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The Treaty of Lisbon and Fundamental Rights

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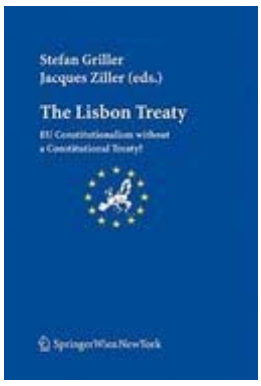

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I. Introduction

When I commented on the Treaty establishing a Constitution for Europe,[1] some years ago, I welcomed it as a major achievement in the constitutional process of the EU not so much because of the substantial changes made with regard to the Treaty of Nice, but essentially due to the fact that the Constitutional Convention and the governments of the Member States had made great efforts to call their baby by its real name: Constitution. Laws were called laws, the person in charge of foreign relations was called Foreign minister, the primacy of European law was expressly recognised and it was agreed that fundamental rights were to be made visible and operational in a legally binding form. Nevertheless,

* I would like to express my greatest thanks to my two research assistants, *Ariane Grieser* and *Michael von Landenberg*, for their critical review of the draft and helpful contributions to the present paper.

1 *Pernice* (2003); see also *Pernice* (2007).

it was quite clear to everybody that the EU continued to be a supranational organisation and was not developed into a beast which could be qualified as a 'super-state', or to which could be attributed any kind of statehood.

In 2004, however, after the French and Duch referenda, an amazing 'roll-back' campaign was initiated against this attempt at straightforwardness, transparency and simplicity. With enormous efforts, the substance of the reform agreed under the Constitutional Treaty has now been salvaged in the Treaty of Lisbon,[2] but the language returns to the somewhat placatory terminology of the original EU. There is one item, however, which survived the revision almost without any change: The Charter of Fundamental Rights.

This contribution will firstly indicate the reasons why, in my view, recognising the legally binding effect of the Charter is a cornerstone of the reform of the EU. Secondly, the conditions under which the Charter has been recognised as a binding instrument have in certain aspects positive effects as compared to the Constitutional Treaty, at least they are not a considerable regression. The Charter, thirdly, makes clear that the Union is specifically different in its kind from an international organisation or any other form of cooperation among states: It is a Union of citizens, and the Charter is an indication that the citizens are taking ownership of it.[3]

II. The Charter of Fundamental Rights in Context

Considering, in particular, the European Charter of Fundamental Rights, it seems to be important to evaluate it in its contextual framework; as part of the "internal affairs" of the European Union, as counterpart to the principle of primacy of European law, and as one of the "Three pillars" of the system for the protection of fundamental rights in the Union.

A. Fundamental Rights and "internal affairs"

Why are fundamental rights addressed in the part of this conference devoted to 'Internal affairs', together with 'Justice and Home Affairs'? The answer is obvious: It is the counterpart for new competencies of the Union regarding the "area of freedom, security and justice". The policies of the third pillar will be shifted from intergovernmental co-operation between Member States to the 'Community method'. All the matters

2 Full text with protocols and declarations in OJ 2007 C 306.

3 See below as follows.

and measures envisaged here: security, home affairs, and justice affect very closely the citizens' personal rights and freedoms. The Tampere-Program and Hague II on the "area of freedom, security and justice" and its implementation give clear indication of how important it is for the citizens to see that the action of the EU in this area is guided and limited by fundamental rights. The need for a Charter of Fundamental Rights became evident when these policies began to be developed in 1995, and the recognition of its binding effect turned out to be a condition for accepting such new competencies at the Union level – not to mention the fact that the switch to the Community method also means that more transparent and democratic procedures will apply to what has been dealt with, so far, in secret diplomatic negotiations, agreed between the ministers and implemented by the national institutions without competent democratic involvement.

Thus, two elements that had been the offspring of fundamental rights in history finally meet in the development of the EU: The first one being the moderation of an executive power or government as did for example the *Magna Carta Libertatum* (1215), addressing the individuals but as subjects submitted to that power, yet nevertheless limiting that submission with regard to their personal freedom and especially with regard to freedom from measures of security and justice.[4] In this (first) sense, fundamental rights are understood as a reaction and limitation to governing power while in another sense, (occurring much later in history) they constitute first of all the governing power treating individuals as free people by themselves establishing a political body or power to protect these freedoms, as is found in the *Virginia Bill of Rights* from 1776 or the *Déclaration des droits de l'homme et du citoyen* (1789), the latter explicitly stating in its Article 2:

> "*Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression*".

and further Article 12:

"La garantie des droits de l'Homme et du Citoyen nécessite une force publique: cette force est donc instituée pour l'avantage de tous, et non pour l'utilité particulière de ceux auxquels elle est confiée".

4 See also the similar Charters in Spain (1188), Denmark (1282), Belgium (1316) and later also the *Habeas Corpus* Act of 1679.

Thus, government becomes a kind of trustee of the citizens.[5] As we know, this concept was extended by *James Madison* in the Federalist No. 46 explaining the federal division of powers:

> "The federal and state Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes".[6]

The question is, what might this mean for the recent developments of the EU? Both aspects, indeed, seem to be relevant with regard to the new reference to the Charter of Fundamental Rights as a legally binding instrument. First: Submitting pillar three to the Community method enlarges the powers at the Union level (especially the crucial ones regarding freedom and security) and reduces – at the same time - the direct control and legitimisation of such policies by the national governments and parliaments. Consequently there is a need for fundamental rights facing and limiting these enlarged powers at the Union level, thus for fundamental rights in the first sense mentioned above. But fundamental rights also work in the second sense: As long as the protection of freedom and security was primarily the responsibility of the Member States, their constitutions (including fundamental rights) permitted the use of measures of security and justice only for the sake of and with regard to the liberty of their citizens. At the Union level such a guarantee is yet to be established. Therefore, the new reference to the Charter of Fundamental Rights as a legally binding instrument means far more than carrying coals to Newcastle. Even conceding that – in its contents – it might state nothing very different from what has already been or could in future be developed by the case law of the ECJ, with an independent validity these fundamental rights are not only re-born but actually newborn and serve to underline the constitutional character of the new Treaties. By addressing the citizens of the EU directly as individuals especially concerning their personal freedom and security they merge (at least within the reach of the Union powers) the national societies into a European society of free people and thus hold the political powers on the Union level directly responsible for their rights and freedoms. The Charter of Fundamental Rights, consequently, not only underlines and clarifies the legal status and freedoms of the Union's citizens facing the institutions of the Union, but also gives the Union

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5 For further information and references concerning the development of fundamental rights see e.g. *Pound* (1957) and *Jellinek* (1919).

6 *Hamilton / Madison / Jay* (1787/88).

and, in particular, the policies regarding the "area of freedom, security and justice" a new explicit normative foundation.

B. Counterpart to the Principle of Primacy

Yet, the Charter should also be regarded in relation to a further issue too: The multilevel construction of the Union. It can be seen as a counterpart to the unconditional acceptance of the primacy of European law over national law, which is now confirmed in the Declaration (17) concerning primacy. There is no express provision on primacy in the Treaty any more, as was envisaged by Article I-6 of the Constitutional Treaty. But more clearly even than the Declaration (1) "concerning provisions of the Constitution", attached to the Constitutional Treaty, the new Declaration to the Lisbon Treaty on primacy refers to the case law of the ECJ, wherein[7] the principle of primacy was already established since 1964[8] as "*a cornerstone principle of Community law*". These are the words of the Legal Services' opinion of 22 June 2007 expressly referred to in the Declaration to the Lisbon Treaty. This reference is made without any reservation whatsoever. The Declaration recognises the principle of primacy "under the conditions laid down by the said case law". This means that provisions of the national constitutions, even those regarding fundamental rights, cannot be invoked against "the Treaties and the law adopted by the Union".[9]

In return, it will be crucial for the citizens to see the EU as being subject to a common catalogue of fundamental rights, providing for effective protection of their individual rights and freedoms at the

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7 See the settled case law of the ECJ e.g. : Case 6/64, *Flaminio Costa v. ENEL* [1964] ECR 585, 593; Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] ECR 629. For details see *Pernice* (2006), 22-27, 53-56.

8 Case 6/64, *Flaminio Costa v. ENEL* [1964] ECR 585, 593.

9 Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125. For the reluctance of national (Constitutional) Courts in this respect see: Pernice, Ingolf, *Verhältnis* (note 7), p. 21-43; see also for the recent case law of the French Conseil d'Etat, in particular Decision of February 8, 2008, case No. 287110, Arcelor, available at: http://www.conseil-etat.fr/ce/jurispd/index_ac_ld0706.shtml, German version published with comments by *Mayer / Lenski / Wendel* (2008), 63 *et seq*.

European level – that means, against threats originating from the European Union.

C. Three pillars of the EU system of Fundamental Rights

Like the Constitutional Treaty in its Article I-9, the Treaty of Lisbon retains in Article 6 the "three pillars" of Fundamental rights: The Charter, the recognition of the rights "as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms" and the rights "as they result from the constitutional traditions common to the Member States", the latter two groups of rights constituting "general principles of the Union's law". While these general principles have been – and will continue to be – established by the case-law of the ECJ,[10] Article 6, para. 2 TEU-L in addition provides for the formal accession to the European Convention, by which the EU will be integrated in the Strasbourg control system, including the jurisdiction of the European Court of Human Rights.

Given the difficulties any desired revision of the Charter will face in a Union of 27 Member States, the necessary openness and dynamic development of the European system for the protection of fundamental rights will be ensured, in particular, by the reference to the general principles of law and, consequently, the existing and future case-law of the ECJ as well as of the European Court of Human Rights.

III. Constitutional and Lisbon Treaty compared

Comparing the Constitutional Treaty to the Treaty of Lisbon with particular regard to the Charter of Fundamental Rights, there are a number of changes regarding the general approach, the contents and even the reach and validity of the Charter.

A. A new approach: Reference to Charter and explanations

First of all, the Mandate of June 2007[11] and the Lisbon Treaty do not follow the approach of the Constitutional Treaty. The Charter is not

10 Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73, *Nold v. Commission* [1974] ECR 491; Opinion 2/94 on *Accession by the Community to the ECHR* [1996] ECR I-1759, para. 33; Case C-299/95 *Kremzow v. Austria* [1997] ECR I-2629. Para.14.

11 IGC Mandate of June 26, 2007, attached to the Conclusions of the European Council, see: http://register.consilium.europa.eu/pdf/en/07/st11/st11218.en07.pdf.

incorporated into the new EU Treaty. With some minor amendments, instead, the Charter was solemnly proclaimed and formally signed in Strasbourg the 12th December 2007 by the Presidents of the European Parliament, the Council and the Commission, and was published later in the Official Journal.[12] It was the day before the Treaty of Lisbon was signed in Lisbon. Para. 1, clause 1 of Article 6 of the new EU-Treaty reads:

> "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2001, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

This new approach deliberately avoids the appearance of a Constitution. But above all, it avoids the very odd situation of including two preambles in one Treaty, one at the top and another in the middle of the text. Instead, the reference in the TEU-L to the Charter as a separate constitutional document gives the Charter an independent existence and may even allow other Organisations or States to refer to it as a binding instrument. As Article 6, para. 1, clause 1 TEU-L expressly gives the Charter "the same legal value as the Treaties", all its merits as a Constitutional document for the EU, thus, are preserved, and its independent existence even allows it to be used as a more general reference for fundamental rights.

Thanks to permanent British pressure there is another peculiar provision in the new EU Treaty: Article 6, para. 1, clause 3 TEU-L reads:

> "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".

Article I-9 of the Constitutional Treaty did not include a similar provision, while Clause 5, final sentence, of the preamble of the Charter in Part II as well as Article II-112, para. 7 of the Constitutional Treaty did so, and Declaration (12) to the Constitutional Treaty included the text of the explanations. The explanations now referred to in the general provision on fundamental rights of the EU-Treaty, and retained in the

12 OJ 2007 C 303/1.

preamble of the Charter as well as in its Article 52, para. 7, are attached to the text of the Charter as published in the same Official Journal as the Charter itself.[13]

Does it make a difference whether the reference to the explanations is in the Treaty, situated amongst the basic principles and objectives of the Union, or in the preamble and the text of the Charter only? In formal legal terms, the answer is no. Symbolically, however, the answer is yes, and this means for the practical application of the Charter in a given case that the explanations will have more weight.

Although the method of referring to such authoritative explanations seems to be questionable from a traditional legal point of view, it may prove to be very effective and useful regarding possible divergencies of the a priori understanding and construction of any specific rights in the different legal cultures and traditions of the 27 Member States. This is particularly important since the effective protection of the citizens' fundamental rights against acts of the European Union or, as Article 51, para. 1, TEU-L reads, of the Member States "when they are implementing Union law", will primarily be a matter for the national courts. As already envisaged under the Constitutional Treaty, the new EU-Treaty states in Article 19 EU (ex Article 220 EC), para. 1, clause 2:

> "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

As long as, on this basis, there is no direct access to the ECJ for "constitutional complaints" against European measures, it seems to be important that national courts have some common idea of what each particular provision of the Charter really means.

B. Fundamental rights and the competences of the Union

There is another new provision in Article 6, para. 1, clause 2, TEU-L, which Article I-9 of the Constitutional Treaty did not contain:

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

As this was not considered to be clear enough, a special Declaration was already foreseen in the Brussels Mandate and is now included as Declaration (1) to the Treaty of Lisbon. It states that

> "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish

13 OJ 2007 C 303/17.

any new power or task for the Union, or modify powers and tasks as defined by the Treaties".

The Charter already includes such a clause in its Article 51, para. 2[14] and the authoritative explanations to this Article reiterate this limitation.[15] These provisions are the expression of a deep concern, almost a phobia of at least some Member States anxious to ensure a restrictive approach regarding the EU competences. Similar clauses can repeatedly be found in the new Treaties, e.g. in the provisions regarding the accession of the EU to the European Convention on Human Rights in Article 2 of the Protocol relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, and in particular in the provisions on the competencies of the

14 Article 51, para 2, CHR reads: "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties".

15 Explanation on Article 51 – field of application, paras. 3 and 4 read: "Paragraph 2, together with the second sentence of paragraph 1, confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers.

Paragraph 2 also confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties. The Court of Justice has already established this rule with respect to the fundamental rights recognised as part of Union law (judgment of 17 February 1998, C-249/96 Grant [1998] ECR I-621, paragraph 45 of the grounds). In accordance with this rule, it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be 'implementation of Union law' (within the meaning of paragraph 1 and the above-mentioned case-law)".

EU, such as Articles 4, para. 1, Article 5 para. 2 TEU-L or Article 308 para. 2 TFEU, and in the related protocols and declarations.[16]

This concern, however, was already met by the principles of conferred competencies and subsidiarity and needs therefore no further reiteration.[17] One could be doubtful about the real meaning of these principles if the authors of the Treaty consider it necessary to repeat the limitation so abundantly. It is all the more surprising since fundamental rights are by their nature not conferring, but rather limiting the competences conferred to the institutions: Inasmuch as they deny the power to affect certain rights and liberties of the individual they have therefore rightly been constructed as 'negative competences' of the institutions concerned.[18]

C. 'Opt-out' for Britain and Poland

Regarding the Charter of Fundamental Rights representatives of the UK and Poland have not only made all efforts to avoid the Charter or at least to limit its impact, but have finally achieved what is called an opt out from the Charter.[19] In fact, the Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom states:

> "Article 1
>
> 1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or ac-

16 See in particular Declaration (24) concerning the legal personality of the European Union: „The Conference confirms that the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties".

17 Apparently dissentig on this point *Weber* (2008), 8.

18 For the construction of fundamental rights as "*negative Kompetenznormen*" see *Hesse* (1999), 133; see also *Mayer* (2001), 583; *Pernice* (2001); for the possible effect of fundamental rights on the division of competencies between the European Union and the Member States see also *Pernice / Kanitz* (2004).

19 On this 'opt-out' see e.g. *Fischer* (2008), 34 *et seq* and also 44, 116 *et seq*; *Mayer* (2008), 88 *et seq*; for the link between 'opt-out' and the possible want of a referendum in the U.K. concerning the Lisbon treaty see *Donnelly* (2008), 207 *et seq*.

> tion of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
>
> 2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.
>
> Article 2
>
> To the extent that a provision of the Charter refers to national law and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practice of Poland or of the United Kingdom".

Is this really an 'opt-out'? I believe the answer must be no. If it is true, as the Preamble of the Charter specifies, that the Charter is meant to

> "strengthen the protection of fundamental rights … by making those rights more visible in a Charter";

if it is true, as the Declaration (1) concerning the Charter of Fundamental Rights of the European Union stresses in its first clause, that the Charter

> "confirms the fundamental rights 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";
>
> if it is true that, as the 'opt-out'-Protocol states in the Preamble,
> "The Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles",

what then could reasonably be the meaning and effect of an opt-out to the Charter? All its provisions are already recognised as binding law. If the Charter, legally speaking, does not add anything further, how can the opt-out have a legal effect?[20]

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20 For an enlightning impression concerning the discussion of this question in the United Kingdom see: 10th Report of Session 2007-08, The Treaty of Lisbon: an impact assessment, Volume I/II: Evidence, House of Lords, European Union Committee. In particular: Evidence provided by *Jo Shaw* on the 14th November 2007, Question 67-76,

But let us have a look at the substantial provisions of the protocol: The first question is to what extent, under European law, are the ECJ and national courts able to find that national law is inconsistent with European fundamental rights? An answer in general terms is that the ECJ has no power whatsoever to nullify national law, while national courts or tribunals may have such a power. More specifically, however, inconsistencies of national law or action with European law may be found by the ECJ in infringement cases (Article 258 TFEU, ex 226 EC) and also in reference procedures under Article 267 TFEU (ex 234 EC). The new powers of the ECJ under Article 269 TFEC to hear Member States' appeals against sanction-decisions under Article 7 TEU-L are limited to procedural matters. Regarding the area of freedom, security and justice a new Article 276 TEU-L excludes any competence of the ECJ to

> "review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security".

The question, however, of the extent to which European fundamental rights may be taken as criteria for the legal review not only of measures of the EU but also of national law must be answered in the light of the principles and case-law of the ECJ. This is exactly what Article 51, para. 1, of the Charter is meant to capture: The provisions of the Charter are addressed "to the Member States only when they are

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where she stated with regard to the protocol: "... this is merely a clarification of the law as we understand it to be, so I might venture the view that this is a Declaration masquerading as a Protocol". And at Q74: "I am not saying it does not have legal effect but I would doubt what legal effect it would have". Similar the supplementary memorandum by *Martin Howe* to his oral evidence, stating that "the Protocol does no more than reiterate the provision of Art. 51(1) of the Charter [...], and has no substantive legal effect". Even more explicit the conclusion of the Committee: "The protocol is not an opt-out from the Charter. The Charter will apply in the U.K., even if its interpretation may be affected by the terms of the protocol" (para.5.87 at Volume I) and its summary concerning the legal effect of the protocol at para. 5.103. The report is available at: http://www.publications.parliament.uk/pa/ld/ldeucom.htm.

implementing Union law". The explanations on this provision reveal that this formula intends to meet the law as it stands. The explanation on Article 51 states in paragraph 2:

> "As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 ERT [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 Annibaldi [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...' (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law".

If this is so, a Protocol which confirms that the Charter will not extend the ability of the ECJ and the national courts in Britain and Poland to find that their national law or practices "are inconsistent with the fundamental rights that it reaffirms" can hardly be understood as a reservation or an opt-out.

The same applies to the part of the protocol which excludes that the provisions of chapter IV – on solidarity – of the Charter create justiciable rights for Britain and Poland. Could collective bargaining rights, as recognised in Article 28 of the Charter, be invoked against national measures restricting the freedom to provide services (Article 56 TFEU, ex Article 49 EC), in order to question whether mandatory requirements of public interest could justify the measures? This is the situation dealt with in the ERT-case, to which the explanations refer. It is clear for Britain and Poland that Article 28 of the Charter would not be applied,

but instead the fundamental right which it reaffirms and which the ECJ recently recognised in its recent case-law.[21]

In case 438/05, *Viking*,[22] the Court mentioned, for the very first time, the Charter and its Article 28 by which the right to take collective action was "reaffirmed". I do not see the difference.

Finally, Article 2 of the Protocol limits references in the Charter to national law and practices in a provision of the Charter so as to apply only insofar as the rights and principles reaffirmed in that provision are also recognised in the law or practices of the two countries. Thus, again, the relevant provisions of the Charter are understood not as creating new rights but as principles confirming the existing social rights and protecting them against challenges by European legislation. They are 'standstill-rules' regarding the level of protection achieved so far. Article 52, para. 5, of the Charter clarifies what their normative content shall be:

> "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality".

Again, the Protocol contains clarifications but not, as I see it, any real reservation in respect of the Charter. The same applies, by the way,

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21 Case C-341/05, *Laval* [2005] OJ C281/10, para. 91 et sequ.; for the freedom of establishment see case C-438/05, *International Transport Workers Federation v. Viking Line* [2006] OJ C60/16. para. 44: "Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices. In addition, as is apparent from paragraph 5 of this judgment, under Finnish law the right to strike may not be relied on, in particular, where the strike is contra bonos mores or is prohibited under national law or Community law".

22 See note 21 above.

to the special Declarations of the Czech Republic and Poland.[23] They have no legal effect except for recalling the interpretation of certain provisions of the Charter by these countries.

D. The Charter and the Court of Justice

With regard to the 'three pillars' of the European system of fundamental rights, mentioned above, the role and powers of the ECJ are of particular importance to the question of the future developments of fundamental rights in the European Union. Though the three sources each have a separate basis and the accession of the Union to the European Convention on Human Rights will imply that the Strasbourg Court will supervise, as it does for all Member States individually, respect for human rights by the EU, including the ECJ, the Charter of Fundamental rights reflects and reaffirms both the guarantees included in the Convention[24] as well as the other general principles of law developed so far by the case-law of the ECJ. Since these principles are mentioned specifically and separately as one of the sources of fundamental rights to be protected, nothing excludes a further dynamic development of other, new fundamental rights by the ECJ, inspired, as it was so far, by the "constitutional traditions common to the Member States". This openness seems to be particularly important for the unity and coherence of the European multilevel constitutional system regarding the need for the ECJ to keep track with the national and Strasbourg developments concerning fundamental rights.

Is there any important change regarding the role and powers of the ECJ relevant to the protection of fundamental rights in the Treaty of Lisbon? It is clear that with the 'communitarisation' of the Third Pillar the general system of judicial review will also apply in this area. And regarding the Common Foreign and Security Policy, the new Article 275 TFEU gives the Court the competence to review

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23 Declaration (53) by the Czech Republic on the Charter of Fundamental Rights in the European Union (p. 368); Declaration (61) by the Republic of Poland on the charter of Fundamental rights of the European Union (p. 270) – family law; Declaration (62) by the Republic of Poland on the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom (p. 270) – Solidarity.

24 For further consideration of the relationship between Charter and Convention see: *Grabenwarter* (2006); *Busse* (2001); *Goldsmith* (2001), 1211; *Thym* (2002).

> "the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union".

As soon as the ECJ gives its judgment in the cases *Yusuf & Kadi*,[25] we will know the exact implications of this provision for the protection of fundamental rights against measures implementing decisions of the UN Security Council.

However, for the institutional and procedural law, the Brussels Mandate did not include any specific amendments regarding the reform of the ECJ as envisaged by the Constitutional Treaty. Thus, the provisions of the Treaty of Lisbon regarding the ECJ take over what has already been agreed.[26] It seems to be important to note, however, that the general provisions of Articles 220 EC will not only be transferred to the fundamental provisions of the new EU-Treaty, but they will also be complemented by a provision reflecting requirements expressed by the recent jurisprudence of the ECJ:[27] The new Article 19 TEU-L adds to the former text of Article 220, para. 1, EC that

> "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

As already mentioned, this provision addresses the primary responsibility of the national courts for the judicial review also regarding the protection of fundamental rights against legislative acts of the European Union being implemented by national authorities. In accordance with the principle of subsidiarity, this provision thus reflects for the judiciary, the co-operative multilevel structure of the Union. This obligation of the Member States implies that in all cases where a national court of last instance is confronted with a case in which the validity of a

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25 For CFI ruling see: Case T-315/01 *Yassin Abdullah Kadi v. Council and Commission* [2005] ECR II-3649; Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat Foundation v. Council and Commission* [2005] ECR II-3533. For the Opinion of Advocate General *Maduro* in *Kadi,* Case C 402/05, see http://curia.europa.eu/jurisp/cgibin/form.pl?lang=EN&Submit=rechercher&numaff=C-402/05.

26 See, in particular, Article 1, clause 20, of the Treaty of Lisbon.

27 Case C-50/00 P *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677, para. 41; Case C-263/02 P *Commission v. Jégo-Quéré* [2004] ECR I-3425, paras. 29-39.

European legislative or regulatory act is challenged because of a violation of fundamental rights, the question has to be referred to the ECJ under Article 267 TFEU (ex 234 EC). As the German Federal Constitutional Court has rightly stated in its decision of 8 January 2001, such mandatory reference to the ECJ is the only way to achieve effective judicial protection of fundamental rights against European legislation in individual cases.[28] Attempts of the EC Court of First Instance and Advocate General *Jacobs* in the cases *Jégo-Quéré* and *UPA* to weaken the very restrictive conditions under the case-law of the ECJ for actions of individual against legislative acts of the Community[29] had been rejected by the Court.[30] The Court, indeed, has stressed the responsibility of the Member States as it is now retained in Article 19, para. 1, clause 2 TEU-L, and referred to the procedure for the revision of the Treaty as to any general reform, if necessary, regarding the individual's access to the Court. Under Article 2, clause 214 (d) of the Treaty of Lisbon, consequently, the conditions laid down under Article 263, para. 4, TFEU (ex 230 EC) are broadened insofar as any natural or legal person may institute proceedings also

> "against a regulatory act which is of direct concern to them and does not entail implementing measures".

Regulatory acts, though, are distinguished under the new provisions of Articles 288 to 290 TFEU, and particularly in Article 289, para. 3, TFEU from "legislative acts", defined as "legal acts adopted by legislative procedure". Though there is no definition of "regulatory acts", the new Article 290 deals with "non-legislative acts of general application" which may be adopted by the Commission, if so empowered by a legislative act, to supplement or amend certain non-essential elements of the legislative act. As a result, the need for specific provisions at national level, ensuring judicial protection against European legislation violating directly or indirectly individual

28 German Federal Constitutional Court, ruling of 9 January 2001, Case 1 BvR 1036/99 – *Part Time*, para 24.

29 Case T-177/01, *Jégo-Quéré v. Commission*, [2002] ECR II-2365, para. 51; advocate general *Francis Jacobs*, opinion on case C-50/00 P, *Unión de Pequeños Agricultores*, para. 102.

30 Case C-50/00 P, *Unión e Pequeños Agricultores*, paras. 36-45; Case C-263/02 P, *Jégo-Quéré*, paras. 30-36.

fundamental rights, through references to the ECJ, as required by the ECJ in its case-law[31] remains relevant.

IV. A Charter for the citizens of the Union

To conclude, let me summarise the results of my short and very provisional analysis with three remarks:

1. The difference between the Constitutional Treaty and the Treaty of Lisbon regarding fundamental rights are of minor importance compared to the great impact of the development from the existing Article 6 TEU to the three pillars of fundamental rights referred to in Article 6 TEU-L. Taken seriously, all three pillars: the Charter as a binding instrument, the accession to the European Convention of Human Rights and the reference to the general principles of law as established by the ECJ, together will change the face of the Union fundamentally. The Charter, in particular, explains what the common values referred to in Article 2 TEU-L as the foundation of the Union may really mean. It gives a clear wording and number to each of the rights to be invoked both in the political process and individual actions for judicial review, and with its balance found between liberal rights and solidarity it may even serve as a model for modern instruments designed to protect fundamental rights worldwide.
2. The Mandate and Lisbon have expressly abandoned the 'constitutional concept' as well as all references to the word 'Constitution' and related symbolism of the Constitutional Treaty. But in retaining a reference to the Charter of Fundamental Rights as a legally binding instrument for the European institutions and policies, the Treaty of Lisbon confirms and makes visible the real status and normativity of the European Primary law, as qualified by the case-law of the ECJ:[32] Could there exist a more compelling argument for the constitutional character of a treaty than the guarantee of fundamental rights protecting the citizens against the institutions and their actions based on that treaty? The new reference in Article 6, para. 1 TEU-L underlines that the Treaty establishes a direct legal relationship between the citizens and those

31 See the cases referred to above, notes 29 and 30.

32 Case 294/83 *Parti Ecologist les Verts v. European Parliament* [1986] ECR I-1368; Opinion 1/92, *Agreement onb the Creation of the European Economie Area II* [1992] ECR I-2821.

who are exercising power on their behalf and upon them. I am not aware of any other treaty or international instrument with this specific feature. It does constitute, I submit, the basis of what we call in French terms the *contrat social*.[33]

3. Indeed, fundamental rights and their effective protection are, in some respect, the conditions under which people may agree to entrust institutions with legislative, executive and judicial powers to be exercised upon them in the public interest of the community of which they are the citizens. They are guidelines[34] for the policies to be implemented by the institutions established under the Constitution, and they limit their respective powers in order to ensure that the citizen remains a free and autonomous individual, member of his / her community. In a multilevel system where the Union powers are established as supranational devices, complementary to the national institutions, to meet challenges which may not be met by their national States individually, the need for commonly agreed, visible and clearly defined fundamental rights is even more important. The common values they express also serve as general guidance for the policies implemented by the national and European institutions at the EU level.[35] The European Union Agency for

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33 Finding an english equivalent for example in *John Locke's* "Two Treatises of Government", esp. II § 95 (ch. 8) reading as follows: "Men being, as has been said, by nature, all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby anyone divests himself of his natural liberty, and puts on the bonds of civil society is by agreeing with other men to join and unite into a community, for their comfortable, safe and peacable living one amongst another, in a secure enjoyment of their properties". For the history of the term "*contrat social*" see *Bastid* (1985). For the application to the EU see already: *Pernice / Mayer / Wernicke* (2001) with further references. And for the use of the term "European social contract" see *Weiler* (1995), 439; *Pernice / Kanitz* (2004), 6.

34 For a guideline-function of the french Déclaration des droits (1789) see *Grimm* (2005).

35 For this objective dimension of fundamental rights see: *Pache* (2006); *Pernice* (2000). For the provisions of the EMRK as objective principles see: *Michelman* (2005), 167 *et seq*; referring to the German origin of this view: *Schlink* (1994), and further: *Dreier* (2004).

Fundamental Rights, created in 2007,[36] could monitor their implementation. They are a common fundament of the composed national and European system of governance, and the guarantees they contain are preserving for each citizen the inalienable rights and liberties which allow the individual to lead a decent life and actively participate in the processes at different levels, which frame European policies.

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36 See Council Regulation (EC) No. 168/2007 of 15 February 2007, OJ 2007 L 53/1.

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