charter and identify, where applicable, which Charter article has same meaning and scope as the corresponding article of the ECHR. Lord Goldsmith notes that ‘12 articles, or part articles, are listed as having the same meaning and scope as

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<sup>64</sup> Article 51 Charter.

<sup>65</sup> Article 53 Charter.

<sup>66</sup> Article 51(1) Charter.

<sup>67</sup> Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50 of 11 October 2000 (CHARTE 4473/00), p. 2.

<sup>68</sup> Lenaerts and De Smijter, p. 281.

<sup>69</sup> Dutheil de la Rochère, p. 348.

<sup>70</sup> Lenaerts and De Smijter, p. 281.

<sup>71</sup> Lord Goldsmith, p. 1209.

<sup>72</sup> Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50 of 11 October 2000 (CHARTE 4473/00).

an identified corresponding ECHR article'.<sup>73</sup> Furthermore five articles of the Charter have the same meaning but their scope is extended compared to the scope of those rights in the ECHR.

Furthermore the members of the Convention quickly agreed that they would not discuss the question of what the legal value of the Charter should be.<sup>74</sup> They agreed rightly so because it was not up to the Convention to decide on the legal value of the Charter.<sup>75</sup> It must be mentioned that the Charter was 'drafted as if it could at some time become legally binding'.<sup>76</sup>

The solemn proclamation of the Charter in Nice on the 7<sup>th</sup> of December 2000 meant that the European Union for the very first time went into the New Year with a strong political document<sup>77</sup> underlying the protection of fundamental rights in the EU: a written fundamental rights catalogue.

## **2.4 The Charter and the Treaty establishing a Constitution for Europe**

Soon after the solemn proclamation of the Charter, on 26 February 2001, the Treaty of Nice<sup>78</sup> was signed. Declaration 23 belonging to the Nice Treaty dealt with the future of the Union. This declaration laid the foundation for the drafting of the Treaty establishing a Constitution for Europe.<sup>79</sup> It sets out, amongst other things, the questions the reform process should address, one of them being 'the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice, in accordance with the conclusions of the European Council in Cologne'.<sup>80</sup>

### **2.4.1 Working Group II incorporates the Charter into the Constitutional Treaty**

The European Convention tasked with the drafting of the Constitutional Treaty did answer this question. More specifically Working Group II did.<sup>81</sup> The working group took as a starting point that the content of the Charter, as adopted by the Convention that drafted the Charter and approved by the Nice European Council 'should be respected by this Convention and not be re-opened by it'.<sup>82,83</sup> The working group recommends that the final, political, decision whether or not the Charter should be incorporated into the treaties will have to be made by the European Convention in plenary session. The final report does state that 'all members of the Group either support strongly an incorporation of the Charter *in a form which would make the Charter legally binding and give it*

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<sup>73</sup> Lord Goldsmith, p. 1211.

<sup>74</sup> Dutheil de la Rochère, p. 348.

<sup>75</sup> See *supra* 56. From the Council Conclusions it becomes clear that it was up to the Member States to decide upon the legal status of the Charter.

<sup>76</sup> Dutheil de la Rochère, p. 348.

<sup>77</sup> A strong political document because, although not legally binding, the Charter was proclaimed by the presidents of the Council, the Parliament and the Commission and as such had strong political backing.

<sup>78</sup> Full title: Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 26 February 2001 [2001] OJ C80.

<sup>79</sup> More commonly known as the Constitutional Treaty.

<sup>80</sup> Declaration 23 to the Treaty of Nice, para 5.

<sup>81</sup> The European Convention was divided into eleven working groups, each of them looked at specific issues more closely. Working Group II looked at the Charter and ECHR.

<sup>82</sup> Final report of Working Group II (CONV 354/02), p. 4.

<sup>83</sup> Eventually the working group did propose certain *drafting adjustments* to the general provisions chapter which it deemed necessary. The working group stresses however that these adjustments do not constitute a change in the substance of the Charter. See the Annex to the Final report of Working Group II (CONV 354/02), p. 17.

*constitutional status* or would not rule out giving favourable consideration to such incorporation'.<sup>84</sup> The working group is adamant that fundamental rights should have a place in a constitutional framework for the EU. In the final report the working group mentioned three possible options to incorporate the Charter into the Constitutional Treaty. The most favoured option was that of 'insertion of the text of the Charter articles at the beginning of the Constitutional Treaty, in a Title or Chapter of that Treaty'.<sup>85</sup> The working group was of the opinion that this option would be most 'in the interest of a greater legibility of the Constitutional Treaty'.<sup>86</sup> The plenary session of the European Convention did agree with Working Group II and voted to incorporate the text of the Charter articles into the Constitutional Treaty, including some *drafting adjustments* to the articles from the general provisions chapter. The Charter would form Part II of the Constitutional Treaty.<sup>87,88</sup>

One of the, one could say, major *drafting adjustments* is that the preamble of the Charter as included in the Constitutional Treaty has this new sentence added: 'In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter'.<sup>89</sup> The original preamble makes no mention of how the Charter should be interpreted by the courts but the addition of 'with due regard to the explanations' clearly limits the freedom of interpretation the Court and national courts would have.

Other *drafting adjustments* are to be found in the general provisions of the Charter.<sup>90</sup> Article II-52 (previously Article 52 Charter) has been renamed 'Scope and Interpretation of rights and principles' and has three new paragraphs added which makes a distinction between rights and principles (Article II-52(5)) and stresses the need that the fundamental rights from the Charter have to be interpreted in harmony with the constitutional traditions that are common to the Member States (Article II-52(4)). These *drafting adjustments* will be looked at more in depth in paragraph 3.

Besides the Charter becoming one part of the Constitutional Treaty, other parts of the Constitutional Treaty have quite some references to fundamental rights. In the eyes of Dutheil de la Rochère those references are 'not contradictory but, in my view, excessively cumulative'.<sup>91</sup> Because of this the Constitutional Treaty is 'unable to promote a clear idea of the ambition of the Union for the individual'.<sup>92</sup> Dutheil de la Rochère comes to this conclusion because in different parts of the Constitutional Treaty the same, or similar, rights are reproduced. Part I of the Constitutional Treaty refers to fundamental rights in a number of articles. For instance Article I-2 states that the Union is founded on values as they are common to the Member States in a pluralistic society such as respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. Article I-3 then turns those values into objectives when it states the protection of human rights, social justice, equality and solidarity are some of the objectives of the Union. The contents of these two

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<sup>84</sup> Final report of Working Group II (CONV 354/02), p. 2. (Underline and emphasis as in the original document.)

<sup>85</sup> Ibid., p. 3.

<sup>86</sup> Ibid., p. 4.

<sup>87</sup> Article I-7(1) states that 'The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II of the Constitution'.

<sup>88</sup> Draft Treaty establishing a Constitution for Europe (CONV 850/03), p. 47.

<sup>89</sup> Constitutional Treaty, Part II, Preamble.

<sup>90</sup> Title VII Charter.

<sup>91</sup> Dutheil de la Rochère, p. 350.

<sup>92</sup> Ibid.

articles can then be found in the Preamble to the Charter incorporated as Part II in the Constitutional Treaty as well. The same is true of some articles in Part III. For instance Article III-158(1) states that 'the Union shall form an area of freedom, security and justice *with respect for fundamental rights*, taking into account the different legal traditions and systems of the Member States'.<sup>93</sup> Dutheil de la Rochère puts it quite strongly, but correctly in my view, when she states that the accumulation of provisions in the different parts of the Constitutional Treaty: 'gives an embarrassing impression of strenuous efforts based on words more than reality'.<sup>94</sup>

#### **2.4.2 Rejection of the Constitutional Treaty**

The Draft Treaty to establish a Constitution for Europe was signed in Rome on 29 October 2004 by heads of state or prime-ministers of the, then, 25 Member States of the European Union. After this signing the Constitutional Treaty would have to be ratified by each respective Member State according to their national procedures for ratification of international instruments. In most countries this would mean ratification by their national parliament<sup>95</sup> but, for instance, in Ireland the people of Ireland would have to vote for or against it in a referendum. In total, the governments of seven Member States decided to put the Constitutional Treaty to a popular vote, i.e. referendum. The outcome of this process was that the people of France and the Netherlands<sup>96</sup> rejected the ratification of the Constitutional Treaty and the ratification process ground to a halt.

The European leaders decided there was to be a 'time of reflection' to see what to do next. Part of this was the institution of a group of 'wise men'<sup>97</sup> 'to see if they can come up with solutions to pull Europe out of its institutional impasse'.<sup>98</sup> This group, under the leadership of the former Italian prime-minister Amato<sup>99</sup>, delivered its report on 4 June 2007 and advised<sup>100</sup> the European Council to have an intergovernmental conference rewrite the Treaty on European Union, amend the Treaty establishing the European Community and give the Charter a legally binding status by having the TEU refer directly to it with a single clause. So the Charter, it was proposed, would not be an integral part of the Treaties. The legal framework of the European Union would then, according to the Amato group, 'be governed by two treaties and the Charter'.<sup>101</sup> The members of the European Council at their June 2007 summit agreed to abandon the Constitutional Treaty and to instead amend the existing treaties<sup>102</sup>. This led to the drafting of the Reform Treaty, which eventually became known as the Lisbon Treaty.

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<sup>93</sup> Emphasis added.

<sup>94</sup> Dutheil de la Rochère, p. 350.

<sup>95</sup> A *novum* was that the Netherlands would use a consultative referendum and, although this referendum would not be legally binding, the government would respect the results. Due to these results the government of the Netherlands retracted the proposal for a law to ratify the Constitutional Treaty (in Dutch and in full: Voorstel van rijkswet tot goedkeuring van het op 29 oktober 2004 te Rome totstandgekomen Verdrag tot vaststelling van een Grondwet voor Europa (wetsvoorstel 30025)).

<sup>96</sup> Two of the *founding fathers* of the European Union nonetheless.

<sup>97</sup> Consisting of former European politicians such as former prime-ministers and former members of the European Commission.

<sup>98</sup> Mahony (2006).

<sup>99</sup> And as such became known as the 'Amato group'. Officially it was called the 'Action Committee for European Democracy' (ACED).

<sup>100</sup> ACED (2007), p. 2.

<sup>101</sup> Ibid.

<sup>102</sup> As suggested by the Amato group.

## 2.5 The Charter and the Lisbon Treaty

At the same June 2007 European Council summit the Member States agreed upon a detailed mandate for the new intergovernmental conference that would be tasked with drafting the new treaty. In this mandate the members of the European Council, in essence, stipulated exactly what changes the intergovernmental conference should make to the two treaties.<sup>103</sup> These changes include the addition of, what would become, a new Article 6(1) TEU which states that:

*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*<sup>104</sup>

The intergovernmental conference completed its work quickly and the Lisbon Treaty<sup>105</sup> was signed by the representatives of the Member States in Lisbon on the 13 December 2007. The Lisbon Treaty amended the Treaty on European Union and the Treaty establishing the European Community<sup>106</sup> instead of unifying the two Treaties into one document, as was intended with the Constitutional Treaty.

The Lisbon Treaty was, eventually,<sup>107</sup> ratified by all the Member States of the European Union and entered into force on 1 December 2009. So with the entry into force of the Lisbon Treaty the Charter became part of primary EU law and as such, after 50+ years, the European Union has its own, legally binding, fundamental rights catalogue.

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<sup>103</sup> See Annex 1 to the Conclusions of the presidency at the occasion of the Brussels European Summit (21 and 22 June 2007) at the occasion of the European Council of Cologne (3 and 4 June 1999) on the drawing up of a Charter of Fundamental Rights of the European Union, conclusion 44.

<sup>104</sup> Emphasis added.

<sup>105</sup> Long title: Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007 [2007] OJ C306/01.

<sup>106</sup> Which was renamed Treaty on the Functioning of the European Union (TFEU).

<sup>107</sup> A few Member States, mostly the Czech Republic and Poland, delayed their ratification mainly due to political reasons. See the next paragraph.



### **3 The Member States and the Charter**

The Charter did not become part of primary EU law without opposition from some of the Member States. Especially the United Kingdom was worried about giving the, as they viewed it, political document that was the Charter a legally binding status in European law. This paragraph will look into those ‘worries’ or ‘fears’ of some of the Member States more closely (paragraph 3.1) and paragraph 3.2 will describe how the Member States curbed this ‘fear’ or in other words: what did they do, if anything, to minimise their worries?

#### **3.1 The Member States’ ‘fear’ towards the Charter**

Most Member States saw the Charter as a codification of fundamental rights already existent in the Union’s legal order through the case law of the Court and the common constitutional traditions of the Member States as well as through the ECHR to which all the Member States are party. They did not raise objections to making the Charter a legally binding document, one that is even on par with the Treaties.

However some Member States had worries. Some saw the Charter as potentially threatening their national identity and traditions, national interests and economic growth. Some had worries when it came to the effects of the Charter in combination with other organisations, especially the European Convention on Human Rights. Some Member States saw the Charter as a purely political declaration and the Charter should not make it possible to expand the competences of the Union institutions via a backdoor.<sup>108</sup> The United Kingdom is the Member State that was most opposed to making the Charter legally binding. One of the ‘fears’ was that by making the Charter legally binding as primary EU law it would potentially expand the field of competences of the Union at the cost of national governments and create a further constitutionalisation of the European Union. In other words: it could be the first step towards a super federal state, some would say a ‘United States of Europe’.<sup>109</sup>

Another problem the United Kingdom had with the Charter was already raised by some of the British delegates to the Convention that drafted the Charter namely: social and economic rights. The British government was afraid that such inclusion would mean that the United Kingdom would have to amend certain laws, e.g. their law on the right to strike, which were considered stricter than those of other Member States.<sup>110</sup>

#### **3.2 How was the ‘fear’ of the Member States curbed?**

One can identify three timeframes when certain limits were put into place to curb the ‘fear’ of certain Member States. The first timeframe was during the drafting of the Charter itself (3.2.1). Then during the drafting of the Constitutional Treaty certain *drafting adjustments* were made by Working Group II of the European Convention to the Charter (3.2.2) and, after the negative outcome on the

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<sup>108</sup> McCrudden, p. 8.

<sup>109</sup> Oreskes et al. (2007).

<sup>110</sup> Jirásek, p. 4.

French and Dutch referenda on the Constitutional Treaty, a third option arose to (re-)negotiate the scope of the Charter during the drafting of the Reform Treaty, a.k.a. the Lisbon Treaty (3.2.3).

### **3.2.1 Limits put in place during the drafting phase**

Because of the concerns mentioned above certain limits were put in place during the drafting of the Charter. McCrudden writes that the Convention agreed that:

*The Charter should adequately reflect existing national constitutional traditions. The Charter should respect the need for subsidiarity. The Charter should recognise the desirability of diverse conceptions of human rights. The Charter should not be legally binding. The Charter should not threaten the ECHR system. The Charter should not expand the range of rights protection already guaranteed. The Charter should not place unacceptable limits on the need to continue the liberalisation of the European and national economies.*<sup>111</sup>

For the United Kingdom the diverse conceptions was a very important limit. To illustrate that I will describe the issue of ‘economic and social rights’ as it was viewed by the United Kingdom. The Cologne Conclusions<sup>112</sup> required that when drafting the Charter account should be taken of ‘economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Art. 136 EC) insofar as they do not merely establish objectives for action by the Union’. The interpretation of this wording proved open for debate in the Convention. Lord Goldsmith<sup>113</sup> notes that there are important differences between the classic civil and political rights and the social and economic rights. The latter can usually not be enforced before a court on an individual basis, unlike the classic fundamental rights. Social and economic rights are, according to Goldsmith, used to ‘inform policy making by the legislator’. Furthermore social and economic rights are rights ‘which are recognized and given effect to in different ways in the Member States whose competence this primarily is’. It is therefore better to speak of principles instead of rights, according to Lord Goldsmith. In other words; social and economic principles belong to the competences of the Member States and the governments of the Member States should set priorities and decide how to implement such principles. As an example he uses the ‘right to housing’. Lord Goldsmith states that it is very difficult to give any legal effect to the ‘right to housing’ when there is no ‘clear legislative guidance as to what level of housing would be adequate, who is to provide it, and under what conditions’. This leads him to conclude that the Charter ‘would appear to leave all these matters to be defined by a judge’.<sup>114</sup> According to Lord Goldsmith such rights should not be included because it ‘is to be doubted that judges have any mandate or special expertise to determine how national resources should be allocated between different priorities’. Instead he writes that such decisions should be left to the national governments to decide. Finally including such ‘rights’ would ‘raise expectations that the Charter was giving rights which the EU, the principal addressee, was in no position to deliver, having neither the competence nor the budget’.

So it is clear that Lord Goldsmith, one of the representatives of the UK government at the Convention, was not in favour of the inclusion of social and economic rights into the Charter. He notes that it was a long and difficult debate. Eventually the Convention came up with the following,

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<sup>111</sup> McCrudden, p. 8-9.

<sup>112</sup> Conclusions of the presidency at the occasion of the European Council of Cologne (3 and 4 June 1999) on the drawing up of a Charter of Fundamental Rights of the European Union.

<sup>113</sup> Lord Goldsmith, p. 1212.

<sup>114</sup> Ibid.

new, concept as the solution. The social and economic rights ‘essentially take the form of principles, which, whilst common to the Member States, are implemented differently in their national laws and practices; and that the principles only give rise to rights to the extent that they are implemented by national law or, in those areas where there is such competence, by Community law’.<sup>115</sup> So social and economic rights would be included in the Charter but would be considered principles instead of rights. Lord Goldsmith notes that inclusion of social and economic rights:

*...does not, however, provide any mandate to the Union institutions themselves to try to implement those rights, outside their own competence, or to impose on Member States some obligation to recognize the principle differently from how it currently does under national law.*<sup>116</sup>

Even though the difference between ‘rights’ and ‘principles’ was not explained<sup>117</sup> let alone codified in the Charter itself it did mean that one of the ‘fears’ of the British government was overcome even before the Charter was proclaimed and eventually became legally binding on the institutions of the Union and the Member States when implementing Union law.

A few years later at the drafting of the Constitutional Treaty it seemed like the Charter would become legally binding. This provided the British government with the opportunity to renew their objections and their ‘fear’ of the expansion of competences and find new allies to ‘fight the battle’ and ‘win the war’.

### **3.2.2 Drafting adjustments**

As mentioned briefly in paragraph 2.4.1 certain *drafting adjustments* were proposed by Working Group II and adopted by the European Convention. These adjustments remained in place when the Lisbon Treaty was drafted.

The first convention, the one that drafted the Charter in 2000, had heated discussions on whether or not to make a distinction between rights and principles. This convention eventually abandoned the idea of codifying such distinction in the Charter.<sup>118</sup> It was reintroduced in the Constitutional Treaty to please certain Member States, mainly the United Kingdom.<sup>119</sup> The United Kingdom insisted on this difference mainly because they viewed civil and political rights as essentially negative (and directly effective) and as such do not require state resources whereas social and economic rights are positive and do require such resources. The United Kingdom prefers to call the latter ‘principles’ because they view principles as not being directly effective.<sup>120</sup> This is why Article 52(5) of the Charter makes a distinction between rights and principles. It states that:

*The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall*

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<sup>115</sup> Lord Goldsmith, p. 1212.

<sup>116</sup> Ibid., p. 1213.

<sup>117</sup> House of Lords EU Select Committee, ‘The Treaty of Lisbon: An Impact Assessment’, 10th Report, 2007-08, HL Paper 62, paras. 5.15 and 5.18-5.20.

<sup>118</sup> See paragraph 2.2.1.

<sup>119</sup> As such the UK got what it first wanted in 2000.

<sup>120</sup> Barnard, p. 260.

*be judicially cognizable only in the interpretation of such acts and in the ruling on their legality’.*

This distinction is not very clear. Some articles in the Charter include both a right and a principle. See for instance Article 23 Charter on the equality between men and women. The first paragraph of this article states that the equality between men and women must be insured in all areas whereas the second paragraph states that ‘The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex’.<sup>121</sup> According to Dutheil de la Rochère such distinction ‘limits the freedom of the individual’, and that of the courts, to refer to principles in connection with any provision of secondary EU law’ and it furthermore ‘restricts the possibility for the courts to use the principles appearing in the Charter as objectives of constitutional value’.<sup>122</sup> This *drafting adjustment* thus dilutes the scope of application of the Charter.

### **3.2.3 The Lisbon Treaty changes**

During the drafting of the Lisbon Treaty the United Kingdom renewed its objections, called ‘red lines’ by the British Prime Minister, the first one was that the government of the United Kingdom would not accept a treaty that ‘allows the Charter of Fundamental Rights to change UK law in any way’.<sup>123</sup> This time the United Kingdom was not alone in its objections to the Charter. The Polish government was opposed to certain aspects of the Charter as well. The Polish government’s objections were more politically motivated than those of the United Kingdom. The Polish government was not pleased with the wording of Article 21, prohibiting discrimination on the grounds of sex, and with Article 9, the definition of the right to marry and the right to found a family. The Polish government was of the opinion that these two articles could imply or aim to legally recognize same-sex marriages and this, according to the Polish government, was in violation of their country’s cultural heritage.<sup>124</sup>

#### **3.2.3.1 Article 6 TEU**

The new<sup>125</sup> Article 6, paragraph 1, clause 1 TEU made the Charter legally binding. It reads as follows:

*The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*<sup>126</sup>

The next clause of Article 6(1) TEU shows a sign of the ‘fear’ some Member States had towards the Charter. It states: ‘The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.’ So here, at the beginning of the Treaty on European Union the Member States stress once more that the Charter in no way can expand the competences of the

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<sup>121</sup> Article 23 Charter.

<sup>122</sup> Dutheil de la Rochère, p. 352.

<sup>123</sup> House of Commons European Scrutiny Committee, ‘European Union Intergovernmental Conference’, 35<sup>th</sup> Report, 2006-07, HC Paper 1014, para. 52. The other ‘red lines’ were: ‘Secondly, we will not agree to something which displaces the role of British foreign policy and our foreign minister. Thirdly, we will not agree to give up our ability to control our common law and judicial and police system. Fourthly, we will not agree to anything that moves to qualified majority voting, something that can have a big say in our own tax and benefit system.’

<sup>124</sup> Jirásek, p. 5.

<sup>125</sup> See for an in-depth analysis of the changes that occurred to Article 6 TEU the article by Bercusson.

<sup>126</sup> Emphasis added.

Union. Apparently this provision was not clear enough for the Member States because they added a Special Declaration to the Lisbon Treaty which 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 by the Treaties.*<sup>127</sup>

Mention must be made of the fact that the Charter itself, in Article 51 paragraph 2,<sup>128</sup> already includes a similar paragraph. This taken in combination with the next clause, which reiterates the use of the explanations, should have sufficed. Why would the Member States be so 'fearful'? Pernice is very clear on this matter. He writes that: 'These provisions are the expression of a deep concern, almost a phobia of at least some Member States anxious to ensure a restrictive approach regarding EU competences'.<sup>129</sup> According to Pernice this 'deep concern' is not only manifested in this particular article, but can be found throughout the Treaties. Professor Pernice writes that this 'deep concern' of the Member States 'was already met by the principles of conferred competencies and subsidiarity and needs therefore no further reiteration'.<sup>130</sup> The repeating of essentially the same clause is odd because fundamental rights are, by nature, limiting the competences of the institutions instead of conferring competences.<sup>131</sup>

The 3<sup>rd</sup> and final clause of Article 6(1) TEU also hints at the 'concern' or 'fear' of the Member States. It states: 'The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanation referred to in the Charter, that set out the sources of those provisions.' Bercusson calls this last clause an amalgam of different provisions that can be found in the Charter itself.<sup>132</sup> First he notes that the Preamble to the Charter as changed by the European Convention already contains the reference that the Charter must be interpreted in light of the explanations.<sup>133</sup> Furthermore Article 52(7) of the Charter as adopted by the European Convention also refers explicitly to the explanations, it reads as follows: 'The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States'.

So it appears that the Member States found it necessary to include the same reference, namely that when interpreting the Charter one must take account of the explanations, three times, twice in the

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<sup>127</sup> Declaration (1) concerning the Charter of Fundamental Rights of the European Union [2007] OJ C306/249.

<sup>128</sup> 'This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.'

<sup>129</sup> Pernice, p. 243.

<sup>130</sup> Ibid., p. 244. Pernice then makes an interesting observation when he writes that 'One could be doubtful about the real meaning of these principles if the authors of the Treaty consider it necessary to repeat the limitation so abundantly'.

<sup>131</sup> Ibid.

<sup>132</sup> Bercusson, p. 91.

<sup>133</sup> This part of the preamble states that: 'In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention'.

Charter and once in the Treaty on European Union. It seems that the latest two additions have been put in on instigation of the government of the United Kingdom.<sup>134,135</sup>

This repetition of the same leads professor Bercusson to exclaim that: 'It may be supposed that its insertion was due once again to pressure exerted by the UK government, which later attempted to opt-out of the Charter!'<sup>136</sup> Pernice calls the 3<sup>rd</sup> clause of Article 6(1) TEU 'peculiar' and notes that in formal legal terms it makes no difference whether the reference to the explanations is in the Treaty or in the preamble and text of the Charter. Symbolically it does make a difference because it means that 'for the practical application of the Charter in a given case (...) the explanations will have more weight'.<sup>137</sup> Such reference might also prove 'to be very effective and useful regarding possible divergencies of the a priori understanding and construction of any specific rights in the different legal cultures and traditions of the 27 Member States'.<sup>138</sup>

### *3.2.3.2 Some Declarations and a Protocol for Poland and the United Kingdom*

Apparently just to make sure that the other Member States understood the 'worries' of the Polish government correctly and make it even clearer the Polish government included two declarations. The first one states that: 'The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity'.<sup>139</sup> The wording of this protocol is in essence superfluous in the sense that it merely reaffirms certain areas that the Charter does not affect. The second protocol is in a sense superfluous because it is a specific 'opt-in' to the Charter. In this second declaration the Polish government reaffirms its respect for social and labour rights, especially as worded in Title IV of the Charter.<sup>140</sup>

All these clauses, or safeguards if you will, were apparently not enough for the United Kingdom or for Poland. Although they agreed that the Charter should become binding within the Union they negotiated a special protocol to the Treaty that could be viewed, at least at first glance, as an 'opt-out' from the Charter.

So the final version of the Lisbon Treaty includes a 'Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom'<sup>141</sup> which, once again, made abundantly clear in Article 1 that the Charter should not in any way extend the competences of the Union (paragraph 1) and neither can Title IV of the Charter create any justiciable

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<sup>134</sup> Pernice, p. 242.

<sup>135</sup> Bercusson, p. 92.

<sup>136</sup> Ibid.

<sup>137</sup> Pernice, p. 242.

<sup>138</sup> Ibid.

<sup>139</sup> Declaration (61) by the Republic of Poland on the Charter of Fundamental Rights of the European Union [2007] OJ C306/270.

<sup>140</sup> Declaration (62) by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom [2007] OJ C306/270. It states: Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.

<sup>141</sup> Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom [2007] OJ C306/156.

rights (paragraph 2).<sup>142</sup> Barnard notes that the wording ‘...does not extend the ability...’ in paragraph 1 seems to ‘merely confirms Article 51(1) and (2) of the Charter’.<sup>143</sup> Paragraph 2 relates directly to the biggest ‘fear’ of the United Kingdom, those of social and economic ‘rights’. The British government tried once again to make abundantly clear in this paragraph that these ‘rights’ are in their view ‘principles’ and as such are not directly effective and do not create justiciable rights. Article 1, paragraph 2 of the protocol seems to contradict the second declaration of the Polish government as mentioned above. It seems that although the Polish government respects the rights as enshrined in Title IV of the Charter (2<sup>nd</sup> Declaration) but only in so far as those rights are provided for in national law (Protocol).

Article 2 of the Protocol<sup>144</sup> provides that rights and principles found in the Charter which refers to national laws or practices will only apply to Poland or the United Kingdom when such rights or principles are recognised in the law and practices of Poland or of the United Kingdom.<sup>145</sup>

In the media this protocol has been called an ‘opt-out’.<sup>146</sup> European law scholars though seem unified in their commentary that Protocol 30 has only limited legal impact.<sup>147</sup> The Protocol merely clarifies<sup>148</sup> the Charter. This can best be seen in the Preamble to the Protocol where it reads: ‘Noting the wish of Poland and the United Kingdom to *clarify certain aspects* of the application of the Charter’.<sup>149</sup> The Preamble to the Protocol starts with the lines: ‘Whereas in Article 6 of the Treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union’ and ‘Whereas the Charter is to be applied in strict accordance with the provisions of the aforementioned Article 6 and Title VII of the Charter itself’. This means that the Charter applies in full to the United Kingdom and Poland except for the rights found in Title IV, the solidarity rights. Barnard writes that there was a ‘rather complex political game at play’.<sup>150</sup> This because the general opinion in the United Kingdom was that the Protocol provided for a full fledged opt-out from the Charter while at the same time the British government in statements, for example as made to the Select Committees of both House, announced the opposite.<sup>151</sup>

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<sup>142</sup> Article 1 of the Protocol:

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

<sup>143</sup> Barnard, p. 267.

<sup>144</sup> Article 2 of the Protocol: To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

<sup>145</sup> Craig, p. 22.

<sup>146</sup> For examples of how the (British) media reported the Opt-out, see: Barnard, p. 277-278.

<sup>147</sup> See for example: Barnard, Bercusson, Claes, Craig, Pernice and/or Dutheil de la Rochère.

<sup>148</sup> Again a repetition of what becomes clear with the provisions in Article 6 TEU and Article 51 Charter.

<sup>149</sup> Emphasis added.

<sup>150</sup> Barnard, p. 277.

<sup>151</sup> See for instance the House of Lords EU Select Committee, ‘The Treaty of Lisbon: An Impact Assessment’, 10<sup>th</sup> Report, 2007-08, HL Paper 62.

Regarding Article 2 of the Protocol where it mentions '*recognised in the law or practices*', Craig is of the opinion that this formulation leaves room for debate and would allow the Court of Justice 'interpretative discretion as to when a Charter right might be regarded as recognised by the law or practice of that country'.<sup>152</sup>

So the Protocol at first reading appears as an Opt-out but in fact it is not much more of clarification and possibly a small 'hurdle' for the Court of Justice when it comes to the solidarity rights from Title IV.

It is therefore even stranger, in my opinion, that the Czech Republic, or better the Czech President Václav Klaus, a few months later, during the ratification process, refused to sign the Lisbon Treaty unless the Czech Republic would be allowed the same 'Opt-out' as Poland and the United Kingdom. The Czech President insisted on this 'Opt-out' because he wanted to prevent the possibility for ethnic Germans and Hungarians that were ousted from their homes after World War II, in what is now the Czech Republic, from placing claims for restitution of their confiscated property by challenging the Czech law from the 1940s that allowed for such confiscation (known as the Beneš Decrees).<sup>153</sup>

The Heads of State and Prime Ministers accepted the demands of the Czech Republic and Protocol 30 shall also apply to the Czech Republic. However the current Treaties make no mention of the addition of the Czech Republic to Protocol 30. This will happen with the next treaty revision, i.e. when a new country joins the European Union.<sup>154</sup>

It is interesting to note that Peers wrote a very interesting analysis of whether or not the 'fear' of the President of the Czech Republic was well founded. Peers concluded that the Beneš Decrees do not fall under the competence of Union law<sup>155</sup> and even if they would the Lisbon Treaty would not 'give any jurisdiction to the Court of Justice to hear direct claims against Member States, in particular as regards human rights'.<sup>156</sup> The Court of Justice has no jurisdiction to hear claims brought by an individual directly against a Member State.<sup>157</sup>

So here, again as with the 'fears' of the United Kingdom and Poland, it seems that the 'opt-out' was more politically motivated than anything else.

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<sup>152</sup> Craig, p. 22.

<sup>153</sup> Gardner.

<sup>154</sup> Conclusions of the presidency at the occasion of the Brussels European Council (29 and 30 October 2009) (15265/1/09 REV 1).

<sup>155</sup> Peers, p. 9.

<sup>156</sup> Ibid., p. 12.

<sup>157</sup> An individual claim against a Member State always has to be brought before a national court of a Member State. National courts can ask the Court of Justice for preliminary questions (Article 267 TFEU). The only way a Member State can be sued directly in the Court of Justice is by another Member State (Article 259 TFEU) or by the Commission (Article 258 TFEU).



## **4 Have the Member States succeeded?**

So it is clear that some of the Member States were quite ‘frightened’ that the Charter would increase or expand the competences of the European Union and tried their utmost to prevent this from being possible. This resulted in repetition of provisions in the Treaty on European Union and the Charter as well as an ‘opt-out’ for Poland, the United Kingdom and, a little later, the Czech Republic to the Lisbon Treaty.

The question looked at in this paragraph is: Have the Member States succeeded in their efforts to prevent the Charter from, possibly, being used as an instrument to extend the competences of the Union, i.e. as a form of competence creep?

### **4.1 Article 6(1) TEU**

Article 6(1) TEU reads as follows:

*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*

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

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

It follows from the first clause that the Charter is on par with the Treaties of the Union. The second clause seems equally unambiguous: the Charter shall not extend the competences of the Union in any way. The third clause defines the method of interpretation. It refers to the general provisions of the Charter and give due regard to the explanations to the Charter.

According to Claes the second clause of Article 6(1) TEU repeats abundantly that the provisions of the Charter shall not extend the competences of the Union. That the Charter shall not extended the competences of the Union is already worded in Article 51 Charter, in the Explanations to the Charter but also in Declaration 1 to the Lisbon Treaty,<sup>158</sup> the Declaration of the Czech Republic,<sup>159</sup> the Declaration of Poland<sup>160</sup> and, finally, in the Protocol on the Accession of the Union to the ECHR.<sup>161</sup> According to Claes the Member States seem obsessed with preventing the extension of competences

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<sup>158</sup> Declaration (1) concerning the Charter of Fundamental Rights of the European Union [2007] OJ C306/249.

<sup>159</sup> Declaration (53) by the Czech Republic on the Charter of Fundamental Rights of the European Union [2010] OJ C83/355.

<sup>160</sup> Declaration (61) by the Republic of Poland on the Charter of Fundamental Rights of the European Union [2007] OJ C306/270.

<sup>161</sup> Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2010] OJ C83/273.

through the Charter. All these joint statements and personal declarations of some of the Member States only repeat what has already been enshrined in the Treaty and the Charter. It does, however, clearly show the political sensitivity of the Charter.<sup>162</sup>

In essence Article 6(1) TUE is clear. No extending the competences of the Union and when interpreting the Charter one has to look at the general provisions and the explanations to the Charter. So what about those general provisions?

## **4.2 The horizontal provisions of the Charter**

As touched upon earlier<sup>163</sup> the final four articles of the Charter contain the horizontal provisions. Article 51 is the most important provision in relation to the subject matter at hand and will therefore be discussed below.

### **4.2.1 Article 51**

Article 51 is entitled 'Field of Application' and this provision sets out the scope of the Charter. It states that:

1. *The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.*
2. *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.*

This provision seems to confirm the scope of application of the Charter to the Member States 'only when they are implementing Union law' and that it will not extend the field of application of the Charter. But when interpreting the Charter one has to look at the Explanations to the Charter as well.<sup>164</sup> They remind us that Article 51, when it comes to the vertical division of power, is drafted in line with the case law of the Court of Justice and that 'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'.<sup>165</sup> The explanations also state that clause 2 in combination with the last sentence of clause 1 'confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union' and that 'the fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties'. The explanations go on and then state that clause 2 'also confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties'. The explanations then refer to the Court's judgment in the *Grant* case.<sup>166</sup> It is clear that the aim of the drafters of the Charter was to prevent 'the Charter from having *any* kind of effect on the vertical division of powers in the broadest sense possible'.<sup>167</sup>

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<sup>162</sup> Claes, p. 163.

<sup>163</sup> See para. 2.4.1 and 3.2.2 above.

<sup>164</sup> See Article 6(1) TUE and para. 4.1 above.

<sup>165</sup> Explanations on Article 51. This explanation refers to the *Wachauf* case, *ERT* case and the *Annibaldi* case.

<sup>166</sup> Case C-249/96, *Grant*, [1998] ECR I-621, para. 45.

<sup>167</sup> Knook, p. 374.

So did the drafters prevent *any* kind of, possible, effect on the vertical division of powers? Do the texts of Article 51 and that of the explanations on that Article indeed reflect the current case law of the Court? This seems not to be the case. Article 51(1) states that the Charter only applies to the Member States 'when they are implementing Union law' whereas the Explanations to the Charter states that it 'follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on Member States when they *act in the scope of Union law*'.<sup>168,169</sup> The statement as worded in the Explanations is different from the provision in Article 51(1). Article 51(1) states 'when they are implementing Union law' whereas the explanations mention 'act in the scope of Union law'. In its case law the Court views that formulation 'act in the scope of Union law' as a broader concept than the formulation 'implementing Union law'. This can best be illustrated with an example taken from the Court's case law.

With regard to the Member States In the *Viking* case<sup>170</sup> the Court was asked to give a ruling on, amongst other questions, if the right to undertake industrial action, such as right of association and the right to strike, would have to be subservient to the right to freedom of establishment as laid down in Article 43 EC since, in accordance with Article 137(5) EC, the Community does not have the competence to regulate those rights? The Court kept its answer brief. It said:

*In that respect it is sufficient to point out that, even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law*<sup>171</sup>

So even when the Member States act in areas that fall outside the scope of the Union's competence, namely national employment law, the Member States must comply with Community law (in this case the right to freedom of establishment). The Member State in question was not *implementing Union law* but did *act in the scope of Union law*. This means that the Court's case law, to which the Explanations on Article 51 refer, is quite a bit broader than Article 51.

It is unclear 'whether the drafters in fact were careless or confused, or deliberately sought to interpose in the Charter a future brake upon the potential expansion of the EU's competences vis-à-vis the Member States'.<sup>172</sup> This variation from the existing case law does seem deliberate according to Carozza, because of the fact that Working Group II (which proposed several other changes to Article 51) did not address this ambiguity at all. This lack of clarity between Article 51 and the Explanation on it can, according to her, be called 'suggestive of the basic contradictions present in the Charter's political context'.<sup>173</sup>

Article 51 has the potential to affect the constitutional balance between the EU institutions and the Member States because the language of the Charter seems to imply a reduction of the scope of EU

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<sup>168</sup> Explanations relating to the Charter of Fundamental Rights of 14 December 2007 [2007] OJ C303/02.

<sup>169</sup> Emphasis added.

<sup>170</sup> Case C-438/05, *Viking*, [2007] ECR I-10779, para. 39.

<sup>171</sup> *Ibid.*, para. 40.

<sup>172</sup> Carozza, p. 44.

<sup>173</sup> *Ibid.*

law at the benefit of greater leeway to the Member States. This could be the case where Member States would not *implement* EU law but merely rely on the derogations from the fundamental freedoms that can be found in the Treaties. Another possibility is that the Court of Justice gives a broad definition of the term *implementing* Union law and as such will tip the constitutional balance in favour of the Member States, thus, in essence, reaffirming its current case law.

Possible and more likely however is that the constitutional balance between the EU institutions and the Member States will tip in favour of the first one. There are a few reasons for this. First the Charter will not only function at a judicial level but will most likely also function in the legislative and policy-drafting processes of the EU institutions.<sup>174</sup> In other words: when the 'legislative ambition of the EU increases, so will the field of application of the Charter'.<sup>175</sup> According to Carozza the Charter itself is a huge catalyst for this. Ever since the proclamation of the Charter all the EU institutions have referred to the Charter in 'virtually every piece of legislation'.<sup>176,177</sup>

An example is the Commission's proposal for a Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. In this proposal the Commission notes that:

*While it is true that the right of movement and residence of family members of Union citizens is not explicitly referred to by the Treaty, the rights does flow from the right to preserve family unity, which is intrinsically connected to the right to the protection of family life, a fundamental right forming part of the common constitutional traditions of the Member States, which are protected by Community law and incorporated in the Charter [of] Fundamental Rights of the European Union.*<sup>178</sup>

What the Commission seems to do here is acknowledge that a right to move and reside freely for family members of Union citizens, even though it is not included in the Treaty, should be placed in the bigger perspective of freedom of movement and as such the Commission is allowed to take action. Now that the Charter has become primary EU law the Commission would not even have to refer to the right to family life as forming part of the common constitutional traditions of the Member States, but instead could use the Charter as a 'supporting legislative basis' for Union action. Such an example<sup>179</sup> leads Carozza to conclude that this could result in the Charter being used as a supporting legislative basis for Union action that is currently considered outside the scope of Union law.

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<sup>174</sup> See para. 4.5 below.

<sup>175</sup> Carozza, p. 47.

<sup>176</sup> Ibid.

<sup>177</sup> The Commission in its recent communication on the strategy for the effective implementation of the Charter, in essence, affirms this practice.

<sup>178</sup> Commission, Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final of 25 September 2001, Explanatory Memorandum, sec. 2.4.

<sup>179</sup> Another example Carozza takes from Eeckhout. Eeckhout argues that with the harmonization of the Member States' asylum law, as agreed upon at the Tampere Council, it could become arguable that 'all asylum applications have a sufficient connection with implementing Union law so as to trigger the application of the Charter, meaning that all fundamental rights issues in asylum cases would be Charter issues.' Eeckhout, p. 976.

According to Carozza there are two possible reasons the Charter could be used to expand the vertical division of powers in favour of the EU institutions. The first reason being that the Charter is more than just a political undertaking, this because the Charter was solemnly declared and proclaimed by all three major institutions of the EU and as such could be regarded as a form of an 'interinstitutional agreement' which 'could have the effect of strengthening the view that the EU can act with respect to human rights issues in areas otherwise within the competence of the Union'.<sup>180</sup> With this reasoning Carozza shows to be a proponent of the argument put forward by Alston and Weiler that the authority of the European Union should be understood to include competence over human rights issues in spheres where there is otherwise another basis for EU competence.<sup>181</sup> Such line of reasoning would be in contravention with the intentions of the Member States as it allows the Charter to expand the vertical division of powers in favour of the EU institutions.

The second reason given by Carozza is the most interesting train of thought as it relates to the Union's accession to the ECHR.<sup>182</sup> By acceding to the ECHR the EU institutions become bound by the jurisprudence of the European Court of Human Rights (ECtHR) and its extensive case law on positive obligations that arise from certain fundamental rights as enshrined in the ECHR. This in turn could mean that the EU institutions feel themselves bound to take positive action to 'ensure that individuals will not be denied the effective enjoyment' of their rights.<sup>183</sup> Another development can be found in the case law of the ECtHR. The ECtHR has interpreted the language used in some articles of the Charter, which is 50 years the younger to the ECHR, as evidence that there is regional consensus among the Member States of the Union on the evolvement of those fundamental rights.

According to Carozza this dynamic interpretation of the ECHR by the ECtHR may mean that the Charter, in some instances, could 'have an impact on the EU Member States indirectly, even in areas strictly beyond the competence of the Union'.<sup>184</sup>

Knook states that when the Charter affects any of the existing competences of the Union this will not conflict with the wording of Article 51(2) where it reads 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'. As for the wording 'modify powers and tasks as defined in the Treaties', which seem quite resolute, Knook writes that it 'is questionable whether these words will have such a tempering effect on the development whereby powers such as Article 95 EC (now Article 114 TFEU) are used extensively by the Union to influence all kinds of policy areas'.<sup>185</sup> According to Knook instead of a tempering effect the Charter will have quite the opposite effect namely that 'the Charter will most likely infuse and further this development' of the Union's human rights policy.<sup>186</sup>

So even though Article 51 seems clear at first sight, this is not necessarily true. Even though only time will tell, it seems that the main aim of Article 51, preventing the Charter of having any, possible, effect on the expansion of competences of the Union, has not necessarily been met.

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<sup>180</sup> Carozza, p. 49.

<sup>181</sup> Alston and Weiler, p. 683

<sup>182</sup> According to Article 6(2) TEU the Union shall accede to the ECHR.

<sup>183</sup> Carozza, p. 49.

<sup>184</sup> *Ibid.*, p. 50.

<sup>185</sup> Knook, p. 386.

<sup>186</sup> *Ibid.*

### 4.3 The opt-out for the three Member States

Paragraph 3.2.3.2 described the content of the so-called opt-outs for the United Kingdom, Poland and, a little while later, the Czech Republic and what seems to be the underlying reason for these Member States to insist on the adoption of Protocol 30 and their issuing of declarations attached to the Lisbon Treaty.

Poland and the United Kingdom were concerned that the Charter could possibly create directly effective and justiciable rights especially regarding the rights enshrined in Title IV of the Charter, the so-called social and economic rights. The United Kingdom views these rights as mere principles and did not want the social and economic rights have any effect in the United Kingdom unless such rights have been provided for in national law.<sup>187</sup> This resulted in Protocol 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

Strangely Poland issued a declaration in which they, in reference to the social movement 'Solidarity', state that 'it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.'<sup>188</sup> If one takes a look at Declaration 61 to the Lisbon Treaty one finds the real reason for the Polish objection, namely that the Charter should not limited or affect in any way the right of the Member States to legislate on matters such as abortion, gay marriage and euthanasia.<sup>189</sup>

The reasons put forward by the President of the Czech Republic to insist on the same opt-out, to me quite frankly seem bizarre. The Czech President insisted on the 'opt-out' because he wanted to prevent the possibility for ethnic Germans and Hungarians that were ousted from their homes after World War II, in what is now the Czech Republic, from placing claims for restitution of their confiscated by challenging the Czech law from the 1940s that allowed for such confiscation (known as the Beneš Decrees).<sup>190</sup> This reasoning makes no sense at all. First, Peers convincingly argues that the Beneš Decrees do not fall under the competence of Union law<sup>191</sup> and even if they would, the Lisbon Treaty does not 'give any jurisdiction to the Court of Justice to hear direct claims against Member States, in particular as regards human rights'.<sup>192</sup> The Court of Justice has no jurisdiction to hear claims brought by an individual directly against a Member State.<sup>193</sup>

It is made clear in paragraph 3.2.3.2 that the so-called opt-out was not a general opt-out for these three Member States to the Charter but merely a clarification of these Member States to the Charter.

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<sup>187</sup> Barnard, p. 269.

<sup>188</sup> Declaration (62) by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom [2007] OJ C306/270.

<sup>189</sup> Declaration 61 reads as follows: 'The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.' Declaration (61) by the Republic of Poland on the Charter of Fundamental Rights of the European Union [2007] OJ C306/270.

<sup>190</sup> Gardner.

<sup>191</sup> Peers, p. 9.

<sup>192</sup> Ibid., p. 12.

<sup>193</sup> An individual claim against a Member State always has to be brought before a national court of a Member State. National courts can ask the Court of Justice for preliminary questions (Article 267 TFEU). The only way a Member State can be sued directly in the Court of Justice is by another Member State (Article 259 TFEU) or by the Commission (Article 258 TFEU).

It could only be considered an opt-out in the sense that the 'rights' enshrined in Title IV of the Charter, the social and economic rights, are not directly effective in the three Member States and that Title IV rights are not justiciable unless Poland, the United Kingdom or the Czech Republic have provided for such rights in their national law.<sup>194</sup> That is the only genuine opt-out in place and Protocol 30 is really not much more than a clarification of certain clauses in the Charter and, mostly, a political document reiterating superfluously that, at least according to these Member States, the Charter should not in any way exert any influence in their national legal order.

If the real intention of these three Member States was to prevent the Charter from, possibly, being used as an instrument to expand the competences of the Union it is safe to say that they have not succeeded.

#### **4.4 The Court and the Charter**

This paragraph will look at possible signs in the recent case law of the ECJ that the Charter is used as an instrument to expand the competences of the Union. For this analysis I will take a look at a very recent case of the ECJ in which the Court explicitly referred to the Charter in its judgment; the case of *Kücükdeveci*,<sup>195</sup> I will furthermore discuss the Opinion of the Advocate General in the *Zambrano* case,<sup>196</sup> which is currently before the Court.

##### **4.4.1 The *Kücükdeveci* case**

The *Kücükdeveci* case has stirred up quite a debate amongst Union law scholars for a number of reasons, one of them being that in this judgment the ECJ allegedly gives retroactive effect to the Charter. If this is true then it would be a groundbreaking judgment by the ECJ and quite possibly one of the first signs that the Court is starting to function in a sense that is typically only seen with constitutional courts right after their inception; namely not just applying and interpreting law but actively shaping it. Such a move could indicate that the Court is of the opinion that fundamental rights are just that fundamental and therefore are always applicable

The facts of the *Kücükdeveci* case are as follows. Mrs. Küçükdeveci was employed by the company Swedex from June 1996 (at the age of 18). She was dismissed by Swedex by letter of 19 December 2006 with effect from 31 January 2007. This meant that Swedex calculated the statutory notice period being based on three years employment instead of the actual 10 years Mrs. Küçükdeveci worked for Swedex. Mrs. Küçükdeveci brought her case before the German Labour Court arguing that her statutory notice period should have been four months instead of the one month given to her. She argued that the German law, which states that employment before the age of 25 is not to be taken into account when calculating the statutory notice period, constitutes discrimination on grounds of age and is contrary to Union law and therefore should be disapplied. The Labour Court of Appeal doubted whether or not the German law was in line with Union law and asked the ECJ for a preliminary ruling. It first asked whether or not national legislation that states that employment before the age of 25 is not to be taken into account when calculating the statutory notice period, constitutes 'a difference of treatment on grounds of age prohibited by European Union law, in

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<sup>194</sup> Barnard, p. 269.

<sup>195</sup> Case C-555/07, *Kücükdeveci*, [2010] ECR I-00000 (nyp).

<sup>196</sup> Case C-34/09, *Zambrano*, [2010] ECR I-00000 (nyp), Opinion of AG Sharpston.

particular primary law or Directive 2000/78<sup>197</sup> and if such legislation could be justified because a basic notice period can be observed in case of dismissal of younger workers ‘first, in order to enable employers to manage their personnel flexibly’ and ‘second, because it is reasonable to require greater personal and occupational mobility from younger workers than from older ones’.<sup>198</sup> The second question is if a referring court, to ensure protection of the legitimate expectations of persons subject to the law, must ask the ECJ whether a national provision is incompatible with Union law before it disapplies a national provision which it considers to be contrary to Union law.<sup>199</sup> This second question falls outside the scope of this paper and therefore will not be considered further.

Regarding the first question the ECJ states that it falls within the scope of Union law because, as it has held in the *Mangold* case,<sup>200</sup> Directive 2000/78 in itself does not lay down the principle of equal treatment in the field of employment and occupation but this directive gives specific expression to the principle of non-discrimination on grounds of age which must be regarded as a general principle of Union law.<sup>201</sup> The Court then in paragraph 22 states that ‘it should also be noted that Article 6(1) TUE provides that the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties. Under Article 21(1) of the Charter, ‘[a]ny discrimination based on ... age ... shall be prohibited’.<sup>202</sup> This paragraph has created quite some debate and one could argue that the Court here gives retroactive effect to the Charter. Retroactive effect because the facts of the *Kücükdeveci* case took place before the Charter gained the same legal value as the Treaties with the entry into force of the Lisbon Treaty. If this was the real intention of the Court<sup>203</sup> then an argument could be made that, by giving retroactive effect to the Charter, the Court is acting as a typical constitutional court in the years after its creation in the sense that it cannot disregard fundamental rights and feels a need to interpret and apply these fundamental rights whenever applicable. This acting as a constitutional court bears similarities with the development of fundamental rights protection across the Atlantic in the United States of America by the United States Supreme Court.

Such a similar development could open the door to expansion of the competences of the Union.

The United States Constitution does not contain any fundamental rights. The framers of the US Constitution deliberately chose to incorporate fundamental rights into a separate Bill of Rights.<sup>204</sup> One clause in the Bill of Rights, the Tenth Amendment, contained a clause similar in approach to Article 6(1) TEU and Article 51 of the Charter as it states that the powers or competences which are not delegated to the Federal Government are reserved to the States or to the people.<sup>205</sup> Compare this to the negative wording of Article 6(1) TEU and Article 51 of the Charter which state that the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

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<sup>197</sup> Case C-555/07, *Kücükdeveci*, [2010] ECR I-00000 (nyp), para 18.

<sup>198</sup> *Ibid.*, para 18.

<sup>199</sup> *Ibid.*, para 44.

<sup>200</sup> Case C-144/04, *Mangold*, [2005] ECR I-09981.

<sup>201</sup> Case C-555/07, *Kücükdeveci*, [2010] ECR I-00000 (nyp), paras 20 and 21.

<sup>202</sup> *Ibid.*, para 22.

<sup>203</sup> It is difficult to assess if this was the real intention of the Court because in *Kücükdeveci* the Court delivered a judgment as brief, regretfully, as the groundbreaking judgment in *Mangold*.

<sup>204</sup> Knook, p. 375.

<sup>205</sup> Amendment X, United States Constitution: ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people’.



Furthermore the Bill of Rights originally applied only to the Federal Government. However over the years the United States Supreme Court has played a major role in expanding the application of the Bill of Rights to apply to, and as such limit, the legislative competences of the states as well. The Supreme Court did this, mostly, through its interpretation of the Fourteenth Amendment. According to the Fourteenth Amendment:

*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*<sup>206</sup>

There are different doctrines, so called ‘incorporation doctrines’, on whether or not the Fourteenth Amendment implies that the Bill of Rights also applies to the states.<sup>207</sup> Suffice to say that, at this point in time, the US Supreme Court has incorporated, through the Fourteenth Amendment, quite a few fundamental rights from the Bill of Rights meaning that these rights apply to the states as well and that the Supreme Court can review states legislation and invalidate state laws that infringe these fundamental rights. This case law is generally considered a ‘remarkable act of judicial activism on the part of the Supreme Court’.<sup>208</sup> A main reason for this is the fact that this incorporation doctrine ‘contradicts the intention of the framers of the United States Constitution and the Bill of Rights, which, like those of the European Constitution and the Charter, intended to rule out the possibility that the Bill of Rights would have any effect on the vertical division of powers’.<sup>209</sup>

For the European Union there are three scenarios imaginable, according to Knook, in which the incorporation of the Charter into Union law could change the role of the ECJ in the vertical division of powers, and as such expand the competences of the Court and of the Union. The first scenario could be that the Court will act merely as the guardian of the Treaties and not as a countervailing power; in short it would adopt a legalistic approach. If that would be the case the Court, according to Knook, will most ‘probably adhere strictly to the letter of the Charter’ and ‘will have to narrow the scope of its fundamental rights *acquis* to agency-type situations’.<sup>210</sup> This would not mean that the Court can content itself with ‘judicial laissez-faireism instead of activism’.<sup>211</sup> It would mean that the Court would have to invalidate any and all Union legislation that is merely “inspired” by the Charter instead of being based on Union competences, this because Article 51 of the Charter clearly states that the Charter does not modify powers and tasks as defined in the Treaties nor does it extend the field of application of Union law. The second scenario would be what Knook calls the status quo (ante) approach. In short this scenario would entail the Court not narrowing its scope of fundamental rights review but instead would choose to stick to its current scope of review. This would mean that the Court would continue to allow ‘fundamental rights legislation by the Union inspired by the Charter, as illustrated by *Österreichischer Rundfunk* and *Lindqvist*’.<sup>212</sup> Such an approach would mean a significant erosion of Article 51 Charter. The third scenario would, in my view, fit in line with the historic and groundbreaking case law that the Court has developed through the years. This scenario

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<sup>206</sup> Amendment XIV, Section 1, United States Constitution.

<sup>207</sup> See Knook’s article for a more detailed description of the different doctrines.

<sup>208</sup> Knook, p. 379.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid., p. 397.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

is the activist approach. It could come about by a Commission that would make ‘extensive use of Union powers to legislate on human rights’ or simply by the Court following the development that it has previously set out in its case law.<sup>213</sup> Either way, it would entail the Court taking full use of its ‘new opportunities for legal activism’ and could lead to a full-fledged adoption of the incorporation doctrine. More specifically this approach would mean that the Court would apply the Charter to all Member States’ legislation, ‘even if there is only a weak connection with Union law, or no connection at all’.<sup>214</sup> Knook writes that this third scenario is ‘anything but inconceivable’.<sup>215</sup>

It will be very interesting to see in which one of these three scenarios the Court will develop its fundamental rights case law. History tells us that the ECJ is not afraid not take an activist approach.<sup>216,217</sup> So if the ECJ intentionally referred to the Charter in *Kücükdeveci* it could quite possibly be on a similar path as the Supreme Court has threaded in its Fourteenth Amendment case law and so maybe the *Kücükdeveci* case is the first judgment of the ECJ under, what Knook labels, the activist approach. Only time will tell.

#### 4.4.2 The *Zambrano* case

Another interesting case that is currently before the Court is the *Zambrano* case.<sup>218</sup> This case concerns, at least in the view of some of the Member States, the Charter and purely internal situations. It is clear from the above that the Member States have no intention to make the Charter applicable to situations that are purely internal to the Member States. Currently the Court has not ruled on this case and only the Opinion of the Advocate General Sharpston is available. The *Zambrano* case, in short, concerns ‘the scope of the right of residence for third country nationals who are the parents of an infant Union citizen who has not, as yet, left the Member State of his birth’.<sup>219</sup> To elaborate a bit more the case concerns the parents, who are third country nationals, of a child that was born in a Member State, e.g. Belgium, making it, according to Belgium law at the time of a birth, a citizen of the Union and whether or not they, the parents being ascendant family members of the child, can derive a right of residence based on the fact that their dependent child is a citizen of the Union, which has not, yet, left the Member State of birth. According to Advocate General Sharpston this raises a number of difficult and important questions to be answered by the Court. Two of the three major questions raised and discussed by the Advocate General are specifically relevant to the subject matter at hand. The first question asked by the Advocate General concerns whether or not the two children, as citizens of the Union, can invoke rights under Articles 20 and 21 TFEU even though they have not, as yet, left their Member State of nationality; and whether Mr Zambrana (and his wife) can ‘therefore claim a derivative right of residence in order to be present in Belgium to look after and support his young children’.<sup>220</sup> To be able to answer this question the Advocate General will have to address ‘whether this is – as has been strongly suggested – a ‘purely internal’ situation, or whether there is indeed a sufficient link with EU law for citizenship rights to be invoked’.<sup>221</sup> Especially

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<sup>213</sup> Knook, p. 398.

<sup>214</sup> Ibid., p. 398.

<sup>215</sup> Ibid.

<sup>216</sup> E.g. the famous *Van Gend en Loos* case or the *Costa/ENEL* case.

<sup>217</sup> Weiler has even called the role of the ECJ *gouvernement de juges* and, interestingly enough, wrote that the only thing missing from this approach was something similar to the incorporation doctrine.

<sup>218</sup> Case C-34/09, *Zambrano*, [2010] ECR I-00000 (nyp), Opinion of AG Sharpston.

<sup>219</sup> Ibid., para 1.

<sup>220</sup> Ibid., para 50.

<sup>221</sup> Ibid., para 50.

this question is relevant for the subject matter at hand. The second question<sup>222</sup> concerns the fundamental right to family life and in essence addresses the basic question of what is the scope of EU fundamental rights. Can they be relied upon independently or 'must there be some point of attachment to another, classic, EU right?'<sup>223</sup>

With regards to the first question put forward by the Advocate General I will focus on the sub question of whether or not the case at hand concerns a purely internal situation or whether there is a sufficient link with EU law. The Advocate General, with quite some reference to the *Rottmann* case<sup>224</sup> and the *Zhu and Chen* case,<sup>225</sup> argues that the situation in the *Zambrano* case is not a purely internal situation. This in contrast with the written observations submitted by eight Member States, in which they unanimously argued that the situation of Mr Zambrano is 'purely internal' and as such does not 'trigger' provisions of Union law. Advocate General Sharpston suggests an objective test for the Court to answer if it is to find that 'the facts of this case do *not* constitute a purely internal situation, devoid of any link to EU law'.<sup>226</sup> Three questions would need to be answered:

- a) *Is there likely to be an interference with Mr Ruiz Zambrano's children's rights, as citizens of the Union, to move and reside freely within the territory of the Member States?*
- b) *If such interference exists, is it in principle permissible?*
- c) *If it is in principle permissible, is it nevertheless subject to any limitations (for example, on grounds of proportionality)?*<sup>227</sup>

Advocate General Sharpston answers these questions in over three pages, I will try to summarize her answer and mention some key points. The Advocate General finds that there is interference because the Zambrano children, as Union citizens, cannot exercise their right to move and reside freely within the Member States independently of their parents. If their parents are forced to leave Belgium, the children will almost certainly be forced to leave with them. This would mean that the children are unable to enjoy and exercise their right to move and reside freely with the Union. Because the children cannot independently exercise this right of residence the Court should recognize a derivative right of residence for Mr Zambrano and as such prevent any possible interference with the right of residence of his children, the Union citizens. The Advocate General is furthermore of the opinion that the circumstances in this case are sufficiently analogous to the situation in *Zhu and Chen* that they warrant assimilation. In principle such interference is permissible, except in certain circumstances, especially if such interference is not proportionate. The Advocate General asks the question if it is 'proportionate, in the circumstances of this case, to refuse to recognise a right of residence for Mr Ruiz Zambrano, derived from his children's rights as EU citizens?'<sup>228</sup> The Advocate General admits that such proportionality test is ultimately a matter for the national courts to decide but remarks that in this case several factors indicate that it would not be proportionate to refuse Zambrano a derivative right of residence.<sup>229</sup> So even though the granting of nationality is an exclusive competence of the Member States they, when exercising such competence, have to abide by Union

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<sup>222</sup> Which is the third question formulated by the AG in his Opinion.

<sup>223</sup> Case C-34/09, *Zambrano*, [2010] ECR I-00000 (nyp), Opinion of AG Sharpston, para 52.

<sup>224</sup> Case C-135/08, *Rottmann*, [2010] ECR I-00000 (nyp).

<sup>225</sup> Case C-200/02, *Zhu and Chen*, [2004] ECR I-9925.

<sup>226</sup> Case C-34/09, *Zambrano*, [2010] ECR I-00000 (nyp), Opinion of AG Sharpston, para 97.

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid.*, para 110.

<sup>229</sup> *Ibid.*, paras 111-121.

law and in this case there is a clear link with Union law. The link with Union law is there because by refusing a derivative right of residence to Mr Zambrano, his children that are Union citizens will be unable to exercise effectively their right to reside. Or in the words of the Advocate General: 'their residence right will therefore [...] be almost completely devoid of content'.<sup>230</sup>

The third question considered by the Advocate General is what is the scope of application of fundamental rights under Union law? 'Can they be invoked as free-standing rights against a Member State? Or must there be some other link with EU law?'<sup>231</sup> The Advocate General recognizes the Court's settled case law, which is also enshrined in the Charter<sup>232</sup>, that EU fundamental rights may only be invoked when 'the contested measure comes within the scope of application of EU law'.<sup>233</sup> Advocate General Sharpston suggests that 'provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU *even if such competence has not yet been exercised*'.<sup>234</sup> The advantages of such an approach would be that it 1) improves legal certainty; 2) such approach would keep the powers of the EU in check, in the sense that it makes clear when EU fundamental rights protection is applicable. Also when there is a shared competence this would imply that such protection 'would be complementary to that provided by national law';<sup>235</sup> 3) if Member States know that EU fundamental rights are guaranteed, this could result in more detailed secondary Union legislation in sensitive areas in the sense that such legislation would include the 'appropriate definition and exact extent'<sup>236</sup> of which EU fundamental rights are applicable, so that this would not have to be solved by the Court in each case; 4) this definition of the scope of applicability of EU fundamental rights 'would be coherent with the full implications of citizenship of the Union'.<sup>237</sup> The Advocate General admits that 'making the application of EU fundamental rights dependent solely on the existence of exclusive or shared EU competence'<sup>238</sup> would currently be a bridge too far in the case at hand as it would introduce an 'overtly federal element into the structure of the EU's legal and political system'.<sup>239</sup> Such change would 'alter, in legal and political terms, the very nature of fundamental rights under EU law' and would therefore require 'both an evolution in the case-law *and* an unequivocal political statement from the constituent powers of the EU'.<sup>240</sup> This, in essence, leads the Advocate General to conclude that in the *Zambrano* case the answer must be that, at this point in time, the fundamental right to family life cannot be invoked as a free-standing fundamental right, independent of any other link with Union law.

Regarding the first question, whether or not this case relates to a purely internal situation, it seems to me that the Advocate General is convincing when she argues that it is not a purely internal situation. It is however very unlikely that the Court will accept the Advocate General's argument and use the Charter to reverse the standing rule that purely national issues do not fall within the ambit of

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<sup>230</sup> Case C-34/09, *Zambrano*, [2010] ECR I-00000 (nyp), Opinion of AG Sharpston, para 117.

<sup>231</sup> *Ibid.*, para 152.

<sup>232</sup> Article 51 Charter.

<sup>233</sup> Case C-34/09, *Zambrano*, [2010] ECR I-00000 (nyp), Opinion of AG Sharpston, para 156.

<sup>234</sup> *Ibid.*, para 163.

<sup>235</sup> *Ibid.*, para 168.

<sup>236</sup> *Ibid.*, para 169.

<sup>237</sup> *Ibid.*, para 170.

<sup>238</sup> *Ibid.*, para 172.

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*, para 173.

the Charter. The Court recently reaffirmed this in the *Estov* case.<sup>241</sup> In this case the Court found itself not competent to rule on the questions referred to it because the facts of the case concerned a purely internal situation.<sup>242</sup> In the Order the Court reemphasises that Article 51 (1) Charter clearly states that it is addressed to the Member States only when they implement Union law and that the Charter does not establish any new competences or modify the competences of the Union.

What the Advocate General in essence proposes with her answer to the third question is that the protection of fundamental rights within the ambit of Union law should depend on a direct material EU competence and not on any directly effective Treaty provision nor on any secondary Union law. The Advocate General realises that this proposal is quite groundbreaking and has a federal element to it and she therefore, rightfully, admits that such direct material competence would not only require further evolving case law in this field but also an 'unequivocal political statement' by the Member States. Such a statement is, in my view, essential, because the proposal put forward by the Advocate General clearly goes above and beyond what the Member States have intended to be the material scope of fundamental rights protection and the Charter. This means that although it seems to me that the Advocate General has a valid and persuasive argument that would indeed benefit the Union and its citizens, and especially the contents of Union citizenship, such a change is a long way away, certainly in lieu of the current political climate in quite some Member States that seem to point toward certain types of nationalism.

#### **4.5 The Commission and the Charter**

Ever since the Charter was solemnly proclaimed the Commission has referred to it in quite a few of their legislative proposals and acts. The way the Commission reviewed legislative proposals to the fundamental rights as enshrined in the Charter was, however, not clearly worked out or defined. To remedy this lack of giving fundamental rights a firm place, to embed the Charter if you will, in the legislative process of the Union, the European Commission quite recently<sup>243</sup> published a communication in which they set out the Commission's strategy for the effective implementation of the Charter by the Union.<sup>244</sup> Is this strategy in line with the provisions of Article 6(1) TEU and Article 51 Charter in the sense that it addresses the 'fear' for creeping competences by, some of, the Member States and possibly introduces measures that, if possible, ensure a competence creep will not occur?

The Commission's strategy sets out in detail what should be done or implemented to ensure that the Charter becomes a bedrock of both internal legislative action as well as external. According to the Commission the objective of this strategy is that the Union must be exemplary in making the fundamental rights as provided in the Charter as effective as possible.<sup>245</sup> To achieve this the Commission has identified three main areas. The first paragraph is entitled 'The Union must be exemplary' and sets out the principles of the strategy that concern the different stages of the

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<sup>241</sup> Case C-339/10, *Estov*, [2010], ECR I-00000 (nyp), Order of 12 November 2010.

<sup>242</sup> One of them being whether or not the non-recognition in national law of a right of appeal of an administrative decision relating to land-use plans would be in violation with Article 47 Charter.

<sup>243</sup> 19 October 2010.

<sup>244</sup> Commission, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' (Communication) COM (2010) 573 final.

<sup>245</sup> COM (2010) 573 final, p. 3.

preparatory and legislative processes as well as strengthening the culture of fundamental rights in the Commission and ensuring that Member States respect the Charter. Paragraph two sets out the goals on how the Commission will better inform the public on the fundamental rights enshrined in the Charter and, when those rights are violated, how to enforce them in practice. This paragraph furthermore identifies the different sort of action that needs to be undertaken by the Commission to achieve these goals. The final paragraph concerns the annual report on the application of the Charter that the Commission will compile. It identifies two main objectives. The first objective is to take stock of the progress of the application of the Charter in a 'transparent, continuous and consistent manner'<sup>246</sup>, or in other words what has been done and what remains to be done. The second objective is to, through the report, 'offer an opportunity for an annual exchange of views with the European Parliament and the Council'.<sup>247</sup>

For this paper the first paragraph of the Commission strategy is the most important one and will therefore be discussed a bit more in depth to see if the Commission addresses the 'fear' for creeping competences and if so, identifies measures to prevent such a creep. Paragraph 1.3 entitled 'Ensuring that the Member States respect the Charter when implementing Union law' starts with a recital of part of Article 51(1) Charter and affirms that the Charter is addressed to the Member States only when they implement Union law. The Commission states that it is 'essential to the mutual confidence necessary for the operation of the Union'<sup>248</sup> that Member States uphold the fundamental rights enshrined in the Charter when they implement Union law. The Commission continues and argues that such upholding of fundamental rights is 'important in view of the expansion of the EU *acquis* in areas where fundamental rights are especially relevant, such as the area of freedom, security and justice, non-discrimination, Union citizenship, the information society and the environment'.<sup>249</sup>

To enforce the Member States to respect the Charter when they implement Union law the Commission identifies the three guiding principles. The first guideline is that of preventing the Member States from not complying with the Charter when implementing Union law. More specifically this means that the Commission will, where applicable, remind Member States that when transposing EU legislation they have an obligation to comply with the Charter. Furthermore the Commission will assist the Member States, especially in the expert committees which have been set up to facilitate the transposition of directives. Secondly, when Member States do not respect the fundamental rights as enshrined in the Charter the Commission, as guardian of the Treaties, will use its powers to try to remedy the infringement and, if necessary, will take the Member State in question to the ECJ on the action for failure to fulfil an obligation. The Commission text seems quite forceful in this respect in the sense that the Commission writes that it is 'determined to use all means at its disposal to ensure that the Charter is adhered to by the Member States when they implement Union law' and that the Commission will start infringement procedures whenever necessary. Priority will be given to infringement proceedings that 'raise issues of principle or which have a particularly far-reaching negative impact for citizens'.<sup>250</sup> This makes quite clear that the Commission has every intent to give the Charter a prominent place in the implementation of Union law by the Member States. The third guideline relates to situations that fall outside the scope of the Charter. In this

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<sup>246</sup> COM (2010) 573 final, p. 12.

<sup>247</sup> Ibid.

<sup>248</sup> Ibid., p. 9.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid., p. 10.

paragraph the Commission reiterates that the Charter does not apply to ‘breaches of fundamental rights with no connection to Union law’.<sup>251</sup> Where there is no connection with Union law the Member States have their own systems in place for the protection of fundamental rights and redress of fundamental rights violations through the national courts. National courts, and supranational courts such as the ECtHR, ensure compliance with fundamental rights. It befalls on the respective Member States to implement measures necessary in accordance with their national laws and international obligations. Interestingly, in this paragraph the Commission also refers to Article 7 TEU. Article 7 TEU contains a mechanism that allows the institutions of the Union ‘to act when there is a *clear risk of a serious breach* or a *serious and persistent breach* by a Member States of the values referred to in Article 2 TEU’ (sic).<sup>252</sup> This includes respect for human rights. Application of the mechanism from Article 7 TEU is a ‘political measure of last resort, intended for situations of an exceptional nature with a systemic structural dimension’.<sup>253</sup> This mechanism will most likely not be used anytime soon.

As mentioned previously, paragraph 1 also sets out the principles of the strategy that concern the different stages of the preparatory (1.1) and legislative processes (1.2). In 1.1 the Commission sets out the methodology that civil servants have to follow in the preparatory stages of drafting a proposal. To assist them with this the Commission has included a ‘Fundamental Rights “Check-List”’.<sup>254</sup> The checklist consists of six questions that have to be born in mind when drafting a new proposal. This questions deal for instance with: Which rights are affected? Are these rights absolute? What is the impact of these rights on the policy in question? Will this impact be beneficial or negative? Is any limitation of a fundamental right clearly and predictably formulated? And whether a possible limitation is necessary and proportionate? Since the checklist does not mention anything on whether or not the draft proposal belongs to the competences of the Union and as such assumes that that evaluation has previously been answered. Particular attention has to be paid to what the Commission calls ‘sensitive proposals and acts’. This is defined as all legislative proposals and implementing acts<sup>255</sup> and delegated acts<sup>256</sup> that ‘raise specific issues of compatibility with the Charter or which are designed to promote a specific fundamental right under the Charter’.<sup>257</sup> The Commission places its methodology in the framework of its ‘Better regulation’ policy and will form a permanent part of the Commission’s impact assessment that accompany the Commission’s proposals. The question of legal compliance of draft acts will not form part of the impact assessment. This question will be answered at a later stage in the draft act itself. Regarding draft acts the Commission notes that the recitals should not just merely mention the draft act’s compliance with the Charter but instead should clearly explain the reasoning behind the adoption of the act in question. In the words of the Commission the insertion of recitals should not be ‘a mere formality’ as ‘it reflects the in-depth monitoring of the proposal’s compliance with the Charter’.<sup>258</sup>

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<sup>251</sup> COM (2010) 573 final, p. 10.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid. For the exact and detailed conditions see the Communication from the Commission entitled: ‘On Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based’ (Communication) COM (2003) 606 final.

<sup>254</sup> Ibid., p. 5.

<sup>255</sup> Article 291 TFEU.

<sup>256</sup> Article 290 TFEU.

<sup>257</sup> COM (2010) 573 final, p. 6.

<sup>258</sup> Ibid., p. 7.

The second part of paragraph 1 defines the methodology that applies during the legislative process itself. More specifically this means the stage after the drafting of the legislation, the preparatory stage, and before the final adoption of draft legislation. In other words the stage that starts after the Commission has tabled a proposal for approval from the Council and Parliament. The Commission will assist the Council and Parliament, the co-legislators, in ensuring that their amendments are in line with the implementation of the Charter. The Commission writes that it 'is ready to help other institutions find an effective way to take into account the effects of their amendments on the implementation of the Charter'.<sup>259</sup> The Commission furthermore clearly and without reservation notes that it will strongly oppose any amendment that, in the view of the Commission, seeks to lower fundamental rights standards that are contained in the proposal. Such amendments will be opposed with all means that the Commission has at its disposal, such means 'may include requesting that the act be adopted unanimously or, where applicable, withdrawing its proposal or bringing an action for annulment of the provisions in question'.<sup>260</sup> Finally the Commission writes that any draft amendments that give rise to the before mentioned issues of compatibility should be subject to the inter-institutional dialogue. So here, as with paragraph 1.1, the Commission places its methodology within the Impact Assessment Framework/Better Regulation Policy and as such will contribute to a structured approach to dealing with such amendments.

In short the Commission with this Communication has set out a detailed and clear strategy that has to ensure the effective implementation of the Charter in the new legal environment that has come into existence with the entry into force of the Treaty of Lisbon. The Commission acknowledges multiple times within Communication the scope of the Charter and that it only binds the Member States when they implement Union law.<sup>261</sup> At the same time the Commission stresses the fact that the Member States must respect the fundamental rights enshrined in the Charter and apply the Charter whenever they do implement Union law. The Communication does not give any indication that a competence creep can be expected anytime soon from the Commission. The Strategy set out in the Communication clearly, and repeatedly, reiterates that phraseology found in Article 6 TEU and Article 51 Charter; the Charter does not expand the competences of the Union.

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<sup>259</sup> COM (2010) 573 final, p. 8.

<sup>260</sup> Ibid.

<sup>261</sup> E.g. on pages 3, 9, 10 and 13.



## 5 Conclusion

The previous pages have set out to explore the coming about of the Charter of Fundamental Rights of the European Union and the fear of some of the Member States that the Charter might expand the competences of the Union. The Member States have tried to curb this fear by including strongly worded articles in both the Treaty on European Union as well as the Charter. Some Member States even negated 'opt-outs' to (certain) provisions of the Charter.

The main question this paper has tried to answer is whether or not the Member States have succeeded and prevented the Charter from having any possible competence creep in favour of the Union?

The answer has to be twofold in the sense that, although it becomes abundantly clear what the intention of the Member States has been when they granted the Charter the same legal value as the Treaties; it is shown that the Court still has ways, even bearing in mind the wording of Article 6(1) TEU and Article 51 of the Charter, to expand the competences of the Union through the Charter, especially if the Court would adopt its own version of the incorporation doctrine.

Furthermore, the so-called 'opt-outs' to the Charter for the United Kingdom, Poland and the Czech Republic are anything but real 'opt-outs'. That these Member States have called them 'opt-outs' publicly has more to do with the internal, political situation of those Member States than with really opting-out of the Charter. The picture that emerges with regard to the 'opt-outs', in my view, is a difference between 'political' statements, i.e. those statements made in the public arena, which tend to 'generalize' the issue and those statements that are more detailed, and legally correct.

Regarding some of the recent cases before the Court, these seem to paint a two-sided picture. On the one hand the Court in the *Kücükdeveci* case seems to take quite an activist approach in the sense that it seems to function as a kind of constitutional court, whereas in the *Zambrano* case it seems highly unlikely to me, at least in the nearby or not so distant future, that the Court will deviate from its case law or even expand or develop it more, as is suggested by Advocate General Sharpston and deliver a groundbreaking judgment that, in my opinion, would be on par with the Court's groundbreaking judgments in *Van Gend en Loos* or *Costa ENEL*.

All in all, the conclusion must be that the Charter is, politically, not intended to expand the competences of the Union in any way, shape or form, but that legally an almost entirely different picture can be painted. Namely that it is legally possible, and not unrealistic, that the Court of Justice of the European Union will continue its tradition of taking a quite activist approach, and if it does so the Charter and the Treaties cannot prevent this. It is however very unlikely that the Court would drastically alter the Union's legal order anytime in the near future. This however does not mean that there is not going to be any competence creep. As Prechal perfectly puts it: 'as is characteristic to any creep – they often do so by stealth'.<sup>262</sup>

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<sup>262</sup> Prechal, p. 19.

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