I.3. DERECHO DE LA UNIÓN EUROPEA

THE TREATY OF LISBON: A NEW EUROPEAN AGENDA FOR HUMAN RIGHTS. FILLING THE GAP BETWEEN SOLEMN DECLARATIONS AND THE REALITY ON THE GROUND

Por D.ª Elvira Méndez-Pinedo
Professor of European Law
University of Iceland

«While we belong, for sure, to our country, to our city and village, there is however a higher belonging which unites all of us. This higher belonging is one to a frontierless world. *Giustizia, tu sei la nostra patria*»*.

Professor Mauro Cappelletti

Resumen

Este artículo se refiere a la protección de los derechos humanos en la Unión Europea (U.E.) antes y después del Tratado de Lisboa que entró en vigor el 1 de diciembre de 2009, con especial énfasis en la Carta de Derechos Fundamentales y la adhesión de la U.E. a la Convención de Derechos Humanos (C.E.D.H.). Se analizan además los próximos dos retos más importantes: la necesaria reducción del «déficit de implementación» y la importancia de mejorar «el acceso a la justicia». El objetivo de hacer efectivos los derechos de todos los ciudadanos debe constituir la primera prioridad en la agenda político legal del siglo XXI a todos los niveles.

Por esta razón, la Parte I ofrece un breve resumen sobre los logros en materia de protección de los derechos humanos en la U.E. antes del Tratado de Lisboa. La Parte II examina cómo la U.E. ha replanteado el papel de los derechos fundamentales en los nuevos Tratados de la U.E. para dar valor jurídico vinculante a la Carta Europea de los

* M. Cappelletti, President of the International Association for Procedural Law, «Some reflexions on the rule of procedural scholarship today», in *Justice and Efficiency. General Reports and Discussions*, The Eight World Conference on Procedural Law, Dutch Association for Procedural Law, ed. By Dr. W. Wedekind, Kluwer-Deventer, 1989, 460 pp. See also M. Storme and F. Carpi (eds.), «International Association of Procedural Law», *In honorem Mauro Cappelletti (1927-2004), Tribute to an International Procedural Lawyer,* Kluwer Law Int., The Hague, 2005, 79 pp.

Derechos Fundamentales y para proporcionar la base jurídica para la necesaria adhesión de la U.E. a la C.E.D.H. En la Parte III, se cierra este estudio recordando la importancia de las próximas batallas pendientes, es decir, la necesidad de reducir lo que se conoce como «déficit de implementación» de estos derechos desde la perspectiva de la teoría juridical y metodología del «acceso a la justicia». Dos cuestiones fundamentales deben estar a la orden del día: la necesidad de dotar de eficacia a los derechos ya declarados a todos los niveles (europeo, nacional y local) y la de proporcionar el mayor acceso a la justicia para todos los ciudadanos. De esta manera se podría llenar la brecha entre las declaraciones solemnes y la realidad sobre el terreno. A la hora de concluir, el autor trata de sugerir las principales directrices que deben inspirar las agendas de derechos humanos de las administraciones nacionales y locales europeas para la próxima década.

Abstract

This article addresses the protection of human rights in the European Union (E.U.) before and after the Treaty of Lisbon which entered into force on the 1st December 2009 with special emphasis on the E.U. Charter of Fundamental Rights and the accession of the E.U. to the European Convention of Human Rights (E.C.H.R.). Furthermore, it discusses the next two important challenges: the necessary reduction of the «implementation deficit» and the importance of improving «access to justice». The goal of making rights effective for all citizens must constitute the first priority in the agendas for the 21st century at all administrative levels.

For this reason, Part I gives a brief sketch on achievements regarding the protection of human rights in the E.U. before the Treaty of Lisbon. Part II examines how the E.U. has rethought the role of fundamental rights within the new Treaty of Lisbon by giving legal binding value to the E.U. Charter of Fundamental Rights and by providing the legal basis for the accession of the E.U. to the E.C.H.R. In Part III the exercise is closed by reminding the importance of the next battles still pending, that is to say, the need to reduce what is known as «implementation deficit» of these rights from the perspective of the «access-to-justice» legal thought and methodology. As it will be explained, the fundamental questions remaining on the agenda refer to the necessity of making rights effective at all levels (local, national and European levels) and providing the greatest access to justice for all citizens (judicial and non-judicial remedies). This would finally fill the gap between solemn declarations and the reality on the ground. Together with the conclusions, the author attempts to suggest the main guidelines that should inspire the human rights agendas of European, national and local Administrations for the next decade.

SUMARIO

I. INTRODUCTION

II. THE PROTECTION OF HUMAN RIGHTS IN THE E.U. BEFORE THE TREATY OF LISBON. MAIN ACHIEVEMENTS

III. THE NEW TREATY OF LISBON (2007): RETHINKING FUNDAMENTAL RIGHTS IN THE E.U.

IV. AN AGENDA FOR THE 21ST CENTURY: IMPLEMENTING FUNDAMENTAL HUMAN RIGHTS AND IMPROVING ACCESS TO JUSTICE IN EUROPE

V. FINAL CONCLUSIONS

Anuario de la Facultad de Derecho, ISSN 0213-988-X, vol. XXVIII, 2010, 419-451

I. INTRODUCTION

The most important references on Human Rights debates are the Universal Declaration of Human Rights (U.D.H.R.)[1], the European Convention for the Protection of Human Rights (E.C.H.R.)[2] and the European Union (E.U.) Charter of Fundamental Rights[3]. Each of these international conventions has a different scope[4]. This article is written from the perspective of E.U. Law, focusing mainly on the E.U. Charter of Fundamental rights and the new Treaty of Lisbon signed in December 2007 which entered into force in December 2009. Incidental references to the E.C.H.R. will be done when they are needed.

Special focus on the European Union is justified by the fact that it is to date the only partly intergovernmental, partly supranational organisation, for which

---

[1] After the Second World War, the adoption of the Universal Declaration of Human Rights in 1948 began a new era, where rights and duties under international law were gradually conferred upon the individual. Thanks to this declaration, today it is clear that individuals have legal rights and are subject to international law.

[2] The European Convention on Human Rights (E.C.H.R.) is an international treaty which was signed on 4 November 1950 in Rome under the auspices of the Council of Europe. It sets out a number of fundamental rights. To date, 47 countries across the European continent have ratified this convention, including all 27 E.U. countries. However, the E.U. itself is not, and currently cannot be, a party. The fundamental rights it protects must be respected by the national courts in all states that are signatories, and individuals can bring cases against the signatory states in the European Court of Human Rights in Strasbourg (which is NOT an E.U. Court).

[3] It should not be confused with the E.C.H.R. Not only the actors but also the scope of the two European texts differs in several issues. The Council of Europe Convention relates solely to civil and political rights. The European Charter contains extra elements, such as the right to good administration, workers social rights, personal data protection and bio-ethics. The E.U. Charter also expands on the conventions provisions on the right of access to law and justice. The Charter insists that this right must involve being heard by a judge, and not merely by a national administrative body.

[4] With some exception, it must be reminded that the domain of international law has been, to a large extent, that of states. States are the primary institutions called upon to promote human rights; it is also generally states that are responsible for violations of human rights. Although non-state actors can also violate human rights, for the time being, in European Law it remains the responsibility of the state to address such violations. The political debate concerning the appropriateness of expanding human rights scrutiny to non-state actors is discussed in the book of A. Clapham, *Human Rights Obligations of Non-State Actors,* Oxford University Press, 2006, 613 pp. For some, extending human rights to cover non-state actors trivializes human rights and allows abusive governments to distract us from ongoing violations. For others, such an extension is essential if human rights are properly to address contemporary concerns. In this book some fundamental assumptions about human rights law are challenged with a radical rethink regarding who has responsibilities and for what.

compliance with human rights is one of the most important foundations. The high political profile of human rights in the E.U. context is a field full of lights and shadows. While there has been a considerable expansion of both judicial and legislative activity in this area, at the same time the E.U. has been frequently criticized for its apparently greater willingness to promote and enforce human rights in its external policies rather than in its internal administration and policies. The criticisms of incoherence and double standards have increasingly been acknowledged by the E.U.[5]. In fact, it is still a paradox that the E.U. is not a member of the E.C.H.R. so that the European Union institutions escape the scrutiny of the European Court of Human Rights[6].

Although the Treaty of Amsterdam introduced two important provisions and the Treaty of Nice brought some additional detailed procedures, the human rights standards to evaluate the E.U. have been far from perfect. The European Court of Justice has tried to fill this gap by interpreting European Law in the light of the E.C.H.R. and the common constitutional principles of the E.U. Member States. But this debate was revived during the drafting of the European Constitutional Treaty which ultimately provided for accession by the E.U. to the E.C.H.R. Since the non-ratification of the European Constitution, the issue is still very much alive. One thing is for sure, there must be no room for complacency. For the time being, the level of human rights protection in the E.U. has not yet reached its highest level. The Treaty of Lisbon brings some important novelties that are essential for the future of the E.U. Not only the European standards will be higher than ever, but it will allow the European institutions to exercise their commitment in order to fight the next battles pending, the implementation in practice of fundamental rights to provide the greatest access to justice for all citizens.

II. THE PROTECTION OF HUMAN RIGHTS IN THE E.U. BEFORE THE TREATY OF LISBON. MAIN ACHIEVEMENTS

Due to the original silence of the founding Treaties, the protection of human rights in the E.U. had been traditionally developed by the case-law of the

[5] The Council of Ministers has reflected this criticism in its E.U. Annual Reports on human rights, published since 1999. See, e.g., the Annual Report for 2006.

[6] As the Secretary General of the Council of Europe has reminded in 2008. See Speech by the Right Hon Terry Devis, «Human Rights in Europe now», Trans European Policy Studies Association, Brussels, 10 March 2008, available internet at the website www.coe.int. A very interesting case is the decision *E.M.E.S.A. Sugar vs. Netherlands* from the Strasbourg based European Court of Human Rights where this Court is asked to exercise external control on the respect of fundamental rights in the legal order of the E.U. E.C.H.R., Decision as to the Admissibility of Application no 62023/00 issued by the Third Section E.C.H.R. on 13 January 2005. *E.M.E.S.A. Sugar* claimed that art. 6(1) of the E.C.H.R. on the right of fair trial had been violated by not allowing it to submit written observations to the Advocate General' Opinion in a preliminary reference procedure before the E.C.J. The application was declared incompatible *rationae materiae* with the provisions of the E.C.H.R. and was rejected as inadmissible.

Court of Justice of the European Union (from now on referred as the «E.C.J.»). This Court engaged itself to provide the maximum protection of the rights of individuals under E.C. law. For obvious reasons, this judicial activism could never substitute itself to the European legislator, so it could never be a complete solution for Europe. Although some modifications to the Treaties were added with the occasion of different reforms, the truth is that, from a legal point of view, the history of European integration in the field of human rights can be divided in two periods, before and after the signature of the Treaty of Lisbon and, even more precisely, before and after the E.U. Charter of Fundamental Rights initially adopted in 2000 and re-enacted in 2007. It cannot be denied that during fifty years, due to the limited economic scope of the E.C. Treaties, the relationship between the E.U. and the E.C.H.R. has not been an easy one, but the Treaty of Lisbon finally allows the E.U. to join the E.C.H.R. thus bringing a full mature «European human rights area» into life. This part of the article refers very briefly to the main achievements of the E.U. in the field of human rights before the Treaty of Lisbon.

1. The development of human rights protection in the European Treaties

The original three European Community Treaties, signed in the 1950s, contained no provisions concerning the protection of human rights. The European Court of Justice started recognising the existence of fundamental rights at Community level in the decade of the 70s[7], and has steadily extended them[8]. Under the Court's continuing case-law, it can be said today that they form part of the general principles of Community law and are equivalent to primary law in the Community legal hierarchy[9].

[7] This Court's approach was formally approved by a joint declaration of the Parliament, Council and Commission in which the three institutions also formally committed themselves to ensuring respect for fundamental rights in the exercise of their powers. Official Journal C.E. 1977 C103, p. 1.

[8] The most important cases of the E.C.J. during this period are previous to the Maastricht Treaty are the following: case *Stork* 1/58 [1959] E.C.R. 17, case *Nold* 4-73 [1974] E.C.R. 491, case *Hauer* 44/79 [1979] E.C.R. 3727, case *Rutili* 36/75 [1976] E.C.R. 140, joined cases *Cinétheque* 60 and 61/84 [1985] E.C.R. 2605; and the case *E.R.T.-A.E. vs. EDP* C-260/89 [1991] E.C.R. I-2925. In the *Stork* judgment, the E.C.J. had previously refused to engage in judicial review of human rights. It was not until ten years later that it changed its case law initiating such review. In the case *Hauer* the Court sets out its methodology, accepting a review in the light of E.C. law itself. It was in this case case *E.R.T.-A.E. vs. E.D.P., op. cit.* at paragraph 41 that the Court changed course. As the E.C.J. declared, although the E.C.J. has no power to examine the compatibility with the E.C.H.R. of national rules which do not fall within the scope of Community law, on the other hand, where such rules do fall within E.C. law, the Court can exercise its function of judicial review. Fundamental rights form part of the general principles of Community law that it is required to uphold, and that in safeguarding such rights it should be guided by the constitutional traditions of the Member States.

[9] Craig, P. and De Burca, G., E.U. Law, *Text, cases and materials*, 4th ed., Oxford University Press, 2007, 1148 pp. See specially chapter 11, pp. 379-427.

Apart from the case-law of the Court of Justice, a range of other non-binding initiatives, declarations and resolutions on human rights have been adopted over the years by the European institutions. Some of the «soft law» instruments on human rights were later introduced as amendments to the European Treaties. The Treaty on the European Union (1992), the Treaty of Amsterdam (1997) and the Treaty of Nice (2001) incorporated some new provisions that advanced the level of protection of human rights within the E.U. Treaties[10]. These amendments consolidated the jurisprudence from the E.C.J. For these reasons, it can be said that during the period 1957-2007, the case-law of the E.C.J. (although never recognised formally as an official source of E.C./E.U. law) has been the most fundamental motor of development in this field.

2. Relevant case-law from the European Court of Justice: giving fundamental rights to citizens

At present, the Community/Union has a single fundamental rights system centred around the general principles of E.U. Law as developed by the European Court of Justice (E.C.J.) in its case law, drawing inspiration from the common constitutional traditions of the Member States and international instruments of which the most influential is the European Convention of Human Rights (E.C.H.R.). If a fundamental right is found to be breached, the European Court of Justice declares the act concerned to be void, with retroactive and universal effect[11].

The main fundamental rights that have so far been recognised explicitly by the European Court of Justice are the following: human dignity[12]; equal treatment[13];

[10] A new policy of human rights developed specially in the field of anti-discrimination law, thanks to the art. 13 of the E.U. Treaty which was introduced by the Amsterdam Treaty in 1997. Another institutional initiative came with the establishment in the Treaties of a sanction mechanism for serious and persistent breaches of human rights in art. 7 T.E.U. and the establishment in 2002 of an E.U. network of independent experts on fundamental rights to exercise monitoring and advisory functions After the entry into force of the Treaty of Amsterdam, the E.C.J. has been given the proper jurisdiction to review the conduct of the European institutions for compliance with the principles of human rights.

[11] Less noticed in this field is a classical move which is one of the most famous hall marks of the E.C.J.: the move from norms to institutional duty, from substance to procedure, from *ius* to *remedium*. This move is, for instance, developed in the European constitutional area which defines the relationship between the Community legal order and that of the Member States. Norm oriented doctrines such as direct effect or supremacy are regularly turned by the E.C.J. into institutional duties for Member States courts. The high tide of this move is the *Francovich* jurisprudence but also the decision which found France in violation of its obligations under the E.C. Treaty for failure to prevent the obstruction to free movement of goods (strawberries) by private individuals blocking its frontier with Spain. E.C.J., joined cases 6 and 9/90 *Francovich*, E.C.R. [1991] I-5357 and case C-265/95 *Commission vs. France*, Judgment of 9 December 1997 E.C.R. [1997].

[12] E.C.J., case *Casagrande* [1974] E.C.R. 773.

[13] E.C.J., case *Klöckner-Werke A.G.* [1962] E.C.R. 653.

non-discrimination[14]; freedom of association[15]; freedom of religion and confession[16]; privacy[17]; medical secrecy[18]; property[19]; freedom of profession[20]; freedom of trade[21]; freedom of industry[22]; freedom of competition[23]; respect for family life[24]; entitlement to effective legal defence and a fair trial[25]; inviolability of residence[26]; and freedom of expression and publication[27].

The Treaty of Maastricht (1992) and the Treaty of Amsterdam (1999) later provided the E.C.J. with a more solid ground for judicial review[28], as they introduced a preamble confirming the importance of human rights and fundamental freedoms in the Union and some new articles (arts. 6 and 7 T.E.U.) referring to the respect of the E.C.H.R. as well as the duties of the European Union, European Community and E.U. Member States regarding fundamental rights, democracy and the rule of law[29]. These provisions were reinforced by a clause establishing a procedure in case a Member State violated fundamental rights, which was reinforced by a Declaration annexed to the Treaty of Nice (2001). In fact, this Treaty confirmed those constitutional changes and amended some provisions introducing a more detailed procedure in case of violations of human rights on behalf of E.U. Member States. However, still today, under the case-law of the E.C.J. there are limits to the protection of fundamental rights:

- In its Opinion 2/94 the European Court of Justice held that, at the present stage of E.C. law, the Community did not have a general power to enact rules on human rights nor a competence to accede to the E.C.H.R.[30]. The new Treaty of Lisbon finally provides the E.U. with power to join the E.C.H.R., although this is a process that will take some years.

---

[14] E.C.J., case *Defrenne vs. Sabena* [1976] E.C.R. 455.

[15] E.C.J., case *Gewerkschaftsbund, Massa et al.* [1974] 917, 925.

[16] E.C.J., case *Prais* [1976] E.C.R. 1589, 1599.

[17] E.C.J., case *National Panasonic* [1980] E.C.R. 2033, 2056 et seq.

[18] E.C.J., case *Commission vs. Federal Republic of Germany* [1992] E.C.R. 2575.

[19] E.C.J., case *Hauer* [1979] E.C.R. 3727, 3745 et seq.

[20] E.C.J., case *Hauer op. cit.* [1979] 3727.

[21] E.C.J., case *International Trade Association* [1970] 1125, 1135 et seq.

[22] E.C.J., case *Usinor* [1984] 4177 et seq.

[23] E.C.J., case *France* [1985] 531.

[24] E.C.J., case *Commission vs. Germany* [1989] 1263.

[25] E.C.J., case *Johnston vs. Chief Constable of the Royal Ulster Constabulary* [1986] 1651 et seq., 1682; and case *Pecastaing vs. Belgium* [1980] 691 et seq., 716.

[26] E.C.J., case *Hoechst A.G. vs. Commission* [1989] 2919.

[27] E.C.J., case *V.B.V.B., V.B.B.B.* [1984] 9 et seq., 62.

[28] Two other cases from the E.C.J. are relevant during the post-Maastrich period, case C-368/95 *Familiapress* E.C.R. [1997] I-3689 and case C-106/96 *UK vs. Commission* E.C.R. [1998] I-2729.

[29] Preamble of the T.E.U., 3rd recital, art. 6 T.E.U., art. 7 T.E.U., art. 13 T.E.C. and art. 177 T.E.C.

[30] E.C.J., Opinion 2/94 of 28 March 1996 on the accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, E.C.R. [1996] page I-1759. See Comment from Advocate General Toth, «The European Union and Human Rights: the Way Forward», in *The Oxford Encyclopædia of E.C. Law*, vol. I Institutional Law, 1990, p. 284.

- For that reason, judicial review by the E.C.J. is still formally limited to E.U. law. Within this framework, such rights must be compatible with the E.U.'s structure and objectives. They must always be considered with regard to the social function of the protected activity[31].
- The principle of proportionality and the guarantee of essential content are further constraints. Consequently, where the E.U. intervenes in the protected sphere of a fundamental right it may neither violate the principle of proportionality nor affect the essential content of that right[32].
- Under E.U. law, it is the European Union that is committed to respecting fundamental rights. The Member States are only required to comply with the minimum standards when they are implementing E.U. law[33].

Although the E.C.J. has done its best to provide the highest standards of protection of European citizens within the E.U., it cannot be denied that this system allows a limited scope of protection which pales with comparison to the E.C.H.R. It was not until the year 2000 that the E.U. made a significant step in the good direction with the proclamation of its Charter of Fundamental Rights.

3. The solemn declaration of the E.U. Charter of Fundamental Rights (2000)

The adoption of the E.U. Charter of Fundamental Rights provided the basis for a more advanced system on the basis of a written bill of rights for the Union[34]. The E.U. Charter was the first and most important development in E.U. law which, in spite of its non-binding status for the time being, is playing a role in E.U. law and policy-making in a number of different ways. The Charter was jointly proclaimed by the European Parliament, the Council and the European Commission on 7 December 2000, and it became politically but not legally binding[35]. A Declaration annexed to the Treaty of Nice referred to this special status[36]. With the new Treaty of Lisbon in force, the E.U. Charter has become legally binding as well.

The Charter covers rights in three areas: 1) civil rights, human rights and the right to justice, as guaranteed by the E.C.H.R.; 2) political rights deriving from the European citizenship established by the E.U. Treaties; 3) economic and

[31] E.C.J., case *Internationale Handelsgesellschaft* [1970] E.C.R. 1125.

[32] E.C.J., case *Schräder vs. Hauptzollamt Gronau* [1989] E.C.R. 2237 at 15.

[33] E.C.J., case *Kremzow vs. Austrian Republic* [1997], E.C.R. I-2629 at 15 et seq., 19.

[34] Official Journal (O.J.) of the European Union 2000, C364, p. 1. See also from the E.U. network of independent experts on fundamental rights, *Commentary on the Charter,* June, 2006 available at the website http://E.C.europa.E.U./justice_home/docs/network_commentary_final%20_180706.pdf.

[35] O.J. 18.12.2000, C 364/1.

[36] The E.U. Charter of Fundamental Rights was to be re-enacted on December 2007 with the goal of giving it legal binding force.

social rights[37]. These rights are not new: the Charter represents "established law" in the European countries. It is the approach that is new as the Charter consolidates all personal rights in a single text, thus implementing the principle of the indivisibility of fundamental rights. It breaks the distinction that European and international texts had drawn until then between civil and political rights on the one hand and economic and social rights on the other, and lists all the rights grouped according to the basic principles of dignity, freedoms, equality, solidarity, citizens' rights and justice.

However significant was this step, the truth is that the E.U. Charter lacked legal binding force and remained a political declaration for many years[38].

4. Relationship between the E.U. and the European Convention of Human Rights (E.C.H.R.)

As the previous background shows, the relationship between the E.U. and the European Convention of Human Rights could not be an easy one. During more than 50 years of European integration, due to the limited scope of action provided by the E.C./E.U. Treaties, the protection of fundamental rights in the European legal order was based in a weak constitutional architecture[39]. As it was made clear by the European Court of Justice in its Opinion 2/294, recital 27

> *«No Treaty provision confers on the Community institutions any general power to enact rules on human rights […]».*

A necessary and evident conclusion from this statement was that the E.C. and E.U. Treaties needed to be amended if the E.U. wanted a real foundation for its fundamental rights policy[40]. For all these reasons, the constitutional process

---

[37] Incorporating the rights set out in the Community Charter of the Social Rights of Workers, adopted on 9 December 1989 at the Strasbourg summit by the Heads of State or Government of 11 Member States in the form of a Declaration.

[38] The Charter itself suffered from various drafting deficiencies, pointed by the doctrine, which mainly refer to the fact that its provisions are addressed to the Member States only when implementing Union law. This seems to contradict the well-established principle that fundamental rights bind Member States whenever they act within the scope of Community law, which also includes derogating from the Treaty. Another problem is the task of identifying fully justiciable «rights» as opposed to general principles for the purposes of art. 52 (e) of the Charter, which is very far from clear. See M. Douglas, «The Treaty of Lisbon 2007: winning minds, not hearts», *Common Market Law Review*, 2008, vol. 45, pp. 617-703, specially on p. 663; and Ward and Peers (eds.), *The E.U. Charter of Fundamental Rights: Politics, Law and Policy*, Hart Publishing, Oxford, 2004.

[39] On the competences of the Community and Union, see article from J. H. Weiler and S. Fries, «An E.U. Human Rights Agenda for the new Millenium», not published nor circulated but available as a working draft in the website: http://www.jeanmonnetprogram.org/E.U./Units/index.html, Teaching materials E.U. Law, New York University.

[40] As the Court continued in recitals 34 and 35 of the Opinion 2/94:

> *«Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct*

of reform within the E.U. and the Treaty of Lisbon complete the background against which we must understand the approach to human rights within the European Union, its past, present and future.

5. The creation of the E.U. Agency for Fundamental Rights

Within the E.U. not all achievements are half-done or pending. It must be added that the creation of the E.U. Agency for Fundamental Rights in 2007 has been a remarkable improvement[41]. However, respecting the principle of legality and transfer of limited/enumerated powers within the E.U. legal order, the Agency's competences will be limited to E.U. aspects[42].

6. Conclusion: «Status-quo» after 50 years of European integration

As these previous paragraphs have summarised, the protection of human rights in the European Community, now European Union law was fundamentally impaired, during this period, by the lack of clear and explicit competences for legislative action and judicial review in the European Treaties. Although the European Court of Justice had –laudably– found no difficulty over the years to assert a comprehensive basis for a judicial protection of human rights covering the entire field of Community law, including where appropriate Member State acts; the institutional architecture and constitutional legal basis was still missing.

On the basis of the institutional Treaties in force until 2008-2009, the European Community could only adopt a general human rights policy the purpose of which would be only to ensure that within E.C. law, the fundamental human rights recognized by the E.C.J., were effectively ensured. Legal basis for any other general human rights policy was explicitly denied by the Opinion 2/94 of the E.C.J. previously mentioned. The various institutional and policy developments in the human rights field within the E.U. did not silence the debate as to whether the E.U. was or not a significant «human rights organiza-

international system as well as integration of all the provisions of the Convention into the Community legal order.

Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235 E.C. Treaty. It could be brought only by way of Treaty Amendment».

[41] The European Monitoring Centre on Racism and Xenophobia, created in 1997 and established in Vienna, has been converted into an Agency for Fundamental Rights following the European Council Decision in December 2003. In June 2006 the European Council decided the Agency would come into being on 1 January 2007. The Council Regulation of 15 February 2007 setting up the Agency entered into force on 1 March 2007.

[42] On 4-5 December 2006 the Justice and Home Affairs Council adopted general guidelines on the setting up and launching of the Agency at the beginning of 2007. Concerning its role in dealing with areas of police and judicial cooperation in criminal matters (Title VI of the Treaty on European Union), the Council agreed that the Union institutions and Member States could, as appropriate and on a voluntary basis, make use of the Agency's expertise within these areas as well.

tion»[43], nor as to whether its attention to human rights protection amounted to more than self-serving instrumentalism. In the fields of immigration, asylum, criminal justice and anti-terrorism, in particular, the E.U. was sharply criticized for neglecting and undermining human rights concerns[44].

It has been pointed out that the situation was not as critical as some have suggested. Regardless of the fact that the E.U. Charter's legal status could be only described as pending, it would be wrong to say that it had no effect at all. In its short life, it was referred to by most European institutions[45] and even by the Strasbourg based European Court of Human Rights[46]. The solemnity of its form and the procedure which led to its adoption proved that the Charter was intended to constitute a privileged instrument for identifying fundamental rights[47], offering the highest level of reference values within all the Member States[48].

But the sad truth is that, in spite of the symbolic value of the E.U. Charter, the scope of E.U. policy on human rights could not very comprehensive due to lack of fundamental treaty provisions and the proper legal basis[49]. Already in the 90s, Advocate General Toth had indicated the way the European Community should go ahead[50]. In his opinion, the merger of the two supranational legal

---

[43] A. Von Bogdandy, «The European Union as a Human Rights Organization: Human Rights and the Core of the European Union», *Common Market Law Review*, 2000, 37, p. 1307.

[44] Both Amnesty and Human Rights Watch in recent years have commented critically on the E.U.'s human rights role. See «*Amnesty International's Assessment of E.U. Human Rights Policy: Recommendations to the Irish Presidency*», January 2004 and *Human Rights Watch World Report*, 2007.

[45] For instance, the European Ombudsman was very explicit in his speech of 8 April 2002 to the European Parliament reminding that, although legally it was only a political declaration, the European citizens had the right to expect the Charter to be followed by the E.U. institutions.

[46] E.C.H.R., cases *Hatton and Others vs. United Kingdom* of 2 October 2001, case *Fretté vs. France* of 26 February 2002, case *I. vs. U.K.* and case *C. Goodwing vs. U.K.* of 11 July 2002, and *case Vo. vs. France* 8 July 2004. For the most up-to-date information check the E.C.H.R. case-law database http://hudoc.E.C.H.R.coe.int.

[47] See A.G. Leger in article from J. Morijn, «Judicial Reference to the E.U. Fundamental Rights Charter. First experiences and possible prospects», p. 9, available on-line at http://www.F.D.uc.pt/hrc/working_papers/john_morjin.pdf.

[48] The Select Committee on the European Union to the House of Lords in the UK recommended that integration of the E.U. Charter into the E.U./E.C. law should go forward within the next ICG and Treaty reform. House of Lords, 6th Report entitled «The Future Status of the Charter of Fundamental Rights», Working Group II. Doc CONV 354/02 at page 13. The same Report stated that the majority of views favoured E.U./E.C. accession to the E.C.H.R. February 3, 2003.

[49] Weiler, J. and Alston, P., «An ever-closer union in search of a human rights policy», *European Journal of International Law*, vol. 9, n.º 4, 1998, pp. 658-723. These authors argue that, while the E.U. is a staunch defender of human rights in both its internal and external policies, it lacks a comprehensive or coherent policy at either level. This discrepancy is even less sustainable than it was just a few years ago. Monetary union, enlargement, a need to match growing powers with effective human rights scrutiny, and various other developments all necessitate a far more developed human rights policy. Existing institutional arrangements are especially unsatisfactory.

[50] A. G. Toth, «The European Union and Human Rights: The way forward», in *Common Market Law Review*, 1997, p. 491. See also this book, *The Oxford Encyclopedia of E.C. law*, Oxford University Press, 1990, 552, especially from p. 284.

orders co-existing in Europe, those of the European Union and the Convention of Human Rights was advisable by a different number of considerations. Furthermore, academic scholars tended to agree that, apart from the incorporation into E.C./E.U. law of the E.C.H.R., there was no any other credible alternative. The accession of the E.C./E.U. to the E.C.H.R. would constitute a major step forward in the integration process bringing a full political mature «European human rights area» into life. Only this would ensure a uniform minimum level of protection across Europe irrespective of the legal actor involved and removing an apparent double standard[51]. Together with the recognition of the legal status of the E.U. Charter of Fundamental Rights, a new Treaty reform was considered to be the best way to guarantee a firm and consistent foundation for fundamental rights in the Union.

III. THE NEW TREATY OF LISBON (2007): RETHINKING FUNDAMENTAL RIGHTS IN THE E.U.

The new Treaty of Lisbon which amends the existing European Union Treaties[52] was signed on 13 December 2007. Subject to ratification in 27 countries, it was initially intended to enter into force[53] on 1 January 2009. Following a negative Irish referendum in 2008 and a second positive referendum in 2009, the ratification of the Lisbon Treaty was delayed until the 1 December 2009.

The two main innovations introduced by the Treaty of Lisbon are the following: 1) The E.U. Charter will have a legal binding effect; 2) The E.U. Treaty is amended to allow the E.U. to become a party to the E.C.H.R. and ensure that the interpretation of human rights made by the E.U. and E.C.H.R. move in parallel in future.

1. The failure of the European Constitution (2005)

The idea of fully incorporating the Charter into the Union's primary law and conferring upon it binding legal status while still preserving the case law on fundamental rights as general principles of Union law was first taken up by the *Treaty establishing a Constitution of Europe*.

[51] The Report of the House of Lords in 2003 favoured the same opinion. See document prepared by the Select Committee on the European Union to the House of Lords, *op. cit.,* February 3, 2003.

[52] The Treaty of Lisbon amends the *Treaty on European Union* (T.E.U.) (essentially the Treaty of Maastricht) and the *Treaty establishing the European Community (T.E.C.)* (essentially the Treaty of Rome), which is renamed the *Treaty on the Functioning of the European Union (T.F.E.U.)*. Both treaties have the same legal rank. Art. 1 T.E.U. See Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Official Journal C 83 of 30.3.2010. Text available at the webpage http://eur-lex.europa.E.U./en/treaties/index.htm.

[53] Art. 6(2) Reform Treaty.

The E.U. Charter was thus incorporated into the Treaty establishing a Constitution for Europe signed in Rome on 29 October 2004, where the whole text became Part II[54]. The entry into force of the proposed E.U. Constitution would have definitively amounted to a full recognition of its legal validity. But since the Constitutional Treaty was not ratified by all Member States, the Charter continued to live on as a solemn political proclamation[55]. As the referenda in France and in the Netherlands proved in 2005, a period of reflexion was imposed by the European citizens.

2. The 2007 Intergovernmental Conference (ICG) preceding the Treaty of Lisbon

The European Council of June 2007 signalled a detailed rethinking of the way in which the Charter would be dealt with[56] and its conclusions in this respect laid the foundations for the relevant provisions in the Treaty of Lisbon[57]. The intergovernmental conference responsible of the reform of the E.U. Treaty decided to make the Charter legally binding without incorporating the text into the proposed Treaty of Lisbon. Nevertheless, it is worth noting that during the post-referenda «period of reflexion», the E.C.J. succeeded in conferring an indirect legal status upon the Charter by referring to it as another valid source of inspiration for the Courts'own case-law[58].

The E.U. Charter was solemnly re-proclaimed at a plenary session of the Parliament by the Presidents of the Parliament, the Council and the Commission on 12 December 2007[59], one day before the official signature of the new Treaty of Lisbon. The declared goal was to give it legal binding value from the date of entry into force of the Treaty of Lisbon itself.

3. The new Treaty of Lisbon. Main improvements in the field of fundamental rights

Even if the new Treaty of Lisbon is no longer overtly a constitutional treaty, most of the doctrine and scholars agree that its entry into force will greatly

[54] O.J. 16.12.2004, C 310/1.

[55] The status of the Charter of Fundamental Rights, and its position in the constitutional architecture of the E.U. Constitution was clear: the Charter was «recognised» in art. I-9 of the Constitutional Treaty and the entire text became Part II of the E.U. Constitution. Furthermore, the Treaty Establishing a Constitution for Europe stated that the Union should accede to the E.C.H.R. (art. I-9).

[56] Brussels European Council, June 21-22 2007, Annex 1, pp. 17, 27.

[57] See P. Craig, «The Treaty of Lisbon: Process, architecture and substance», *European Law Review*, April 2008, pp. 137-166.

[58] If a right is contained in the Charter, this acts as an irrefutable presumption that it is already protected under the general principles. See, for instance, E.C.J., cases C-438/05 *Viking Line*, judgement of 11 Dec. 2007, case C-341/05 *Laval un Partneri*, judgment of 18 Dec 2007; Case C-450/06, *Varec*, judgment of 14 Feb. 2008.

[59] O.J. 2007, C 303/1 (Charter) and C 303/17 (explanations).

improve the democratic character of the Union. This will be achieved by increasing Parliament's legislative powers, by giving legal binding force to Charter of Fundamental Rights and, all in all, by strengthening the rule of law in the E.U. legal system.

As stated before, one of the most important novelties is that the E.U. Charter of Fundamental Rights will finally become binding and will have the same legal value as the European Treaties, as established in art. 6 of the new T.E.U.[60]. Another big novelty is that the Treaty of Lisbon finally provides the legal basis necessary for the accession of the Union to the European Convention on Human Rights[61]. The newly reformed art. 6 reads as it follows:

> Article 6
>
> 1. 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.
>
> 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
>
> 3. 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.

As this text proves, the new drafting of art. 6 finally gives the Charter the same legal binding force than the Treaties so that the rights, freedoms and principles set out in the Charter can become fully effective in E.U. law[62].

---

[60] The Treaty of Lisbon (Official Journal of the European Union 17.12.2007, C 306/1) repeals arts. 4 and 5 of the Treaty on European Union (latest consolidated version O.J. 29.12.2006, C 321 E/1). Consequently, the following article is numbered as 6, the present text being replaced by the referred text. See also Declaration 1.

[61] Art. 6(2) T.E.U. and Protocol on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms; Declaration 2.

[62] But as critics point out, the Charter contains no new rights indeed. They all exist in the E.U. Treaties, in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe) and various other human rights documents. The only added value is that, by bringing these various rights together, and making them visible for the citizens of the Union, it is a manifestation of shared European values. The result is the most up to date legally binding human rights document on earth, and it offers the citizens a basis for scrutiny of E.U. institutions and member states when they implement European Union law.

The Treaty of Lisbon finally resolves a paradox that had subsisted for decades. Since the E.U. itself does not have legal personality, it could not yet itself accede to the E.C.H.R. At the same time, thanks to the case-law of the E.C.J., it was declared that the E.U. had to comply with the rights in the E.C.H.R. New art. 6(2) T.E.U. stipulates that the European Union shall accede to the E.C.H.R.[63]. Accession by the E.U. to the E.C.H.R. will mean the E.U. institutions would be directly subject to the E.C.H.R. and the European Courts would be able to directly apply the E.C.H.R. as part of E.U. law. Following accession, E.U. law will then have to be interpreted in the light of the E.C.H.R., not only as a general principle of E.U. law but as a Convention directly applicable to the E.U. and to which the E.U. adheres.

Differences between human rights at E.U. and at the E.C.H.R. are substantial in theory but, in practice, it can be said that the judicial dialogue between the E.C.J. and the European Court of Human Rights proves that both systems can be complementary and non-exclusive[64]. The accession of the E.U. to the E.C.H.R. was an important issue pending, and once the legal basis for it has been established[65], it should make the relationship between the two systems less ambiguous and clearer[66], much to the benefits of the European citizens. In fact, by overcoming the legal objections to accession first identified by the Court in its Opinion 2/94, the Treaty of Lisbon paves the way for an important series of additional fundamental rights guarantees under Union law[67].

The conceptual status accorded to E.C.H.R. rights is dealt with in art. 6(3) T.E.U., which provides that the fundamental rights, as guaranteed by the E.C.H.R., and as they result from the constitutional traditions common to the

---

[63] The implications and modalities of Union accession to the E.C.H.R. are explained in the book by P. Alston (ed.), *The E.U. and Human Rights*, Oxford University Press, 1999.

[64] As it is clear, the scope of the E.U. Charter remains different to the E.C.H.R. which is the most common source of reference for fundamental rights in Europe. The E.C.J. regularly draws on the provisions of the E.C.H.R., and it recent years has made extensive reference to the case-law of the Court of Human Rights in Strasbourg. The mutual influence of the E.C.J. and the European Court of Human Rights came into existence because both courts, in their different ways, sought to avoid giving contradictory rulings, or finding the jurisprudence of the other court to be at fault. A mutual determination was thus there to avoid conflict and to demonstrate defence to the approach of the other court in relation to similar questions arising before them. This complex but cooperative relationship is meant to continue but it does not resolve all the concerns and conflict between the two systems.

[65] Before accession can take place, the Union will have to work with the Council of Europe to overcome the institutional barriers to accession built into the framework of the E.C.H.R. itself. See discussions of the Council of Europe Steering Committee for Human Rights, *Study of Technical and Legal Issues of a Possible E.C./E.U. Accession to the E.C.H.R.*, Report adopted on 28 June 2002, DG-II (2002) 006.

[66] Craig, P. and De Burca, G., *E.U. Law. Text, cases and materials*, *op. cit.*, pp. 394 and 426.

[67] For instance, a more direct means of challenging the infringement of fundamental rights by primary Treaty provisions than that currently offered by the *Matthews* and *Bosphorous* jurisprudence. See cases *Matthews vs. United Kingdom*, Judgment of the E.C.t.H.R., 18 Feb. 1999 and *Bosphorous vs. Ireland*, Judgment of the E.C.t.H.R., 30 June 2005.

Member States, constitute general principles of the European Union's law. This approach follows the one originally adopted in the E.U. Constitution[68] and offers a clear legal mandate for the E.C.J. to retain and develop its own case law, albeit to an unspecified degree.

For these reasons, it can be said that the new Treaty of Lisbon constitutes a positive and decisive step forward in the field of human rights in the European Union. Nevertheless, attention must be paid to some other points that are not so positive. In the first place, the scope of the E.U. Charter is clarified but it is not unlimited as the same Article 6 (1) declares that the Charter shall not extend in any way the competences of the Union as defined in the Treaties and another Protocol annexed to the Treaty repeats so[69]. In the second place, the United Kingdom and Poland negotiated a separate Protocol seeking to establish national exceptions to the justiciability of the Charter[70] in these two countries. In the third place, the fact remains that the Charter is incorporated by reference as its text will not be detailed in the Treaties. And last but not least, new art. 6 and other Protocols also state that accession to the E.C.H.R. will have to be done preserving the specific characteristics of the E.U. and E.U. law. The interpretation of these thorny issues will fall under the exclusive competence of the E.C.J.

4. Conclusion: The Treaty of Lisbon as a decisive step forward in the European Union

The institutional and judicial approval of the E.U. Charter of Fundamental Rights and the accession of the E.U. to the E.C.H.R. are significant steps forward in the right direction. Although the Charter applies mainly to the E.U. and its institutions, it is addressed also to the Member States «when implementing Union law»[71]. Although no new powers or tasks for the E.U. are created by Article 6, it represents more than the codification of the *status quo* as all addressees are expressly required to promote the rights contained therein[72].

The Treaty of Lisbon is a decisive step forward that reinforces the notion and the content of the European citizenship bringing it to the high standards of the E.C.H.R. As the Advocate General F.G. Jacobs once stated, E.C. law should

---

[68] See. Craig, P., «The Lisbon Treaty, Process…», *op. cit.* on p. 162.

[69] The rights under the Charter apply to the activities of E.U. institutions to the benefit of all European citizens. The rights will also apply when E.U. law is implemented in national law but only in this situation. The Charter would not create fundamental rights of general application in national law, for example a general right to strike will not be created. All E.U. countries, both present and future, will have to abide by these rights when implementing E.U. law. In addition, there will be scope for relying directly on the provisions of the Charter before European courts.

[70] Unanimity among the member states' governments has come at a price. See Protocol Number 7 on the application of the Charter of Fundamental Rights to Poland and the United Kingdom, as well as the Polish declarations 51 and 53 annexed to the Treaty of Lisbon. See also Declarations 61 & 62.

[71] It will have to be seen whether the E.C.J. decides to adopt a broad interpretation of this provision.

[72] Craig, P., *E.U. Law.*, *op. cit.*, p. 427.

go further in the field of human rights, and the status of European citizenship was the key to move in that direction[73]:

> *«A Community national who exercises his Treaty rights, such as the right to go to another Member State as a worker or a self-employed person, is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host state; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention of Human Rights. In other words, he is entitled to say "civis europeus sum" and to invoke that status of European citizenship in order to oppose any violation of his fundamental rights».*

IV. AN AGENDA FOR THE 21ST CENTURY: IMPLEMENTING FUNDAMENTAL HUMAN RIGHTS AND IMPROVING ACCESS TO JUSTICE IN EUROPE

Furthermore, the Treaty of Lisbon offers big hope for fighting the pending battles of the 21st century, that is to say, the fight to end the current implementation deficit which affects fundamental rights within all legal orders and to improve a broad access to justice for citizens. Some articles introduced in the Treaty of Lisbon will certainly help this process[74].

Together with the recently created Fundamental Rights Agency of the E.U., new instruments such as human-rights «mainstreaming» and human-rights «impact assessment» being currently developed by the European Commission and Council, prove that human rights issues occupy an increasingly high profile within E.U. law and policy. But, at the same time, although a new dynamic new manifestation of fundamental rights at work is emerging, characterised by the emergence of positive rights, proactive initiatives and positive duties assumed by the E.U. and Member States; this reformulation does not come without critics or dangers.

1. Fighting the implementation deficit: filling the gap between solemn declarations and the reality on the ground

As the Council of Europe Commissioner for Human Rights has declared:

> *«There is a growing gap between solemn declarations on human rights and the reality on the ground. It is time to end hypocrisy and turn words into deeds»*[75].

[73] See Opinion A.G. Jacobs in Case 168/91 *Konstantinidis* [1993] E.C.R. I-1191 at paragraph 46, and Jacobs F.G., «Citizenship of the European Union-A legal analysis», *European Law Journal*, vol. 13, n.º 5, September 2007, pp. 591-610.

[74] For instance, the concept of E.U. citizenship is affirmed and developed (arts. 8 T.E.U. & 17 T.F.E.U.); the right of citizens to approach the Court of Justice is broadened (reform of former art. 230 E.C.) and new competences will be given to the European Union on improving access-to-justice [arts. 67.4, 68 and 81.2.e] T.F.E.U.).

[75] Council of Europe, Parliamentary Assembly. Report Committee on Legal Affairs and Human Rights, Doc. 11202, adopted on 28 March 2007, *State of human rights and democracy in Europe.*

In the field of fundamental rights, priority number one for the next decade should be implementation. The main objective to pursue is to ensure effectiveness of the legal provisions in force as most of the laws needed in Europe are already there. Implementation means in the first place an examination of the rights under the perspective of procedural law. It implies seeing the rights from the point of view of the ordinary citizens and economic operators, searching to improve «access-to-justice» both at judicial and non-judicial levels. In the second place, it implies the necessary task of the so-called «mainstreaming» human rights within the Administration, making the rights work as fundamental principles both in the external and internal application.

2. Access-to-justice: a worldwide movement to make rights effective

The question on how to implement rights in practice is usually left without answers even in academic discussions. In this sense, it is essential to rediscover a methodology that already exists and that, for unknown reasons, seems to have been forgotten out of the field of international procedural law. We refer to the «access-to-justice» method of thought and legal research. In reality, «access-to-justice» is a legal term that defines the worldwide movement and methodology of «normative, institutional and legal reform» started in the 70's to make rights fully effective. The origins, aim and approach of the access-to-justice original project directed by Prof. Mauro Cappelletti at the European University Institute in Florence constitute in fact a large comparative world study on the «quality of justice», ie., on the minimum standards of judicial and non-judicial fairness[76]. The general report of the entire Florence Project[77] summarises the main issues of this movement. It discusses first the importance of «access to justice», describes the major barriers to effective access, and then examines the three major «waves of reform» in the «access-to-justice» movement.

1. The worldwide focus on the reform of legal aid to the poor (or those economically disadvantaged) can be seen as the first wave of reform.

State of human rights in Europe. The Legal Affairs Committee, in its part of a joint report, argues also that «It is time to end hypocrisy and turn words into deeds», calling for «zero tolerance» of human rights violations.

[76] M. Cappelletti, General Report, «Access to Justice: The Worldwide Movement to Make Rights Effective», in *Access to Justice*, vol. I. *A World Survey*, Book 1, Sijthoff and Noordhoff-Alphenaandernrijn– Giuffré ed., Milan, 1978. This project tried to give a response on perhaps the most basic challenge of our modern legal systems not only from a theoretical point of view but offering a comparative analysis of attempts, achievements and failures in the real world. The point of departure was the social problem or basic social need shared by all societies, the need to make justice more accessible to all persons and to the new rights. Comparative analysis was directed to the discovery of trends in all societies which are evaluated regarding their progress and point the direction of further legal reform. From the beginning, the project was concerned with the search of promising solutions which would contribute to the emerging discussions and advance the progress of society.

[77] Series in six volumes published between 1978 and 1979 in English.

2. This wave is followed by the movement to give representation to «diffuse», widespread or collective interests through such mechanisms as class/collective actions, public interest lawyers and the granting of standing to sue or active legitimacy to consumers, citizen and environmental groups.
3. Finally, noting that both reform waves were characterized only by the provision of legal representation to unrepresented groups, this legal doctrine draws attention to and describes a third and larger wave of reform, which goes beyond legal representation and was made necessary by the limitations of the first two. This wave moves the focus on to new techniques of judicial and non-judicial procedures and alternative methods of dispute resolution. It describes a full range of procedures and institutions that comprise other effective and progressive solutions such as informal decision-making, small claims courts, the reform of legal services, legal insurance and other group and prepaid legal services.

The new approach and methodology of «access-to-justice» reform is not without dangers, which the report examines, including the risk that streamlined judicial mechanisms may threaten essential procedural safeguards and lower the quality of justice; but it is considered to be a necessary approach to make possible for «ordinary» individuals and groups such as consumers or environmentalist groups defending «diffuse» or «general interests» to assert and vindicate their legal rights.

If today, in many countries «access-to-justice» is not simply a slogan nor a vague sociological formula, but is rather the expression which synthesises effectively the modern themes of the protection of rights beyond the limited perspective of the «actionability» of claims, this is due to the commitment of this movement of legal reform and legal thought[78]. As M. Cappelletti once said, a tremendous task is waiting for us. We must never be satisfied with the *statu quo*, we must be aware of the wide-spread and growing popular discontent with the functioning of the judicial process which is overload and inefficient. Justice is the central issue of the human society, a goal that must never be abandoned.

The «access-to-justice» movement and doctrine showed us in the 70's and 80's that effectiveness is the key concept to have present in the next wave of legal research and legal reform. The methodology is still valid today as, unfortunately, the progress in the field of access to justice at European, national and regional/local level still needs to be greatly ameliorated. Thinking about implementation a typology of possible strategies can be evaluated. The research done by the «access-to-justice» project series already proved that choice of the

[78] Access-to-justice has finally come to the E.U./E.C. law in the field of the protection of rights, especially in the field of consumer protection and environmental law. It is also advanced in the field of non-discrimination.

instruments was not really the most relevant issue. There are currently 47 countries represented in the Council of Europe, 27 in the European Union and 30 in the European Economic Area. Institutions and legal systems are different so the tools and methodology to use can be very diverse. What is essential is to continue the legacy of the «access-to-justice» movement, the methodology of legal thought and legal reform which aims to deliver in practice the best justice that all citizens deserve.

3. Enforcing rights in the European Union. Challenging the E.U. and Member States actions. Redress at national and European levels

It is clear now for the European Union that access to justice should be ameliorated at all levels and some improvements are already under way[79]. European law is different from international law in the sense it gives rights and imposes obligations not only on Member States, but also on citizens and businesses directly. Member States are primarily responsible for the implementation of European law. European law becomes in practice an integral part of the legal system of the Member States. All citizens therefore have a right to expect that national authorities throughout the European Union will enforce their European rights properly[80].

The question of where to seek redress depends to a large extent on the nature of the problem[81]. In the first place, problems must fall within the scope of European law. In most circumstances, when confronted with violations of E.U. law citizens will have to seek redress on the basis of national rules and within the national legal system. But if the breaches originate at the E.U. level, will have to seek access to the European Court, the E.C.J. or Court of First Instance. If the problem concerns the exercise of European rights, such as from now on, fundamental rights, citizens can raise their problem at both national[82]

[79] The Tampere European Council of 1999 called upon the need to strengthen co-operation between the European Commission and the Council of Europe on matters concerning access to justice. To this end, the two Institutions are jointly producing «legal aid information sheets», which contain practical information, in 11 European languages, on how to obtain legal aid in 44 European States. These information sheets, which will be available on internet were presented during a jointly organised Conference on «Towards a better access to justice for individuals», which took place from 24 to 26 October 2004 in Brussels. Further information at the websites: http://E.C.europa.E.U./civiljustice/ from the E.C. and the website http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Access_to_justice_and_legal_aid/ from the Council of Europe.

[80] See Craig, P. and De Búrca, G., *E.U. Law: Text, Cases and Materials,* Oxford University Press, 4th edition, 2007 and the website from the E.U. http://E.C.europa.E.U./youreurope/nav/en/citizens/services/E.U.-guide/enforcing-rights/index_en.html.

[81] *Ibidem* website from the E.U.

[82] Although national authorities are responsible in the first instance for applying European law properly, the national courts ensure that they actually do so. National courts have a fundamental role in ensuring that individual rights arising from European law are respected by the

and European Level[83] trying to make use of the most effective means of redress.

Recent surveys on civil justice issues in the European Union confirm the importance of access to justice for E.U. citizens[84]. One of the big novelties of the E.U. Charter of Fundamental Rights is that the right to an effective remedy against both national and Community authorities[85]. Thanks to the binding legal status of this art. 47 of the E.U. Chart, the new Treaty of Lisbon now consolidates the principle that Member States must provide remedies sufficient to ensure effective legal protection in the areas covered by Union law. The necessary legal instruments must exist for effective enforcement. This obligation therefore now has an explicit constitutional status. This represents a higher level of protection than the one traditionally guaranteed by the E.C.J.'s case law[86].

---

authorities in their Member States. In addition, if a citizen has suffered loss from the failure of national authorities to implement European law correctly, he/she may be able to seek financial compensation. A citizen may also ask the national court's attention the possibility of referring an issue to the European Court of Justice. Direct access to the European Court of Justice is very limited for citizens. See articles from N. FENELLY, «The role of the National Judge in Ensuring Access to Community Justice. Reflections on the Case Law of the Community Courts Four Years on from *Jégo-Quéré/UPA*» and J. TEMPLE LANG, «The Principle of Loyal Cooperation and the Role of the National Judge in Community, Union and E.E.A. Law», both in the magazine published by *E.R.A.–Forum, Academy of European Law*, Trier, n.º 4/2006.

[83] Redress at European level. Any person or business may lodge a complaint with the Commission about an alleged violation of European law by a Member State. However, disputes between private parties cannot be settled by the Commission in this context. Complaints are made free of charge and can be made without the assistance of a lawyer. Citizens have also the right to petition the European Parliament on a matter which is related to the European Union's fields of activity and which affects them directly. Complaints to the European Ombudsman for maladministration of the E.U. institutions is also possible.

[84] The objective of a recent Special EUROBAROMETER survey was to gain insight into the experiences of European Union citizens, their opinions and their preferences with regard to civil justice in the European Union. The idea of European civil justice is to ensure that citizens and companies in one Member State can exercise their rights in another Member State in the event of a dispute that crosses national borders. Vice-President Barrot pointed out that: «Europeans are concerned about their ability to access civil justice abroad, or to see a civil court ruling enforced in another country. They look to the E.U. to ease their path». The survey published in April 2008 focused on the extent to which European Union citizens have been involved in civil justice matters in another European Union Member State, what their opinions and concerns are about (access to) civil justice in other Member States and what their preferences are when it comes to harmonising European law and enforcing civil court rulings. See the full Report from Eurostat at the website: http://E.C.europa.E.U./public_opinion/archives/ebs/ebs_292_en.pdf.

[85] This art. 47 was not intended however to change the system of judicial review established by the E.U. nor the restrictive *locus standi* of individuals under art. 230 (4). It has to be noted that the right of citizens to approach the Court of Justice is broadened by the new Treaty of Lisbon. See reform of art. 230 E.C. *infra*.

[86] Art. 47 is all-embracing in that it applies to all rights and freedoms guaranteed by Union law but presupposes the existence of a right or freedom which is a matter of interpretation of Union law. Whether such a right or freedom exists is not determined by art. 47 itself. On the principle of effectiveness and the right to an effective remedy, see T. TRIDIMAS, *The General Principles of E.U. Law*, Oxford University Press, 2nd edition, 2006, on pp. 455-456.

It can be therefore observed that the incorporation of fundamental human rights into the E.U. legal order has been an important factor in the development of the right to effective judicial protection. The Treaty on the European Union and the Treaty of Lisbon contain explicit references to the European Convention on Human Rights. The rights laid down in the convention are recognised as general principles of law that are part of the Community legal system. The case law of the European Court for Human Rights, which has fleshed out the right to an effective remedy, must also form part of the Community legal order[87]. These ameliorations increase the quality of redress at national and European level for rights derived from E.U. law and show that «access-to-justice» must be regarded as a never-ending work in progress/methodology.

4. Critical analysis of the dynamic reformulation of rights in practice. The illusion of justice?

The growing importance of the principle of judicial protection in the Union legal order is demonstrated also by a number of other developments over the last years. In the first place, we must refer to a certain harmonisation of national procedural laws carried at European level in order to ensure effective enforcement of rights derived from Union law, sometimes based on the «principle of effectiveness» of E.U. law[88]. As a result, it can be said that the principle of procedural autonomy of Member States has been slowly been framed by the jurisprudence of the European case-law during the last decade. Due to the jurisprudence of the E.C.J., judges now are obliged to set aside domestic legislation, administrative practices or the established case law of the national jurisdictions, if this is necessary to ensure that the rights that private parties derive from Union law can be enforced[89].

It is undeniable that access to justice –interpreted as a right to effective judicial protection for individuals– has been at the heart of the reasoning of the E.C.J. in important cases. However, it must be said that the same standards do not seem to apply to remedies in a national context on the one hand and remedies before the Union Courts, on the other. The dynamic reformulation of rights done by the E.C.J. in the last decade did not seem to apply to the E.U. institutions themselves, but rather to the Member States.

---

[87] L. Parret, «Judicial protection after Modernisation of European Competition Law», *Legal Issues of European Integration*, vol. 32 (4), 2005, pp. 343-344.

[88] Curtin, D. and Mortelmans, K. «Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script», in D. Curtin and T. Heukels (eds.), *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers*, vol. II., Martinus Nijhoff Publ, London, 1994; Tridimas, T., «Enforcing Community Rights in National Courts: Some Recent Developments», in D. O'Keeffe and A. Bavasso (eds.), *Judicial Review in European Union Law. Liber Amicorum in Honour of Lord Slynn of Hadley*, Kluwer Law International, London, 2000, pp. 465-479. See also the E.U. policy on access to justice in the field of consumer policy as commented previously.

[89] E.C.J., judgment of 9 December 2003, case C-129/00, Commission/Italy. See Mc Kendrick, «Modifying Procedural Autonomy: Better Protection for Community Rights», *European Review of Private Law,* 2000, p. 565.

In this sense, reference must be made to the reluctance of the E.C.J. to open up the interpretation of former art. 230 E.C. (now art. 263 T.F.E.U.) in order to ameliorate the standing to sue of private individuals in direct proceedings before the E.C.J.[90]. The case law in Luxembourg has drawn attention to the admissibility criteria or «standing to sue» for direct actions before the E.C.J. The fourth paragraph of art. 230 E.C. Treaty confers the right on individuals to lodge a direct appeal against acts of Community institutions provided certain admissibility criteria are met[91]. Such a direct appeal is possible against acts addressed to a particular individual or against acts which, although in the form of a regulation or addressed to another person, in fact concern that individual directly and individually[92]. In its judgement in the *Jégo-Quéré* case of 3 May 2002, the Court of First Instance declared bravely enough that it was time to review existing case law on the possibility of private parties challenging Community measures of a general nature[93]. The Court of First Instance proposed a new criterion for analysing «individual concern». The reasoning of the C.F.I. was largely based on the principle of effective judicial review as well as on the European Convention on Human Rights. The Court referred to the Opinion of the Advocate General in *UPA* who also called for a reform of the case law in this area[94]. In this sense, the judgement in *Jégo-Quéré* appeared to offer new opportunities to potential applicants, but the sense of victory did not last long[95].

In its judgement of 25 July 2002, *Union de Pequeños Agricultores*, the Court of Justice refused to depart from the settled case law to allow more actions by private parties to be brought under art. 230 E.C.[96]. More specifically, the Court seemed to indicate that a more flexible interpretation of «individual concern», even in cases where there is no effective judicial review for parties, goes further than the text of the E.C. Treaty allows. The judgement contains a striking paragraph concluding that it is not unlikely that a reform of the existing system of remedies is necessary, but it is up to the Member States to take the initiative in that respect[97].

[90] In general on remedies at a national level *see* W. Van Gerven, «Of rights, remedies and procedures», *Common Market Law Review*, 2000, pp. 501-536; T. Eilmansberger, «The relationship between rights and remedies in E.C. law: in search of the missing link», *Common Market Law Review*, 2004. pp. 1199-1246.

[91] Tobler, C. and Beglinger, J., *Essential E.C. Law in Charts*, Hvgorac, Budapest, 2007, 313 pp.

[92] One of the most controversial subjects in the past was the strict test applied for the interpretation of «individual concern» in relation to acts of a general nature.

[93] E.C.J. 3 May 2002, case T-177/01, *Jégo-Quéré et Cie SA/Commission*, E.C.R. (2002) pp. II-2365.

[94] Opinion of Advocate General Jacobs in case C-50/00 P, E.C.R. (2002) pp. I-6677; the new criterion Jacobs proposed for «individual concern» was different: *see* par. 60 of the Opinion.

[95] W. Heusel: Editorial: «Access to Justice in Community Law», *E.R.A.–Forum*, n.º 4/2006, p. 458 and Temple Lang, J., «The Principle of Loyal Cooperation and the Role of the National Judge in Community, Union and E.E.A. Law», *E.R.A.–Forum, Academy of European Law*, Trier, n.º 4/2006.

[96] E.C.J. 25 July 2002, case C-50/00 P, *Union de Pequeños Agricultores*, E.C.R. [2002] pp. I-6677.

[97] Par. 45. The judgement was confirmed in the judgement of 1 April 2004 in the appeal against the C.F.I.'s judgement in *Jégo-Quéré,* E.C.J. 1 April 2004, case C-263/02.

Commentary on this small revolution initiated by the C.F.I. and promptly questioned by the E.C.Js., has been varied: some regretted that the E.C.J. did not take the opportunity to open up *locus standi* for individuals[98] and others argued that there is no gap in judicial protection under Community law and no need to lament the rejection of a re-interpretation of art. 230. This last line of the argument places great emphasis on the important duties the national judges have to ensure judicial protection[99].

In spite of the judgment of the E.C.J., the thorough analysis made by Advocate General Jacobs in *UPA,* and the many comments in literature questioning whether the Community judicial system is in line with the right to effective judicial protection, and whether there is an illusion of European justice; provide a strong basis for further legal thought.

The differences of opinion expressed by the Community judges came to the attention of the Convention working on a Constitution for the European Union. For this reason, the Treaty of Lisbon contains a modified article on the admissibility of direct actions by individuals against Community acts which is a new art. 263 T.F.E.U.[100]. The creation of a possible appeal of individuals against an act of a general nature can be seen as quite an important step considering the legal systems in the Member States. These developments show that this general principle of effective judicial protection (and therefore greater access to justice[101]) has become such an important part of the E.U. legal order that even the Court has questioned the instruments that the Treaties currently offer individuals who aim to challenge acts of the institutions through direct actions[102].

The new wording of art. 230(4) which has become art. 263 (4) in the Treaty of Lisbon opens up the *locus standi* for individuals compared to the old provision. The difference is that now there is no requirement of individual concern

[98] Amongst the most disappointed: F. Ragolle, «Access to justice for private applicants in the Community legal order: recent Revolutions», *European Law Review*, 2003, p. 90; A. Arnull, «April shower for Jégo-Quéré», *European Law Review*, 2004, p. 287.

[99] *See* Temple Lang, «Actions for Declarations that Community Regulations are invalid: the duties of National Courts under Article 10 E.C.», *European Law Review*, 2003, pp. 102-111 and Groussot, «The E.C. System of Legal Remedies and Effective Judicial Protection: does the system really need reform?», *Legal Issues of Economic Integration,* 2003, pp. 221-248; P. Nihoul, «Le recours des particuliers contre les actes Communautaires de portée générale», *J.T. Droit Européen*, 2002, pp. 38-43.

[100] Notwithstanding the questions of interpretation that can be expected with regards to this new provision.

[101] F. Francioni, *Access to justice as a human right*, The collected courses of the Academy of European Law, New York, Oxford University Press, 2007, 244 pp.

[102] L. Parret, «Judicial protection after Modernisation of European Competition Law», *Legal Issues of European Integration*, vol. 32 (4), 2005, pp. 343-344. It should be said that the Court had already raised the issue in 1995 in a paper for the I.G.C. before the Treaty of Amsterdam. For remarkable comments on this subject from the President of the C.F.I., see B. Vesterdorf, «The Community Court system ten years from now and beyond: challenges and possibilities», *European Law Review*, 2003, pp. 303-323.

in relation to regulatory acts that do not entail implementing measures. But this reform is deficient in two ways:

1. the new T.F.E.U. does not define the term «regulatory acts» and they appear to mean any act other than a legislative act; and
2. it does not reform the need for individual concern in case of general legislation (directives, regulations), which is the factor limiting possibilities for direct action by non-privileged applicants in E.U. law and by collective associations such as NGOs who are defending rights of a more public nature such as environment or consumer rights.

Professor Tridimas has argued that the fundamental right to judicial protection required that *locus standi* should not depend on the nature of the contested measure but on whether it affects adversely the interests of the individual[103]. In this sense, the limited liberalization of *locus standi* introduced by Lisbon Treaty has not brought an innovative reform of the European judicial system. It is a small change intended to redress some of the defects caused by the previous legal framework of the direct actions before the E.C.J. which excluded natural and legal persons of the right of general review of European legislation.

5. «Mainstreaming» human rights and human rights «impact assessment» initiatives in the E.U.

It is true that human rights issues occupy an increasingly high profile within E.U. law and policies. Together with the recently created Fundamental Rights Agency of the E.U., new instruments such as human-rights «mainstreaming» and human-rights «impact assessment» are currently developed by the European Commission and Council[104]. This means, in practice, reassessing the importance of human rights within the external and internal activities of the E.U. Administration, including the law-making process. But, at the same time, although we can celebrate that a new dynamic new manifestation of fundamental rights at work is emerging, characterised by the emergence of positive rights, proactive initiatives and positive duties assumed by the E.U. and Member States; this reformulation does not come without dangers itself. While this model has important advantages, its weakness lies in its strong dependence on political will by all parties involved[105].

[103] House of Lords, Report of the European Union Committee, *Report on the Future Role of the E.C.J.*, 15 March 2004, on p. 43. Report available at http://www.statewatch.org/news/2004/mar/hol-E.C.J.-47.pdf.

[104] Mainstreaming of human rights is mentioned in the 2001 *Annual Report on the State of Human Rights in the E.U.* which states unequivocally that «The Union is committed to intensifying the process of mainstreaming human rights and democratisation objectives into all aspects of E.U. external and internal policies».

[105] Without the bedrock of fundamental rights, processes such as social dialogue and the European employment strategy based on the concept «flexi-curity» (combination of market flexibility and job security) quickly prioritise economic goals over social concerns, reflecting the greater bargaining

The challenge is therefore to ensure that proactive strategies are firmly centred on the bedrock of fundamental rights rather than political discretion.

6. A new agenda for human rights at European, national, regional/autonomous and local level

As an annex to this article the author has enclosed a practical agenda for a suggested next wave of legal action and reform in order to make rights effective for all citizens.

V. FINAL CONCLUSIONS

In spite of the vigilance always needed in the field of human rights, what cannot be ignored is the fact that, as the European Parliament has declared, the Treaty of Lisbon is a fundamental step forward in what has been characterised as a constitutional development of the European Union legal order. A full mature «European human rights area» would be born finally resolving the paradoxes derived from a double standard E.U./E.C.H.R. Furthermore, the Treaty of Lisbon offers big hopes for fighting the pending battles of the 21st century, that is to say, the fight to end the current implementation deficit which affects fundamental rights within all legal orders and the need to improve the level of access to justice (in a broad sense) for all citizens.

The movement towards a renovated fundamental rights discourse in the E.U. culminates, in the first place, in the declaration of the legal binding nature of the E.U. Charter of Fundamental Rights which offers a new approach integrating civil and political rights with socio-economic rights and casts positive, proactive duties on the States. We move away from traditional paradigms focusing on positive duties to complement traditional notions of human rights. In the second place, the E.U. will be able to become a party to the E.C.H.R. In that way, the interpretation of human rights made by the E.C.J. and the E.C.t.H.R. will be able to develop in parallel in a more formal way[106]. This will certainly consolidate the jurisprudence of the E.C.J. with respect to the application and enforcement of European law by national actors/Member States: the move from norms to institutional duty, from substance to procedure, from *ius* to *remedium*[107].

---

power of economic interests. Even if the E.U. Charter of Fundamental Rights places duties on E.U. institutions and Member States in implementing E.U. law, questions of compliance will still arise. In many respects, positive duties depend on the goodwill of the driving institutions as well as the energy and strategic focus of relevant interest groups. See S. Fredman, «Transformation or Dilution: Fundamental Rights in the E.U. Social Space», *European Law Journal*, vol. 12, n.º 1, 2006, pp. 41-60.

[106] The Law Society, *A guide to the Treaty of Lisbon. European Union insight,* January 2008, available online at www.lawsociety.org.uk/documents/downloads/guide_to_treaty_of_lisbon.pdf.

[107] See expression taken by Van Gerven, W., «Of rights, remedies and procedures», *Common Market Law Review,* 2000, pp. 501-536 and Weiler and Fries, «A Human Rights Policy for the European Community and Union: A question of competences», available online at http://fds.oup.com/www.oup.co.uk/pdf/0-19-829806-4.pdf.

A new European human rights agenda can develop that finally starts to fill the gaps between solemn declarations and the reality on the ground. The final goal of this agenda is to bring into life a common code of fundamental values, in particular those laid down in the E.C.H.R. Nationals of any E.U. country should be finally able to say «civis Europeus sum» and invoke the status of European citizenship in order to oppose any violation of their fundamental rights in Europe. This is a new agenda at supranational level that sets the example for national, autonomous/regional and local actors.

BIBLIOGRAPHY

Books

ALSTON, P. (ed.), *The E.U. and Human Rights*, Oxford University Press, 1999.

CLAPHAM, A., *Human Rights. Obligations of Non-State Actors*, Oxford University Press, 2006, 613 pp.

CRAIG, P. and DE BURCA, G., *E.U. Law. Text, cases and materials*, 4th ed., Oxford University Press, 2007, 1148 pp.

FRANCIONI, F., *Access to justice as a human right, The collected courses of the Academy of European Law*, New York, Oxford University Press, 2007, 244 pp.

STORME, M. and CARPI, F. (eds.), International Association of Procedural Law, *In honorem Mauro Cappelletti (1927-2004), Tribute to an International Procedural Lawyer,* Kluwer Law I., The Hague, 2005, 79 pp.

TRIDIMAS, T., *The General Principles of E.U. Law*, Oxford University Press, 2nd edition, 2006, 577 pp.

WARD and PEERS (eds.), *The E.U. Charter of Fundamental Rights: Politics, Law and Policy*, Hart Publishing, Oxford, 2004.

Articles

ARNULL, A. «April shower for Jégo-Quéré», *European Law Review*, 2004, p. 287.

CAPPELLETTI, M., General Report, «Access to Justice: The Worldwide Movement to Make Rights Effective», in *Access to Justice, vol. I. A World Survey*, Book 1, Sijthoff and Noordhoff-Alphenaandernrijn-Giuffré ed., Milan, 1978.

— «Some reflexions on the rule of procedural scholarship today», in Justice and Efficiency. General Reports and Discussions, *The Eight World Conference on Procedural Law*, Dutch Association for Procedural Law, ed. By Dr. W. Wedekind, Kluwer-Deventer, 1989, 460 pp.

CRAIG, P., «The Treaty of Lisbon: Process, architecture and substance», *European Law Review,* April 2008, pp. 137-166.

CURTIN, D. and MORTELMANS, K. «Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script», in Curtin, D. and Heukels, T. (eds.), *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers,* vol. II., Martinus Nijhoff Publ, London, 1994.

DOUGLAS, M., «The Treaty of Lisbon 2007: winning minds, not hearts», *Common Market Law Review,* 2008, vol. 45, pp. 617-703.

EILMANSBERGER, T., «The relationship between rights and remedies in E.C. law: in search of the missing link», *Common Market Law Review*, 2004, pp. 1199-1246.

JACOBS, F. G., «Citizenship of the European Union-A legal analysis», *European Law Journal*, vol. 13, n.º 5, September 2007, pp. 591-610.

FENELLY, N. «The role of the National Judge in Ensuring Access to Community Justice. Reflections on the Case Law of the Community Courts Four Years on from Jégo-Quéré/UPA», magazine published by *ERA-Forum, Academy of European Law*, Trier, n.º 4/2006.

FREDMAN, S., «Transformation or Dilution: Fundamental Rights in the E.U. Social Space», *European Law Journal*, vol. 12, n.º 1, 2006, pp. 41-60.

GROUSSOT, A., «The E.C. System of Legal Remedies and Effective Judicial Protection: does the system really need reform?», *Legal Issues of Economic Integration*, 2003, pp. 221-248.

HEUSEL, W.: «Access to Justice in Community Law», *ERA-Forum*, n.º 4/2006, p. 458.

MCKENDRICK, «Modifying Procedural Autonomy: Better Protection for Community Rights», *European Review of Private Law*, 2000, p. 565.

MORIJN, J., «Judicial Reference to the E.U. Fundamental Rights Charter. First experiences and possible prospects», p. 9, available on-line at http://www.F.D.uc.pt/hrc/working_papers/john_morjin.pdf.

NIHOUL, P. «Le recours des particuliers contre les actes Communautaires de portée générale», *J.T. Droit Européen*, 2002, pp. 38-43.

PARRET, L., «Judicial protection after Modernisation of European Competition Law», *Legal Issues of European Integration*, vol. 32 (4), 2005, pp. 343-344.

RAGOLLE, F., «Access to justice for private applicants in the Community legal order: recent Revolutions», *European Law Review*, 2003, p. 90.

TEMPLE LANG, J., «Actions for Declarations that Community Regulations are invalid: the duties of National Courts under Article 10 E.C.», *European Law Review*, 2003, pp. 102-111.

— «The Principle of Loyal Cooperation and the Role of the National Judge in Community, Union and E.E.A. Law», *ERA-Forum, Academy of European Law*, Trier, n.º 4/2006.

TOBLER, C. and BEGLINGER, J., *Essential E.C. Law in Charts*, Hvgorac, Budapest, 2007, 313 pp.

TOTH, A.G., «The European Union and Human Righs: the Way Forward», in *The Oxford Encyclopædia of E.C. Law*, vol. I, Institutional Law, 1990, p. 284.

— «The European Union and Human Rights: The way forward», in *Common Market Law Review*, 1997, p. 491.

TRIDIMAS, T., «Enforcing Community Rights in National Courts: Some Recent Developments», in D. O'Keeffe and A. Bavasso (eds.), *Judicial Review in European Union Law. Liber Amicorum in Honour of Lord Slynn of Hadley*, Kluwer Law International, London, 2000, pp. 465-479.

VAN GERVEN, W., «Of rights, remedies and procedures», *Common Market Law Review*, 2000, pp. 501-536.

VESTERDORF, B., «The Community Court system ten years from now and beyond: challenges and possibilities», *European Law Review*, 2003, pp. 303-323.

VON BOGDANDY, A. «The European Union as a Human Rights Organization: Human Rights and the Core of the European Union», *Common Market Law Review*, 2000, 37, p. 1307.

Weiler, J. and Alston, P., «An ever-closer union in search of a human rights policy», *European Journal of International Law*, vol. 9, n.º 4, 1998, pp. 658-723.

Weiler, J.H. and Fries, S., «An E.U. Human Rights Agenda for the new Millenium», at the website http://www.jeanmonnetprogram.org/E.U./Units/index.html, *Teaching materials E.U. Law,* New York University, 2005.

— «A Human Rights Policy for the European Community and Union: A question of competences», available online at http://fds.oup.com/www.oup.co.uk/pdf/0-19-829806-4.pdf.

Other docs

Council of Europe, Steering Committee for Human Rights, *Study of Technical and Legal Issues of a Possible E.C./E.U. Accession to the E.C.H.R.*, Report adopted on 28 June 2002, DG-II (2002) 006.

Council of Europe, Parliamentary Assembly. Report Committee on Legal Affairs and Human Rights, Doc. 11202, adopted on 28 March 2007, *State of human rights and democracy in Europe.*

E.U. *Annual Reports on human rights,* 2001 and 2006.

E.U. network of independent experts on fundamental rights, *Commentary on the E.U. Charter,* June, 2006.

House of Lords, 6th Report, *The Future Status of the Charter of Fundamental Rights*, Working Group II. Doc CONV 354/02.

Speech by the Right Hon Terry Devis, *Human Rights in Europe now,* Trans European Policy Studies Association, Brussels, 10 March 2008.

The Law Society, *A guide to the Treaty of Lisbon. European Union insight* January 2008 available online at www.lawsociety.org.uk/documents/downloads/guide_to_treaty_of_lisbon.pdf.

ANNEX 1
PROPOSAL FOR A NEW AGENDA.
MAKING HUMAN RIGHTS EFFECTIVE AT EUROPEAN, NATIONAL/AUTONOMOUS AND LOCAL LEVEL

1. International law and European Law must constitute the framework for legal/political action

In the field of human and fundamental rights, even at local level, it is essential to follow the developments of International and European Law that set the framework rules and the priorities for the future.

2. Priority number 1 must be implementation

As the Commissioner for Human Rights of the Council of Europe says, «there is a growing gap between solemn declarations on human rights and the reality on the ground». It is essential now to focus in the implementation deficit. Most of the

laws needed are there. We must now work to ensure effectiveness of the legal order. A Declaration of Human Rights should be done at all levels of Administration. This would mark a starting point in a long process of improvement of the society standards. Implementation means working for the citizens, improving their «access-to-justice», but also «mainstreaming» human rights within the Administration, making them part of the local government activities.

3. Access-to-justice: a methodology to make rights effective

Thinking about implementation a typology of possible strategies can be evaluated. Political preferences or opinions may favour one or another strategy. World wide research proves that choice of the instruments is not really the most relevant issue. Solution A can be more or less effective than Solution B. Plan X can work better in one country than Plan Y in another. There are currently 47 countries represented in the Council of Europe, 27 in the European Union and 30 in the European Economic Area. Institutions and legal systems are different so the tools and methodology to use can be very diverse.

What is essential is leadership, fighting the battle, keeping the goals in mind, not loosing the focus of implementation and evaluating improvements. Any strategy adopted must be directed towards improving information and ensure a better access-to-justice for all citizens. «Access-to-justice» is a legal term that defines the worldwide movement started in the 80's to make rights fully effective. Effectiveness is the key concept for the human rights in the next decade.

4. Fighting against barriers: best practices to help the citizens to enforce their rights

Identification of the most usual obstacles to the exercise in practice of existing rights has already been done by scholarly research. All procedural specialists agree that information for the citizens about their current rights is the most essential measure to begin with in the battle of effectiveness. Nobody can enforce a right without previous knowledge of its existence. In the context of a welfare state, access-to-justice means also helping the citizens, especially those in most need (immigrants, low-income, handicapped, etc.), to exercise their rights supporting initiatives like free legal-aid schemes or encouraging the work of private organisations. For the immigrant community, translation services and assistance are essential for their well-being within the society (together with a clear immigration policy directed towards integration). Not all measures require extra-funding, some very good initiatives and practices already existing should be better known by the general public.

5. Executive Plan– Implementing Declarations on Human Rights

When dealing about implementation, specialists are of the opinion that executive programs and follow-up reports are essential. An Executive Plan drafted and approved by the concerned Administrations should be adopted following the Declaration of Fundamental Rights. The Plan for Action should contemplate both

external measures towards citizens but also internal action. As the experts in international human rights mainstreaming have pointed out, activities such as data-gathering, management, analysis and dissemination are the essential tools to advocate and collaborate within the Administration. For this exercise, all relevant information about the current protection of human rights in the society and the initiatives carried by all different public and private actors involved should be collected.

6. A tool for measuring improvement: Follow-up Questionnaires

Together with an Executive Plan for Action, a «Follow-up Questionnaire» could be foreseen as a complement. This tool could measure, in practice, the effectiveness of the Administration and/or other actors in implementing human rights priorities.

7. Coordination of all actors and players in the human rights arena is essential

In order to set human rights at the highest level and not lowest common denominator, it is essential to coordinate the work of all actors involved in the legislative and executive process as well as within the civil society. It is very important to avoid duplicating efforts and parallel lines of action.

A previous exercise of defining competence should not be excluded. Some recommendations for a next wave of legal reform fall under the competence of the Parliament (of the State or at Autonomous Community level). Some others belong to the sphere of the Government. National actors should communicate better with local actors. Research must complement policy-making. The list can go on. The question is where all actors involved can reinforce each other and work together to achieve common goals.

8. Leading role of the E.U. Agency for Fundamental Rights

In this context, it would be very good initiative to give the mission to the Office for Human Rights of the European Union to assume a leading role (formal/informal –to be defined later) in the human rights panorama. This mission would be an example of leadership and «best practice». The E.U. Agency for Fundamental Rights could serve as a coordination pole and link all the actors involved in the process. It could very well do that by organising a Seminar/Workshop every year inviting all the actors active in Europe to meet and exchange knowledge, reports and experiences. The website of the Agency could also serve as a connecting point between all the other actors, in order to offer to the public a full panorama of the existing legal order and the different institutions involved with fundamental rights in 30 E.E.A. countries.

9. Human and fundamental rights do not create yet obligations between individuals

Human rights are the mirror of our societies. Deciding on rights is often about deciding on some of the deepest values of society. Unfortunately, even in Europe, all fundamental rights lack 100% effectiveness because «classic non-discrimination pro-

visions» do not apply horizontally as among individuals in all circumstances. Institutions and procedures like the «Ombudsman» only apply for vertical relations between the State and the citizens. The interference of the State in regulating relationships between individuals such as cases of non-discrimination is not without critics.

10. Investing in human rights creates economic growth for the society

There is general agreement in Europe and in the world that discrimination is detrimental to the economy and to society as a whole. By promoting diversity and fighting discrimination, all governments can play an important role in modernising economic and social policy. Social progress must accompany economic benefit. Investing in human rights creates economic growth as society gets richer and more opportunities arise.

11. Education and information are part of a long term project for society change

A lot has been done from a legal point of view but it is fact easier to change laws than to change attitudes. Social change is very slow. At the end of the day, combating discrimination effectively means changing societies, deep-rooted wrong patterns of behaviour. Public and private habits of conduct within a society lead –most of the times unconsciously– to certain population groups suffering discrimination. Education and information about human rights is essential in this context to increase awareness in the society.

12. Human rights must be integrated into other public policies

Assuring a good Administration in all different sectors of public action and policies must not be forgotten. Human rights must be fully respected in other policies. Equality law is not only about preventing unequal treatment of individuals. It requires positive and affirmative action. The Administration must not only ban discrimination but is obliged to further promote equal opportunities for all in order to remove the structural obstacles still barring the way to many groups exposed to discrimination: immigrants, ethnic minorities, people with disabilities, older workers and young people and other groups. Human rights and equality are a «cross-cutting issue». Removing obstacles, providing information on existing rights and assuring good governance can be even more important than creating new organisations, institutions or procedures.

13. Good governance: Mainstreaming human rights within the Administration

As the Office of the UN High Commissioner for Human Rights defines, governance is the process whereby public institutions conduct public affairs, manage public resources, and guarantee the realization of human rights[108]. Good governance

[108] http://www.unhchr.ch/development/mainstreaming.html.

accomplishes this in a manner essentially with due regard for the rule of law. Mainstreaming human rights should also figure in the Agenda of good governance. Mainstreaming means enhancing and developing a human rights programme and integrating it into the different range of the Administration activities, both external policies and internal organisation.

14. Helping local actors and the civil society: defining the most urgent priorities for the allocation of funds

In the context of a liberal economy and modern welfare-state, the Administration has the responsibility of defining priorities and leading the action. This process must be properly planned. It is accepted by many academics that some public policies can be better implemented by the civil society. Helping all actors and players currently engaged in human rights issues is the ideal but maybe impossible in practice for budget and financial reasons.

Leadership is essential. Priorities should be established. Which actors should be supported? Which players can be helped by other international or European organisations? What other complementary policies are also necessary in practice to ensure human rights in practice? For instance, university research, analysis and different projects can be also funded by the European Union through different programmes. Financing of associations can be of course linked to specific projects where evaluation is done regularly.

Final considerations

In view of the above considerations, it can be said that no single definition or approach to the «implementation» of human rights exists and this is not a bad thing. There is no single model or «programme» that magically makes it happen. Any policy should be based on local reality. International and European institutions offer the general guidelines and framework to achieve goals but diversity is part of the exercise. The most important factor is to show leadership and adopt a clear human rights policy and agenda.

Implementation of human rights within the Administration and towards the citizens must be directed to the goal of making rights effective. The structure of the Administration and the public budget related to human rights activities are, of course, related issues but, for the time being, they are not the main priorities where urgent action is needed. Priority number 1 is to define and launch the process of implementation of the human rights in practice. It is the exercise of rights that makes them highly valuable, rights which are not exercised are useless. Human rights entail an obligation on the part of the government, at all levels. An Executive Plan for Implementation should be prepared by the E.U. Agency of Fundamental Rights setting the example for 30 E.E.A. European countries.