
The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?

Gerard Quinn*

Originally an economic union to further market integration, the European Union has gradually and paradoxically become a major force in human rights both within and outside Europe. The author surveys this development, from early inchoate principles in treaties up to the recent *Charter of Fundamental Rights of the European Union*. He argues that the issue of human rights is closely linked to the still-controversial goal of European political integration, and its further development depends on the future direction of that integration.

After the Second World War, different yet complementary approaches to European reconstruction emerged, exemplified by the Council of Europe on the one hand and the European Union on the other. The former's interstate approach augmented existing nation-states on the basis of shared ideals, while the latter's supranational approach used a common economic space to erode national boundaries. As the Union's vision of political integration was gradually realized it drew closer to the human rights principles championed by the Council. During the 1990s this latent convergence became visible, and human rights provided a core instrument for re-legitimizing the economic project by increasing the Union's relevance in ordinary people's lives.

The author concludes by considering the future of the human rights agenda in Europe. Its challenges and changing nature necessitate redefining the relationship between Council and Union towards greater co-operation. These institutions are, in a sense, twin organizations only now beginning to come to terms with each other.

Alors qu'elle constituait à ses débuts une union économique destinée à promouvoir l'intégration des marchés, l'Union européenne est graduellement — et paradoxalement — devenue un acteur important dans le domaine des droits de l'homme, autant en Europe que dans d'autres régions. L'auteur fait état de cette évolution, des premiers principes généraux issus de traités jusqu'à la récente *Charte des droits fondamentaux de l'Union européenne*. Selon lui, la question des droits de l'homme est étroitement liée à l'objectif encore controversé d'une intégration politique européenne et, en conséquence, ses progrès futurs dépendent de l'orientation que prendra cette intégration.

La création du Conseil de l'Europe, d'une part, et de l'Union européenne, d'autre part, illustre les approches différentes quoique complémentaires concernant l'intégration européenne adoptées après la Seconde guerre mondiale. Alors que la première — une approche interétatique — renforçait les états-nations en conformité avec des idéaux communs, la seconde — une approche supranationale — utilisait l'espace économique commun pour estomper les frontières entre les États membres. Le succès du projet d'intégration politique rapprocha graduellement celui-ci des principes relatifs aux droits de l'homme dont le conseil se faisait le promoteur. Cette convergence latente devint visible dans les années 1990, et les droits de l'homme fournirent alors un instrument de base pour légitimer de nouveau le projet d'intégration économique en démontrant la pertinence de l'Union pour la vie quotidienne des citoyens.

L'auteur conclut en abordant l'avenir du programme européen des droits de l'homme. Les nouveaux défis et la nature changeante de ce programme nécessitent une redéfinition de la relation entre le Conseil et l'Union afin de permettre une meilleure coopération. Ces institutions, qui sont en un sens jumelles, ne font que commencer à développer une véritable relation.

* Professor of Law and incoming Dean of the Faculty of Law at the National University of Ireland, Galway; Member of the Human Rights Commission of Ireland.

© McGill Law Journal 2001

Revue de droit de McGill 2001

To be cited as: (2001) 46 McGill L.J. 849

Mode de référence : (2001) 46 R.D. McGill 849

Introduction

I. Backdrop: The “Problem” of the “Nation-State” and the “Solution” of Competing Models of European Integration

- A. *The Nation-State in Europe*
- B. *Augmenting the Nation-State: The Council of Europe and the Human Rights Agenda*
- C. *Eroding the Lines between Nation-States in Limited Sectors: The EU and the Market Integration Agenda*

II. The Slow Rise of Human Rights Doctrine in EU Law

- A. *Early Treaty Articles of Human Rights Resonance*
- B. *The Emergence of General Principles of Community Law in ECJ Jurisprudence*

III. Options for Enhancing the Human Rights Dimension

IV. The 1990s—The Human Rights Issue to the Fore in the EU

- A. *Background: The 1980s Market-Building Agenda*
- B. *Preparing the Ground: Three “Comité des Sages” Reports on Human Rights*
- C. *Report of the Westendorp Reflection Group (1996)*

V. Human Rights and Treaty Changes at Amsterdam (1997)

VI. The *Charter of Fundamental Rights* (2000)

Conclusion

*The Union is not and does not want to be a super-state. Yet it is far more than a market. It is a unique design based on common values. We should strengthen those values ...*¹

Introduction

Unlike the Council of Europe (“Council”), the European Economic Community (“EEC”) was not generally known in the past as a human rights organization and certainly did not see itself as such. Instead, it saw itself as pioneering an historically unique experiment of cross-border economic integration—an experiment that was not obviously or visibly based on high principles such as human rights.

All of this is changing.² In the short space of a decade the European Union (“EU”, “Union”)—since 1992 the successor to the EEC—has become the single largest funder of human rights activities throughout the world.³ Successive waves of treaty revision have led to the accretion of human rights competences at the level of the Union.⁴ The EU presents a common front at major international forums dealing with human rights issues, including the United Nations Commission on Human Rights.⁵ It has a near-global diplomatic reach which, together with its trading prowess on the world stage, enables it to flex its diplomatic and economic muscle to leverage change. Human rights issues now figure prominently in the external relations of the EU and in its development co-operation programs. Since 1999 the EU has begun publishing an Annual Human Rights Report and organizes a large discussion forum with considerable NGO involvement around its publication each year.⁶ The latest and highly visible

¹ *Report of the Reflection Group on the Intergovernmental Conference*, SN 520/95 (1996) at III.

² The leading textbook in the field is P. Alston with M. Bustelo & J. Heenan, eds., *The EU and Human Rights* (Oxford: Oxford University Press, 1999). Most textbooks in the field date from the early 1990s onwards: A. Cassese, A. Clapham & J. Weiler, *Human Rights and the European Community*, 3 vols. (Baden-Baden: Nomos, 1991); N. Neuwahl & A. Roasas, eds., *The European Union and Human Rights* (The Hague: Martinus Nijhoff, 1995); His Honour Judge A. Geddes, *Protection of Individual Rights under EC Law* (London: Butterworths, 1995); M. Colvin, E. Guild & A. Owers, eds., *Judging the European Union: Judicial Accountability and Human Rights* (London: JUSTICE, 1996); L. Betten & N. Grief, *EU Law and Human Rights* (London: Longman, 1998).

³ For a review of the legal basis for these funds and how they were disbursed by the Commission, see *Report from the Commission on the Implementation of Measures Intended to Promote Observance of Human Rights and Democratic Principles in External Relations for 1996-1999*, COM(2000)726 final (Brussels, 14 November 2000).

⁴ See Part IV, below. See also J.H.H. Weiler & S.C. Fries, “A Human Rights Policy for the European Community and Union: The Question of Competences” in Alston, *supra* note 2, 147.

⁵ But see A. Clapham, “Where Is the EU’s Human Rights Common Foreign Policy, and How Is It Manifested in International Fora?” in Alston, *ibid.*, 627.

⁶ *EU Annual Report on Human Rights* (European Initiative for Democracy and Human Rights, 1999), online: Europa (The European Union On-line) <http://europa.eu.int/comm/external_relations/

manifestation of this trend towards human rights in the EU is the adoption of the non-binding *Charter of Fundamental Rights of the European Union*⁷ by the heads of state in December 2000.

This trend could potentially transform the nature of the EU. The Union is increasingly being seen not merely as an economic force, but also as a potential force for good both on the world stage and at home. This trend also bristles with many potential implications—both positive and negative—for the Council of Europe, which is still Europe's premier human rights organization. The implicit repositioning of the Council is quite crucial when one recalls that the membership of the Council (which currently stands at forty-three) sweeps far beyond the existing fifteen Member States of the EU and embraces most of the former communist states of eastern and south-eastern Europe.⁸

The story of the role of human rights in the construction of the EU is complex, ongoing but compelling. It is part history, part politics, and part law. It is intimately tied up with the felt need for a new beginning in the aftermath of the Second World War. It is an ongoing work in progress precisely because the process of European integration has no natural (or at least no agreed) end point.

In this essay I try to come to terms with the place of human rights in the evolving EU legal and political order. I focus on the internal dimension of human rights within the Union as distinct from the human rights dimension of its external relations, development aid, and co-operation, which deserve separate treatment. To do so I first look at how Europe diagnosed its own situation in the aftermath of the Second World War. This is important, for it reveals quite clearly that the founders of unification perceived that Europe's chief problem did not reside in the legacy of centuries of enmity, but lay instead in the political and legal ideal of the nation-state itself. It follows that the main challenge confronting the founders was to find a way (or a plurality of complementary ways) to reconfigure European nation-states to avoid internal repression and external aggression—two goals that are not unrelated.

human_rights/doc/report_99_en.pdf>; *European Union Annual Report on Human Rights* (Council and Commission, Paris, December 2000), online: Europa (The European Union On-line) <http://europa.eu.int/comm/external_relations/human_rights/doc/report_00_en.pdf>. The proceedings of a Discussion Forum organized around the First Report of 1999 have also been published. See *Conference Report—EU Human Rights Discussion Forum* (30 November, 1 December 1999), online: Euro-Mediterranean Human Rights Network <http://www.euromedrights.net/english/Download/conferencereport_EUDiscussionForum.pdf> (date accessed: 16 July 2001).

⁷ 18 December 2000, [2000] O.J. C. 364/1 [hereinafter *Charter*].

⁸ On the dramatic events of the 1990s that led to the spectacular and controversial rise in membership of the Council of Europe, see D. Huber, *A Decade Which Made History: The Council of Europe 1989-1999* (Strasbourg: Council of Europe, 1999).

This theme of the place of the nation-state reverberates through the decades since 1945. Even now Europe seems to have the greatest of difficulties in addressing the core question of whether the modern idea of Europe is larger than the nation-state or whether it is built on—and ultimately bounded by—the nation-state. This seemingly theoretical issue is not merely interesting in its own right, but also holds the key to understanding the place of human rights in the evolving EU legal order. To many the growth of human rights in EU law signifies a trend towards greater European federalism—a trend that can be applauded or deplored depending of course on the political view one takes of the nature of European integration.

I then recount the various attempts through the decades to enhance the visibility and role of human rights in the EU legal order. As is well known, the original EEC was grounded on a particular model of integration (“functionalist integration”) that did not obviously rest on principles of human rights.⁹ Nevertheless, it was equally plain that the ultimate—if frustratingly unarticulated—object of functionalist integration was quintessentially political in character, and therefore cohered very well indeed with high principles of human rights. To a certain extent, those who have consistently argued for greater prominence for human rights in EU law and policy have tended to focus on this end goal of political integration—an end goal that is fatally incomplete without human rights. Those who have argued against greater provision for human rights in the EU have often done so on the basis that it fits only too well with a proto-federation.

Last, I take a look at the process for reform underway within the EU. Perhaps surprisingly, most of the practical steps taken towards further provision for human rights in the early days were taken by the European Court of Justice (“ECJ”). The movement for greater human rights visibility now seems irresistible, and has been described as a train that has left the station but with no obvious destination.¹² I will conclude by reconsidering the complementarity of the Council of Europe and the European Union generally and specifically in the field of human rights.

I. Backdrop: The “Problem” of the “Nation-State” and the “Solution” of Competing Models of European Integration

To understand the “fit” of human rights with EU law it is first necessary to reflect on the nature of European integration. This process is both reactive and proactive. It is reactive in the sense that integration reacts against the excesses of the nation-state—excesses that were perceived to contribute to the slide towards war. It is proactive in the sense that it conjures up an image of a Europe that can transcend its parts.

⁹ See generally B. Rosamond, *Theories of European Integration* (New York: St Martin's Press, 2000) at 31ff.

¹⁰ P. Alston, Address (EU Annual Human Rights Discussion Forum, December 1999).

A. *The Nation-State in Europe*

To start our analysis with the nation-state may seem strange. It is important to recall, however, that there was a real feeling in Europe in the late 1940s that Europe needed to become once again greater than the sum of its parts. Much of the blame for the catastrophe of the Second World War was laid at the foot of the traditional nation-state.

Indeed, in the context of European history the state itself is a relatively recent legal ideal, emerging from the implosion of the feudal legal order throughout Europe from the seventeenth century onwards.¹¹ Its chief characteristic is that, unlike the situation under feudalism, power or sovereignty was reconceptualized as focussed and concentrated in one core entity within the polity. This concentration of power tempted potentates who were formerly the notional rulers of their fiefdoms to arrogate power and to wield it absolutely. The great constitutional struggles against this absolutism led eventually to the liberal (and latterly the liberal-democratic) revolution. Rather than seeking to put the clock back and to diffuse power among the dispersed feudal rankings, the liberal revolution accepted the concentration of power (and sovereignty) but sought instead to legitimate it on a new political theory—one that rested at least ostensibly on the rights and interests of the person. A cordon sanitaire between the person and the state emerged in the distinction between the public and the private. It is important to understand that this buffer sanitized the use of public power and also created space for civil societies to emerge and for market economies to consolidate.

By way of contrast, concepts of the nation are ancient. It is possible to think of nations as culturally, ethnically, or linguistically distinct.¹² Nations were scattered across Europe before and during the feudal period. Potentates generally ruled over parts of several nations and could often be “foreign” themselves. In other words, there was no automatic assumption that the political community should congeal around a single homogeneous nation. It was the commingling of the state with the nation that in time led to the notion that the best or most enduring political community should be one that is defined ethnically. The high point of the European nation-state was reached during the nineteenth century.

The nation-state itself was felt in the late 1940s to be the core problem of Europe. Why? First, it explicitly restricted membership of the political community along the lines of ethnicity. It is, of course, never possible to carve out discrete political communities along purely ethnic lines. The inevitable presence of presumptively disloyal

¹¹ See C. Tilly, “Reflections on the History of European State-Making” in C. Tilly, ed., *The Formation of National States in Western Europe* (Princeton, N.J.: Princeton University Press, 1975) 3.

¹² See J.A. Armstrong, *Nations before Nationalism* (Chapel Hill, N.C.: The University of North Carolina Press, 1982). On cultural nationalism see R.R. Ergang, *Herder and the Foundations of German Nationalism* (New York: Columbia University Press, 1931) at 85-90, 115ff.

national minorities was itself felt to be a major contributing factor to the slide towards war. The problem was a theory of state that did not make space for the presence of difference. Second, the burgeoning markets that the nation-state cultivated and protected were deflected away by protectionist measures towards Africa and the exploitative process of colonization. This only meant that conflict took place at one geographical remove from European soil, and it was only a matter of time before it returned to Europe. A better form was needed to channel economic activity for the benefit of all. Third, within the nation-states themselves the constant threat (or perceived threat) of outsiders lent credence to arguments that authoritarian forms of government were “temporarily” needed to maintain a high state of readiness. Absolute notions of sovereignty and associated notions of non-interference in internal matters created a barrier that concealed iniquity and worse from the outside world. The whole system appeared permanently set on a bloody collision course.

It was plain that something had to be done—and not just because President Truman and Secretary of State Marshall, to their credit, demanded some gesture of reconciliation and unity as a condition for Marshall aid.” Europe had travelled a long way from the common citizenship of the Roman Republic and even from the *Respublica Christiana*. Europe needed to retrieve that which united it and not what divided it. Thinkers and writers of the time were mindful that Europe had a more civilized past and that a better future could be imagined. Altiero Spinelli and Ernesto Rossi issued their famous Ventotene Manifesto in 1941, which asserted, among other things, that the principle of non-intervention in the internal affairs of nation-states had only led to a (false) freedom for each population to choose its own form of despotic government “as if the constitution of each of the single states were not a question of vital interest for all other European nations.”¹³

These writers caught the imagination of political giants. Winston Churchill added immense impetus to the European movement by calling explicitly for a “United States of Europe” in a speech at the University of Zurich in 1946. He asked rhetorically “why should there not be a European Group which could give a sense of enlarged patriotism and common citizenship” and which could take its rightful place in the world. He spoke of the establishment of a Council of Europe as a “first step”.¹⁴

It is important to realize that two radically different paths towards European integration were pursued from the late 1940s. One path, exemplified by the Council of Europe, sought to avoid the excesses of nation-states and the tendency towards self-

¹³ See generally D. McCullough, *Truman* (New York: Simon & Schuster, 1992) at 562-65.

¹⁴ A. Spinelli & E. Rossi, “The Ventotene Manifesto” in B.F. Nelson & A.C.-G. Stubb, *The European Union: Readings on the Theory and Practice of European Integration*, 2d ed. (Boulder, Colo.: Lynne Rienner Publishers, 1998) 3 at 5.

¹⁵ W.S. Churchill, “The Tragedy of Europe” in *ibid.*, 7 at 9.

destruction. It did so by placing a floor beneath which they would not be allowed to fall. This floor was composed of common European standards of human rights. The other path, pursued by the EEC, represented an altogether different model of integration—one that focussed on taming and harnessing economic forces. The unity it sought was a unity of mutually interlocking self-interest—not a unity of shared values.

B. Augmenting the Nation-State: The Council of Europe and the Human Rights Agenda

The “first step” set out by Churchill was taken by the establishment of the Council of Europe in 1949.¹⁶ In purely formal terms the Council of Europe is a classical interstate organization.¹⁷ It offers an interstate forum within which to conclude conventions and it can also adopt softer instruments such as recommendations to guide the policies of its Member States.

The Council of Europe is different, however, from more classical interstate organizations in that it exists not merely to provide a forum for its Member States, but also to pursue a mission of its own with respect to those states. This mission is predicated on the theory first announced by Spinelli that the internal constitutional arrangements of its Member States are not merely of internal concern but also implicate all of Europe. Although it accepts existing nation-states that were built on theories of ethnicity, it seeks to identify and “enforce” a new pan-European ethics—one based on human rights.¹⁸ That is, it insists on the notion of a common European public morality—one that all peoples can subscribe to regardless of their ethnicity.

At least a dozen or so conventions out of the current total of 178 concluded by the Council of Europe deal with a variety of human rights issues. The most famous of these is the *Convention for the Protection of Human Rights and Fundamental Freedoms*.¹⁹ The debates surrounding the drafting of the *ECHR* are revealing. It was plain

¹⁶ *Statute of the Council of Europe*, 5 May 1949, 87 U.N.T.S. 103.

¹⁷ See generally V. Hurd, *The Council of Europe: Design for a United States of Europe* (New York: Manhattan Publishing, 1958); A.H. Robertson, *The Council of Europe: Its Structure, Functions and Achievements* (London: Stevens and Sons, 1961).

¹⁸ The *Statute of the Council of Europe*, *supra* note 16, art. 1(a) [emphasis added], states the statute's core objective as follows:

The aim of the Council of Europe is to achieve a greater unity between its Members for the purpose of safeguarding and realizing the *ideals and principles which are their common heritage* and facilitating their economic and social progress.

¹⁹ 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 [hereinafter *ECHR*]. For works on the *ECHR* see generally F.G. Jacobs & R.C.A. White, *The European Convention on Human Rights*, 2d ed. (Oxford: Clarendon Press, 1996); P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Hague: Kluwer Law International, 1998); C.A. Gearty, ed., *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (The Hague:

that the intention of the framers was to protect certain core rights that honoured individual dignity and autonomy. But it was equally plain that a more “instrumental” intention was at play—namely, that by protecting such rights the *ECHR* mechanism could also lay the foundations for a particular kind of political community founded on liberal-democratic principles.²⁰ The faith behind this form of instrumentalism was (and is) that by preserving a particular form of governance, human rights will be spontaneously honoured. Hence the much vaunted (but often overstated) symbiotic relationship between democracy and human rights. Hence also the obvious connection between international guarantees of human rights and the maintenance of peace between nations.

The European Court of Human Rights in Strasbourg has jurisdiction over the interpretation of the *ECHR* and can hold Member States in violation. The Court (along with other treaty-monitoring mechanisms within the Council of Europe) provides a mechanism for peering behind the lines that divide Europe’s nation-states, and it enables a detached and independent entity to arbitrate disputes within Member States (and exceptionally between them). But the important point is that this mechanism leaves intact those lines between nation-states. Member States are free to ratify Council of Europe conventions or not, as the case may be. They can make derogations within reason from obligations arising under Council of Europe conventions. *In extremis*, a Member State may withdraw from the Council of Europe if it feels unable or unwilling to comply with rulings from the European Court of Human Rights. All of this underscores the interstate and voluntaristic nature of the Council of Europe.²¹

C. Eroding the Lines between Nation-States in Limited Sectors: The EU and the Market Integration Agenda

The model of integration pursued by the EEC/EU is strikingly different.²² Whereas the Council of Europe leaves the lines between nation-states intact, the whole purpose of the EEC/EU is to erode those lines. This process of erosion is not,

Martinus Nijhoff, 1997); D.J. Harris, M. O’Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995).

²⁰ See the following revealing extracts from the remarks of Mr. Ungoed-Thomas: “What we are concerned with is not every case of injustice which happens in a particular country, but with the question whether a country is ceasing to be democratic”; “Have those freedoms, give effect to those freedoms, and you will ensure that each State remains democratic!” See Council of Europe, *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights*, vol. 2 (The Hague: Martinus Nijhoff, 1975) at 166, 60.

²¹ This should not be overstated, since the political cost of remaining recalcitrant can be prohibitive. In this respect the mobilization of shame and the use of “soft power” can be just as effective as the use of direct legal sanction.

²² See generally P. Craig & G. de Búrca, eds., *The Evolution of EU Law* (Oxford: Oxford University Press, 1999).

of course, wholesale, or at least it did not start out as wholesale. The founders of the EU decided to stay away from high politics and to concentrate instead on the integration of limited but important cross-border economic sectors. The theory rests on the depressing but successful insight that people (and nations) co-operate best when they calculate such co-operation to be in their own self-interest. In comparative terms, it is at least worthy of note that the main impulse behind the movement away from a confederate to a federal constitution in the United States was the problem of regulating interstate commerce.²³ In the U.S. it was problems of interstate commerce that led to moves for greater political unity. In the EEC it was the need for greater political unity that led to an initial focus on integrating interstate commerce.

In a speech in May 1950, Robert Schuman, foreign minister of France, put forward a profoundly influential thesis. He asserted that "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity."²⁴ A first start was made in the coal and steel industry.²⁵ This sector was symbolically important because it showed a commitment on the part of nation-states to place the means of waging war beyond their own exclusive control. To ensure that the sector would continue to be animated by common goals rather than national interests, a novel supranational institution was inaugurated—the High Authority for Coal and Steel. This reveals in turn a commitment to the notion of an identifiable European public interest separable from the interests of the nation-states and that can best be secured by supranational institutions. To this day the European Commission embodies that supranational faith and ideal.²⁶

The European Coal & Steel Community ("ECSC") experiment was successful. Jean Monnet, who was a French civil servant and diplomat, persuaded Robert Schuman to take the next logical step and to propose a new entity that was to become the EEC. In a famous speech Monnet asserted that

[t]he Europeans had to overcome the mistrust born of centuries of feuds and wars. The governments and peoples of Europe still thought in the old terms of victors and vanquished. Yet, if a basis for peace in the world was to be estab-

²³ For a review of the debates that led to the convention in Philadelphia, see generally B.J. Hendrick, *Bulwark of the Republic: A Biography of the Constitution* (Boston: Little, Brown & Co., 1937). "The cradle of the American Constitution was ... the home of Washington, and the chief impelling purpose that led to this new form of government was the necessity of regulating commerce" (*ibid.* at 11). For further comparative perspectives on federalism, see M. Tushnet, ed., *Comparative Constitutional Federalism: Europe and America* (New York: Greenwood Press, 1990).

²⁴ R. Schuman, "The Schuman Declaration" in Nelson & Stubb, *supra* note 14, 13 at 14.

²⁵ *Treaty instituting the European Coal and Steel Community*, 18 April 1951, 261 U.N.T.S. 140 (Treaty of Paris).

²⁶ See generally M. Cini, *The European Commission: Leadership, Organisation and Culture in the EU Administration* (Manchester: Manchester University Press, 1996) at 13ff.

lished, these notions had to be eliminated. *Here again, one had to go beyond the nation and the conception of national interest as an end in itself.*²⁷

The *Treaty of Rome*²⁸ established the EEC. The main aim of the EEC was to ensure economic and social progress “by common action in eliminating the barriers which divide Europe.”²⁹ More and more sectors of the national economies were henceforth to be integrated into a “common market”. The Euratom treaty was also signed in 1957,³⁰ which with the ECSC and EEC made three “communities” in all. In 1965 a merger treaty—the *Treaty establishing a single council and a single commission of the European communities*³¹—merged the High Authorities of the three communities.

Market integration in the EEC was to be advanced by conferring “four freedoms”: free movement of workers,³² the right of establishment,³³ free movement of capital,³⁴ and the right to provide services.³⁵ It is of course possible to view the four freedoms listed above from the perspective of human rights theory and doctrine. But the reality is that they were granted because of their purely instrumental value in helping to forge a new common market. Hence an accident of history tends to have the effect of telescoping principles of more general import. The Community acts through Regulations that are directly effective and Directives which may have direct legal effect.³⁶

Through the project of constructing a common market, it was felt (or hoped) that the EEC model would lead to more avowedly political integration in two ways. First, any common market requires common efforts at maintaining and stabilizing it. Purely national rules would not do, since there was always the standing danger that such laws would reflect purely national interests and not a common European public interest. Second, all markets have impacts that require regulation. Effective regulation inevitably entails a common approach—something that can only be achieved through more political integration. Hence it was hoped at least in some quarters that there would be

²⁷ J. Monnet, “A Ferment of Change” in Nelson & Stubb, *supra* note 14, 19 at 21-22 [emphasis added].

²⁸ *Treaty establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 11 [hereinafter *EEC Treaty*].

²⁹ *Ibid.*, Preamble.

³⁰ *Treaty establishing the European Atomic Energy Community*, 25 March 1957, 298 U.N.T.S. 167.

³¹ 8 April 1965, [1967] O.J. 152.

³² *Consolidated Version of the Treaty establishing the European Community*, 10 November 1997, [1997] O.J. C. 340/3, 37 I.L.M. 79, arts. 39-42 [hereinafter *EC Treaty*]; *EEC Treaty*, *supra* note 28, arts. 48-51. Subsequent references in connection with the *EC Treaty* to former article numbers refer to the treaty prior to amendments effected by the *Treaty of Amsterdam*, *infra* note 73.

³³ *EC Treaty*, *ibid.*, arts. 43-48 (formerly arts. 52-58).

³⁴ *Ibid.*, arts. 56-60 (formerly arts. 67-73).

³⁵ *Ibid.*, arts. 49-55 (formerly arts. 59-66).

³⁶ *Ibid.*, art. 249 (formerly art. 189).

a natural spillover from the exigencies of economic integration into an unstoppable dynamic for political integration.

Note the contrast with the Council of Europe. Unlike conventions and recommendations, the legal tools of the EEC (Regulations, Directives) were designed and intended to override national law (even national constitutional law) and therefore erode the lines between nation-states. The veil of national sovereignty is not just pierced but lifted. This was made palatable by applying this lifting of the veil only to discrete areas of economic activity. But as the expected spillover effect began to materialize, the lifting of the veil became increasingly political, and therefore much more problematic.

At a deep level, it could be said that human rights were always necessarily implicated by the theory of functionalist integration. If one extrapolates from the economic focus of the project, it is fairly plain that the ultimate form of political integration envisaged could sit well with principles that were common to the Member States, including respect for human rights. Hence it could be argued—and often is—that the Council of Europe and the European Union share the same ultimate goal of a Europe at peace with itself and its neighbours.

Yet, crucially, the original treaties did not spell out this vision, and understandably so, since these treaties focussed in the main on means (especially economic means) rather than ends. This fixation on economic means (and the legal tools needed to effectuate them) rather than on grand political ends allowed those who held diametrically opposed visions of the ultimate ends of European integration to sign up together to the technocratic process of economic integration. In other words, the fixation on economic means allowed those countries that viewed Europe as a transcendent ideal and those countries that viewed Europe as founded on (and bounded by) the nation-state to contribute equally to the economic experiment.

The argument between these competing visions of Europe provides the prism through which human rights are viewed in an EU context. The argument for more visible human rights provision in EU treaty law fits perfectly with the march towards greater political integration and the movement towards a federal Europe. But herein lies the problem. Precisely because of the neatness of the fit, many who favour a Europe of the nations argue against more human rights provision because it would entail ceding more sovereign power to the Institutions of the Union to pry (at least potentially) into purely domestic affairs. Instead, they tend to argue for continued reliance on Council of Europe mechanisms.

II. The Slow Rise of Human Rights Doctrine in EU Law

Despite the originally narrow economic focus of the EEC, a human rights dimension was gradually developed by the ECJ. Indeed, the original EEC treaty did contain a few weak trace elements of a concern for human rights, although they were not thought of as such at the time.

A. *Early Treaty Articles of Human Rights Resonance*

Article 12³⁷ forbids discrimination on the basis of nationality. It was inserted to ensure that a common market in labour could emerge. Although it is possible to think of it in terms of non-discrimination on the grounds of nationality and ethnic origin, it was not looked on thus. Article 141³⁸ forbids discrimination on the basis of gender with respect to equal pay for equal work. It was inserted to ensure that French social standards would not be diluted by membership in the common market. Although this could theoretically be put under the rubric of equality between the sexes, it was inspired more to preserve social advantage in France. Indeed, to this day there are many who argue that “equal opportunities” is a term reserved exclusively for gender in EU law and policy. That is more a result of history than logic.

The early focus on equality in the *EC Treaty* (or on instances of the application of the equality idea) is interesting for two reasons. First, its mere presence inspired agitation to broaden and deepen it to apply to other groups (*e.g.* persons with disabilities) and in contexts outside the purely economic. Second, it supports the thesis that equality is not merely a civilizing factor worth having for itself, but is also a productive factor in advanced market economies. Articles 136 to 145³⁹ set out EC competences in the field of social policy. It is important to bear in mind the reality that we are here dealing with the social dimension of one peculiar kind of market—namely a cross-border market—and not with the full plenitude of social policy as understood domestically.⁴⁰

B. *The Emergence of General Principles of Community Law in ECJ Jurisprudence*

Notwithstanding the weak provision for human rights in the treaties, the ECJ felt obliged to develop a rich jurisprudence in this field almost from the start. This jurisprudence is important because it was eventually formalized in treaty law and because it has always emboldened those who seek more human rights provision in the EU.

The key to this jurisprudence lies in a consideration of the exigencies of market building. Building a common market requires common rules and institutions that are sufficiently removed from the national scene to be capable of comprehending the European public interest. The ECJ is the ultimate interpreter of the treaties.⁴¹ Perhaps surprisingly, the treaties did not contain any assertion of the supremacy of Community

³⁷ *Ibid.* (formerly art. 6).

³⁸ *Ibid.* (formerly art. 119).

³⁹ *Ibid.* (formerly arts. 117-28).

⁴⁰ See generally T. Hervey, *European Social Law and Policy* (London: Longman, 1998).

⁴¹ *EC Treaty*, *supra* note 32, art. 220 (formerly art. 164).

law over national law. Yet the supremacy of Community law is vital in maintaining the integrity of the market-building endeavour. If each nation-state were allowed to define and implement Community law as it wished, then the standing danger would arise that it might interpret such laws in a self-serving manner.

Hence the ECJ fashioned the notion of the supremacy of Community law,⁴² which can take precedence over domestic constitutions as well as over positive domestic law. At one level this is fully in keeping with Article 27 of the *Vienna Convention on the Law of Treaties*,⁴³ to the effect that states cannot plead the content of their own constitutions as an excuse for not implementing international obligations which they have freely chosen. But it goes further. It enables provisions in domestic constitutions that are at odds with EC/EU law to be set to one side.

This innocuous-sounding doctrine of the supremacy of Community law led to a revolution of sorts among the constitutional courts of Europe.⁴⁴ If Community law were truly supreme, then the hard-won constitutional norms on human rights could theoretically be set at naught and overridden by Community law to the contrary. I say theoretically because of course the competences of the Community were generally in the pure economic field where the opportunities for an interface, let alone a clash, with human rights were minimal. Yet these opportunities were real enough, at least in principle, to impel some of the national constitutional courts to announce that they would pronounce on the validity of Community law within their jurisdiction and having sole regard to the terms of their own constitutions.⁴⁵ This would have halted the doctrine of the supremacy of Community law dead in its tracks with profoundly negative implications for the integrity and coherence of the process of economic integration.

The ECJ had to react somehow to salvage the doctrine of the supremacy of Community law. It did so by placing limits on the outer bounds of that law. In a long line of cases commencing in 1969 with *Stauder v. Ulm (City of)*,⁴⁶ the Court an-

⁴² The classic statement on supremacy is contained in *Reference for a preliminary ruling under Article 177 of the EEC Treaty made by the Tariefcommissie, Amsterdam, on 16 August 1962 in the proceedings between N.V. Algemene Transport—en Expeditie Onderneming van Gend & Loos and Nederlandse administratie der belastingen (Netherlands Inland Revenue Administration)*: “[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields” (C-26/62, [1963] E.C.R. 1 at 12, [1963] 2 C.M.L.R. 105).

⁴³ 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980).

⁴⁴ See M. O’Neill, “Fundamental Rights and the European Union” in G. Quinn, ed., *Irish Human Rights Yearbook* (Dublin: Sweet & Maxwell, 1995) 67.

⁴⁵ See generally *ibid.*

⁴⁶ *Stauder v. Ulm (City of), Sozialamt (Reference for a preliminary ruling by the Verwaltungsgericht Stuttgart)*, C-29/62, [1969] E.C.R. 419, [1970] C.M.L.R. 112.

nounced that these limits were not to be found in the treaties, but instead in the “general principles of Community law”. The classic statement of the formula is contained in the ECJ’s judgment in *Internationale Handelsgesellschaft*:

[R]espect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.⁴⁷

The judgment of the Court in the *Nold* case of 1974 was to the effect that cognizance could be taken of international conventions to which the Member States were party.⁴⁸ This includes the *ECHR*. General principles of Community law (including human rights) can be used to challenge the validity of Community law and of national measures of transposition under certain restrictive conditions of standing.⁴⁹ They cannot be invoked to challenge the validity of purely domestic law. It has to be remembered that the Member States are each individually answerable to the Council of Europe system in Strasbourg for their purely domestic law.

Among the rights recognized and enforced by the ECJ under this jurisprudence are freedom of expression,⁵⁰ freedom of association,⁵¹ the right to religion,⁵² the right to property,⁵³ the right to privacy,⁵⁴ and the right to pursue a business.⁵⁵ The interpretation put on these rights by the ECJ did not always accord with the precedents of the European Court of Human Rights in Strasbourg.⁵⁶ Notwithstanding the difficulties of *locus*

⁴⁷ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Reference for a preliminary ruling by the Verwaltungsgericht Frankfurt), C-11/70, [1970] E.C.R. 1125 at 1134, [1972] C.M.L.R. 255 [hereinafter *Internationale Handelsgesellschaft*].

⁴⁸ *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission*, C-4/73, [1974] E.C.R. 491, [1974] 2 C.M.L.R. 338 [hereinafter *Nold*].

⁴⁹ For an exceptionally clear account and evaluation of the case law, see generally B. de Witte, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights” in Alston, *supra* note 2, 859.

⁵⁰ *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* (Reference for a preliminary ruling from the Monomeles Protodikeio (Regional Court) Thessaloniki), C-260/89, [1991] E.C.R. I-2925.

⁵¹ *Union Royale Belge des Sociétés de Football Association ASBL and Others v. Jean-Marc Bosman and Others* (Reference for a preliminary ruling from the Cour d’Appel, Liège), C-415/93, [1995] E.C.R. I-4921, [1996] 1 C.M.L.R. 645.

⁵² *Prais v. Council*, C-130/75, [1976] E.C.R. 1589, [1976] 2 C.M.L.R. 708.

⁵³ *Nold*, *supra* note 48.

⁵⁴ *National Panasonic (UK) v. Commission*, C-136/79, [1980] E.C.R. 2033, [1980] 3 C.M.L.R. 169.

⁵⁵ *Regina v. Kent Kirk* (reference for a preliminary ruling from the Crown Court at Newcastle-upon-Tyne), C-63/83, [1984] E.C.R. 2689, [1984] 3 C.M.L.R. 522.

⁵⁶ See generally D. Spielmann, “Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities” in Alston, *supra* note 2, 757. See also I.

standi, the case law is of huge symbolic importance. In jurisprudential terms, it links the Community legal order to high principles, even though these principles are not self-evidently provided for in the text of the treaties. This underscores the point that an economic community cannot be completely divorced from a broader community—one based on shared values.⁵⁷

III. Options for Enhancing the Human Rights Dimension

From early on it was clear that a gap had arisen in the coverage of human rights. On the one hand, each Member State was bound by the *ECHR* and answerable to the European Court of Human Rights in Strasbourg. On the other hand, the Institutions of the Community were bound by loose principles of Community law that were even more loosely inspired by the *ECHR*. And, as intimated in the formula contained in *Internationale Handelsgesellschaft*, it was unclear whether the chief departure point for the ECJ in the interpretation of such general principles was the “objectives of the Community” or human rights as inspired by the *ECHR*.⁵⁸

Clearly, doing nothing was not an option, since the ECJ had already signalled that there was a human rights dimension to the EC/EU. Indeed, the Institutions had also signalled their enthusiasm for this jurisprudence through soft law.⁵⁹

Many felt—and continue to feel—that the most viable option to enhance human rights provision in EU law lay in the ratification by the EC/EU of the *ECHR*. Many modalities are possible—including the possibility of the ECJ requesting advisory opinions from the European Court of Human Rights. This option would have ensured uniformity in the interpretation of the human rights obligations as between the Member States and the Institutions of the Community. It would have required some technical changes to the *ECHR* to enable an international institution (as distinct from a state) to ratify the convention. These technicalities were never the problem. The problem was—and is—that ratification would have meant that the Community would be bound by the rulings of the European Court of Human Rights, and so one international organization would have to surrender or share sovereignty with another. In any event, this debate was rendered academic in 1996, when the ECJ ruled in an advisory

Canor, “*Primus inter Pares*. Who Is the Ultimate Guardian of Fundamental Rights in Europe?” (2000) 25 *Eur. L. Rev.* 3.

⁵⁷ See the debate about the significance of this jurisprudence: J. Coppel & A. O’Neill, “The European Court of Justice: Taking Rights Seriously?” (1992) 29 *C.M.L. Rev.* 669; J.H.H. Weiler & N.J.S. Lockhart, “Taking Rights Seriously: The European Court and Its Fundamental Rights Jurisprudence” (1995) 32 *C.M.L. Rev.* 51 & 579.

⁵⁸ *Supra* note 47.

⁵⁹ EC, *Joint Declaration by the European Parliament, The Council and The Commission*, [1977] O.J. C. 103/1.

opinion that it would be beyond the competence of the Community to ratify the *ECCHR* absent treaty changes.⁶⁰ So far, no such treaty changes have been proposed.

Another option might involve the drafting of a Bill of Rights for the Union and giving it legal status by adding it to the treaties. This option has the merit of logic and clarity. It suffers, however, through its close connection with federalism. It is fairly plain that the addition of this Bill of Rights would go a long way towards openly acknowledging an evolving EU constitutional order. At some point, the equivalent to the Fourteenth Amendment to the U.S. Constitution would have to be considered, which would turn the content of the Bill of Rights around and make it effective against the Member States as well as against the Institutions of the Union. For the moment this option is not being pushed, but it will probably be revived when the Union gets around to debating whether the treaties need to be crunched down into a single coherent document that will partake of the form of a nascent constitution.⁶¹

Yet another option would involve making explicit what is already implicit—namely, that only those states that adhere to human rights are eligible for entry into and participation in the Union. This could be coupled with adding piecemeal protection of certain kinds of rights—rights that serve directly to enhance the legitimacy of market building. Equality and non-discrimination are the obvious examples. These options have now been used.⁶²

A last option entails the drafting of a non-binding declaration on human rights in the Union. In fact, such a charter was adopted by way of solemn proclamation as recently as December 2000.⁶³ It is not clear how this will materially advance respect for human rights in the Union apart from providing a focal point.

IV. The 1990s—The Human Rights Issue to the Fore in the EU

The question of the status of human rights within the EC/EU simmered away throughout the 1980s and finally reached the top of the political agenda in the 1990s.

⁶⁰ *Opinion Pursuant to Article 228(6) of the EC Treaty (Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms)*, Opinion 2/94, [1996] E.C.R. I-1759. For commentary see G. Gaja, "Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms" *Case Comment* (1996) 33 C.M.L. Rev. 973; A.G. Toth, "The European Union and Human Rights: The Way Forward" (1997) 34 C.M.L. Rev. 491.

⁶¹ This is not as fanciful as it seems. See European Parliament, *What Form of Constitution for the European Union?* (Working Paper) (Political Series, Poli 105A EN) (December 1999). See also "Our Constitution for Europe" *The Economist* 357:8194 (28 October 2000) 11 (which issue contains a draft constitution for the EU at 17).

⁶² See Part V, below.

⁶³ See *supra* note 7; Part VI, below.

The reason has less to do with human rights as such and more to do with a crisis of confidence in the integration process itself.

A. Background: The 1980s Market-Building Agenda

In the 1980s most effort was focussed on making economic and monetary union a reality. To that end a new treaty with the misleading title of the *Single European Act*⁶⁴ was concluded in 1986. Most of this convention was taken up with political and economic issues. The preamble to the *SEA* genuflected to human rights: "Aware of the responsibility incumbent upon Europe ... to display the principles of democracy and compliance with the law and with human rights to which they are attached ..."⁶⁵ The European Commission under Jacques Delors had managed to persuade the heads of state to adopt a non-binding *Community Charter of the Fundamental Social Rights of Workers*⁶⁶ in December 1989. As befits its title, this document focussed chiefly on the economic and social rights of workers. It did not have any legal status as such, but was probably intended by Delors to provide the basis for negotiating comparable legal provisions in the treaties. When the *Treaty on European Union*⁶⁷ was being negotiated in the early 1990s, it was clear that at least one Member State (the U.K.) would not agree to enhanced provision for social rights in the treaties. Instead, eleven out of the twelve Member States agreed to a separate protocol whereby they would use the Institutions of the Community (now Union) to adopt measures under a social agreement to have effect only as between themselves. This was very sparingly used to avoid a two-speed social Europe.

The *Maastricht Treaty* gave birth to the EU, which is comprised of three pillars: the EC, common foreign and security policy, and justice and home affairs. The latter two pillars are purely intergovernmental in character, while only the first is fully supranational. The treaty set in train the process for full economic and monetary union. A feeble effort was made in the *Maastricht Treaty* to embrace the jurisprudence of the ECJ on human rights,⁶⁸ but this did no more than acknowledge formally the long-standing jurisprudence of the ECJ. Furthermore, and for the avoidance of doubt, Article L made it plain that Article F(2) was non-justiciable.⁶⁹

⁶⁴ [1987] O.J. L. 169/1, [1987] 2 C.M.L.R. 741 [hereinafter *SEA*].

⁶⁵ *Ibid.*, Preamble.

⁶⁶ EC, Commission, *Community Charter of the Fundamental Social Rights of Workers* (Luxembourg: EC, 1990).

⁶⁷ 7 February 1992, [1992] O.J. C. 224/1, 1757 U.N.T.S. 3, [hereinafter *Maastricht Treaty*], now *Consolidated Version of the Treaty on European Union*, [1997] O.J. C. 340/2, 37 I.L.M. 67 [hereinafter *TEU*].

⁶⁸ See text accompanying note 83.

⁶⁹ *Maastricht Treaty*, *supra* note 67.

The ink was barely dry on the *Maastricht Treaty* when a clamour arose among Europe's peoples that the EU was woefully out of touch with the concerns of the common person. The fixation on further and deeper economic and monetary union suggested an enterprise obsessed with markets over people. The dream of a European Union felt like a nightmare to those who had long felt estranged from an endeavour that showed little direct concern for the problems that affected them. Long-term unemployment in particular was high at the time, and yet the EU seemed uninterested. Denmark voted against adoption of the treaty, and only voted for it once certain opt-outs were given in respect of economic and monetary union. France almost voted against it. In short, the very legitimacy of the market-building project was put at issue.

That something more had to be done to revive the legitimacy of the process of integration was clear. From the early 1990s onwards, the Euro elites began talking openly about the construction of a "People's Europe"—one whose relevance to the lives of ordinary people was plain. Human rights became part of that mantra. It is hard to know whether this new-found interest in human rights was purely instrumental in the sense of reviving the legitimacy of the integration endeavour, or whether it had other more honourable wellsprings. Regardless of its provenance, it was real and inspired the NGO community (which had been curiously dormant at the EU level) to begin agitating for treaty revisions to make human rights more central and visible.⁷⁰ They did not have long to wait for an opportunity to ventilate their arguments—Article N(2) of the *Maastricht Treaty* required yet another intergovernmental conference ("IGC") to revise the treaties in 1996.⁷¹

B. Preparing the Ground: Three "Comité des Sages" Reports on Human Rights

Meanwhile, and mindful of the need to do something and to be seen as doing something in the field of human rights, the European Commission convened three separate *comités des sages* to reflect on the future of human rights in the EU. Interestingly, they came to different conclusions as to the best way forward.

The first of these groups reported in February 1996.⁷² This group, which was chaired by Mme Pintasilgo, favoured the drafting of an enforceable Bill of Rights to

⁷⁰ For a review of the views of NGOs and the Member States during the period leading up to the adoption of the *Treaty of Amsterdam*, *infra* note 73, see G. Quinn, "The Drafting of the EU Charter on Human Rights—Issues and Perspectives" in U.K., H.L., Select Committee on European Union, *EU Charter of Fundamental Rights* (HL Paper 67) (London: The Stationery Office, 2000) 161 at 172-74.

⁷¹ *Supra* note 67.

⁷² EC, *For a Europe of Civil and Social Rights—Report by the Comité des Sages* (Luxembourg: EC, 1996). The group's members were Maria de Lourdes Pintasilgo (chair), Eduardo García de Enterría, Hartmut Kaelble, Louka Katseli, Frédéric Pascal, Bengt Westerberg, and Shirley Williams.

be added to the treaties with sufficient flexibility to add social and economic rights as a Europe-wide consensus emerged as to which ones lent themselves to judicial enforcement. This was the only one of the three reports to be published before the conclusion of the IGC negotiations leading up to the *Treaty of Amsterdam*.⁷³

The second group, chaired by Mme Lalumière, reported in December 1998.⁷⁴ It focussed principally on practical steps that could be taken within existing arrangements to enhance the visibility and role of human rights. It pointed to the contrast between the highly visible role of human rights in the external relations of the Union and the almost complete absence of a formal role for human rights in the internal affairs of the Union. It argued that this gap had to be closed because it went, *inter alia*, to the question of the credibility of the EU in international forums. This group also argued for ratification of the *ECHR*, but more practical matters dominated its deliberations (e.g. the need to appoint a commissioner with responsibility for human rights).⁷⁵

The third group, which was chaired by Professor Simitis, reported in February 1999.⁷⁶ Its primary recommendation was for the immediate ratification by the EC/EU of the *ECHR*.

⁷³ *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, 2 October 1997, [1997] O.J. C. 340/1 [hereinafter *Treaty of Amsterdam*].

⁷⁴ *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* (Florence: European University Institute, 1998). The research for this group was organized by the Academy of European Law at the European University Institute in Florence under the direction of Professor Philip Alston. The members of the group were Antonio Cassese, Catherine Lalumière (chair), Peter Leuprecht, and Mary Robinson. The project received financial support from DG Relex of the European Commission.

⁷⁵ To achieve their objectives the *comité* recommended a variety of initiatives including (1) the appointment of a commissioner with responsibility for human rights; (2) the development of a specialist human rights office within Council to assist the work of Monsieur Pesc; (3) more ready access to the ECJ to press human rights claims; (4) the creation of a European Union Human Rights Monitoring Agency; (5) the publication of an annual EU human rights review; (6) the development of the Parliament's capacity in the human rights field; (7) accession to the *ECHR*; (8) greater interaction between the Member States in addition to the mechanism of COHOM, the working group on human rights; (9) expansion of the Commission's development co-operation program along the lines of human rights; (10) the elaboration of an EU Code of Conduct for business; (11) greater use of human rights clauses in trade agreements; (12) a study of procedures to be used to suspend membership rights of deviant regimes; (13) more consultation with NGOs; and (14) high priority for human rights education.

⁷⁶ European Commission, Expert Group on Fundamental Rights, *Affirming Fundamental Rights in the European Union: Time to Act* (Luxembourg: Office for Official Publications of the European Communities, 1999). The members of the group were Christine Bell, Lammy Betten, Jochen Frowein, Pirkko Koskinen, Lorenzo Martin Retortillo, Alessandro Pizzorusso, Jean Rossetto, and Spiros Simitis (chair).

C. Report of the Westendorp Reflection Group (1996)

Before the 1997 IGC commenced, the heads of government appointed a reflection group to survey, clarify, and systematize the main issues that would arise for consideration and to provide them with the benefit of their own views. The reflection group was chaired by Carlos Westendorp, formerly the foreign minister of Spain.

The Institutions, as well as many Euro-level NGOs, made submissions to the Westendorp Reflection Group. The European Commission's submission was divided into two parts, (1) Democracy and Transparency in the Union, and (2) Effectiveness and Consistency of the Union's Policies.⁷⁷ Significantly, the Commission report looked to the development of citizen's rights as the primary means for enhancing the legitimacy of the EU enterprise. It asserted that

[T]he first challenge is obvious—to make Europe the business of every citizen. ... That is why the Commission does not regard the Treaty's objective of a Community closer to the citizen as an empty formula, but as an overriding principle which guides its actions.⁷⁸

It went on:

Democracy comprises the very essence of the Union. ... One of the Treaty's basic innovations in terms of democracy is the concept of European citizenship. The object of this is not to replace national citizenship but to give Europe's citizens an added benefit and strengthen their sense of belonging to the Union. The Treaty makes citizenship an evolving concept and the Commission recommends developing it to the full. *Moreover, although the task of building Europe is centered on democracy and human rights, citizens of the Union have at this stage no fundamental text which they can invoke as a summary of their rights and duties. The Commission thinks this gap should be filled, more especially since such an instrument would constitute a powerful means of promoting equal opportunities and combating racism and xenophobia.*⁷⁹

What is interesting is that the Commission's submission foresaw the drafting of a charter. The final report of the Westendorp Reflection Group strongly supported the claims being made by NGOs for clear treaty revision in the area of human rights.

V. Human Rights and Treaty Changes at Amsterdam (1997)

A variety of new provisions were agreed to by the heads of state and enshrined in the *Treaty of Amsterdam* (which amends the provisions of the original treaties). No

⁷⁷ European Commission: Directorate-General for Information, Communication, Culture and Audiovisual Media Publications Unit, *Commission Report for the Reflection Group* (Luxembourg: Office for Official Publications of the European Communities, 1995).

⁷⁸ *Ibid.* at 3.

⁷⁹ *Ibid.* at 6 [emphasis added].

concrete proposal to add a Bill of Rights or to amend the treaties to enable the Union to accede to the *ECHR* or any other international human rights treaties was put to the Amsterdam Council, although the Dublin General Outline (draft text prepared by the Irish presidency of the Council during the IGC) did refer to the possibility of incorporating a new article to clarify judicial control of respect for fundamental rights.⁸⁰ Instead—and very much along the lines recommended by the report of the Westendorp Reflection Group—steps were taken to heighten the profile of the Union as one based more visibly on the principles of human rights as follows.

First, Article 6(1) of the *TEU* now states that the Union as such is founded “on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.”⁸¹ Second, Article 49 states that only those European states that respect the principles set out under Article 6(1) may apply to become members of the Union.⁸² Third, Article 6(2) states that the Union “shall respect fundamental rights, as guaranteed by the European Convention on Human Rights ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”⁸³ Fourth, a new mechanism is provided in a new Article 7 of the *TEU* to deal with Member States that persistently and seriously violate the principles set out in Article 6(1).⁸⁴ An elaborate (and exclusively political) process is set out according to which the relevant determinations are to be made. The sanction is the suspension of certain rights, including voting rights of the Member States concerned. The political costs involved in invoking Article 7 are formidably high. It must be pointed out that this provision was not invoked against Austria in 2000.⁸⁵

The non-discrimination rules of the treaty were an obvious (and easy) target for change. A new article was inserted to the effect that

[w]ithout prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European

⁸⁰ Conference of the Representatives of the Governments of the Member States, *The European Union Today and Tomorrow—Adapting the European Union for the Benefit of its Peoples and Preparing It for the Future—A General Outline for a Draft Revision of the Treaties*, Doc. CONF 2500/96 (Brussels, 5 December 1996) at 14.

⁸¹ *Supra* note 67 (originally *Maastricht Treaty*, *supra* note 67, art. F(1)).

⁸² *Ibid.* (originally *Maastricht Treaty*, *ibid.*, art. O).

⁸³ *Ibid.* (originally *Maastricht Treaty*, *ibid.*, art. F(2)).

⁸⁴ *Ibid.*

⁸⁵ See M. Ahtisaari, J. Frowein & M. Oreja (*comité des sages*), *Report* (Paris: 2000). Interestingly, the *comité des sages* felt that the *TEU*, *ibid.*, art. 6(1), “constitutes, therefore a legal obligation on the part of EU Member States.” This is probably an overstatement.

Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁸⁵

Two landmark Directives have already been adopted on the basis of this new competence. The first, which focusses on racial discrimination in many different spheres beyond the purely economic, was adopted by Council on 29 June 2000.⁸⁷ The second, adopted by Council on 27 November 2000,⁸⁸ is confined to discrimination in the field of employment, and covers all categories mentioned in Article 13 save for gender (already covered under a web of EU Directives) and race, which now has a stand-alone Directive. An “action programme” accompanies and augments the legislative menu.⁸⁹

VI. The *Charter of Fundamental Rights* (2000)

Apart from a declaration marking the fiftieth anniversary of the *Universal Declaration of Human Rights*⁹⁰ in December 1998,⁹¹ nothing much happened in response to the Lalumière *comité des sages*, as had been expected. Then, quite suddenly, the German government proposed the drafting of an EU *Charter on Fundamental Rights*. The proposal was accepted at a meeting of the European Council (heads of state) in Cologne on 3-4 June 1999. The summit concluded:

Protection of Fundamental Rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy ... There appears to be a need, at the present stage of the Union's Development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens.⁹²

⁸⁵ *EC Treaty*, *supra* note 32, art. 13. See generally L. Flynn, “The Implications of Article 13 EC—After Amsterdam, Will Some Forms of Discrimination Be More Equal Than Others?” (1999) 36 *C.M.L. Rev.* 1127.

⁸⁷ EC, *Council Directive 2000/43 of 19 July 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, [2000] O.J. L. 180/22.

⁸⁸ EC, *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, [2000] O.J. L. 303/16.

⁸⁹ EC, *Council Decision 2000/750 of 27 November 2000 establishing a Community action programme to combat discrimination (2001 to 2006)*, [2000] O.J. L. 303/23.

⁹⁰ GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

⁹¹ European Union, “Declaration of the European Union on the Occasion of the 50th Anniversary of the Universal Declaration on Human Rights” (10 December 1998). This declaration, like its counterpart in 1977, was proclaimed by the Council, Commission, and Parliament.

⁹² European Union, News Release 150/99 “Cologne European Council, Presidency Conclusions” (4 June 1999), Annex IV, “European Council Decision on the Drawing up of a Charter of Fundamental Rights of the European Union”.

The summit called for the convening of a broadly representative drafting body. The composition of that body (called the "convention") was agreed at a European Council summit in Tampere, Finland, on 15-16 October 1999.⁹³ It was composed of fifteen representatives of national governments, one representative from the European Commission, sixteen members of the European Parliament, and thirty members of national parliaments (the Council of Europe had observer status in the persons of the deputy secretary-general and a member of the European Court of Human Rights). It held the first of its seventeen formal meetings on 17 December 1999 and its last on 2 October 2000, and engaged in extensive consultation with NGOs. The *Charter* was proclaimed by the heads of state at their Nice Summit in December 2000.

Throughout the drafting process the convention operated on the basis that the text should be sufficiently flexible to allow for its possible insertion into the treaties. Eventually, the heads of state opted not to include the *Charter* in the treaties, but simply to declare it on a purely political basis. There is, however, nothing to stop the ECJ from using the *Charter* as a guide to general principles of Community law—thus conferring on it legal status of sorts through the back door. But the real relevance of the *Charter* is that it forns the basis for negotiations as to the content of a future Bill of Rights with treaty status.

Space constraints prohibit a detailed account of the content of the *Charter*. Suffice it to say that it contains seven chapters as follows: (1) Dignity (Articles 1-5), (2) Freedoms (Articles 6-19), (3) Equality (Articles 20-26), (4) Solidarity (Articles 27-38), (5) Citizens' Rights (Articles 39-46), (6) Justice (Articles 47-50), and (7) General Provisions (Articles 51-54). Regarding its substance, two general observations appear warranted. First, the drafters did not seem too concerned that the standards they were setting would diverge from established international practice. On occasion the *Charter* standards exceed international standards, and on other occasions they seem to fall below such standards. As if in acknowledgement of this, a belt and braces provision was inserted in Article 53 to the effect that nothing in the *Charter* should be interpreted as restricting rights as established under international law. Furthermore, Article 52(3) is to the effect that those rights in the *Charter* that have equivalent protection in the *ECHR* shall have the exact same meaning and scope. Second, by far the largest section (Solidarity) deals with economic, social, and cultural rights. While this is greatly to be welcomed, it is nevertheless curious, since these rights do not correspond with any existing competences at the level of the Union.

⁹³ Tampere European Council, Presidency Conclusions, Annex, "Composition, Method of Work and Practical Arrangements for the Body to Elaborate a Draft EU Charter of Fundamental Rights" (15-16 October 1999), online: European Union <http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm>.

The *Charter* is addressed to the Institutions of the Union and to the Member States only when they are implementing EU law. The *Charter* is expressly stated not to “establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.”⁹⁴ But, as mentioned earlier, that the ECJ might use this instrument as a guide to general principles of Community law in any event might entail some theoretical modification of the treaty tasks.

Conclusion

What conclusions can be drawn from the above? First, Europe has successfully tamed nation-states and indeed remoulded them. The Council of Europe sets out and polices vital normative anchors. The EU integrates in a way that seems to make the classic nation-state seem anachronistic. Both institutions are wedded to a political vision of democracy, the rule of law, and human rights. No market mechanism can exist in a vacuum. The EU was always and will remain primarily a community of shared values. If, as in the early 1990s, the EU views itself merely as a technocratic mechanism for merging markets or for sharing limited government power, it will lose legitimacy. The people have always expected more from European unification than have their politicians. In an interesting communication commenting on the *Charter* in its draft form, the European Commission stated that “There is a need for a Charter of Fundamental Rights because the European Union has entered a new, more resolutely political phase of integration.”⁹⁵ The reasoning fits with the analysis in the earlier part of this article, in that it is the advance towards political integration that is making the issue of human rights pressing and controversial.

Second, it is fairly predictable that some concrete moves to simplify the treaties will be made over the coming years. Almost inevitably—whether intended or not—this will ignite a debate about whether the EU should have its own recognizably constitutional text. It is too early to say how that debate will turn out. Either way, the drafting of such an instrument would be fatally incomplete without a Bill of Rights. One can therefore predict that the drafting of such a Bill of Rights will sooner or later dominate the debate about human rights in the EU.

Third, the *Charter of Fundamental Rights of 2000* might yet seep into the jurisprudence of the ECJ through the doctrine of general principles of Community law. Its very existence means that human rights issues cannot go away. But probably its most important long-term impact will be on the drafting of a future Bill of Rights for the Union.

⁹⁴ *Supra* note 7, art. 51(2).

⁹⁵ “Commission Communication on the Charter of Fundamental Rights of the European Union”, COM(2000)559 final at para. 8.

Last, the evolution of the constitutional character of the Union to the point that it has its own Bill of Rights will have implications for the Council of Europe. To one who tends to see the EU and Council of Europe as twins separated at birth, this development is not necessarily bad for Europe or for the Council of Europe. But it does heighten the importance of more sustained and formalized co-operation between the two bodies. Perhaps even a system of rotation of judges between the ECJ and the European Court of Human Rights should be considered. Human rights are too important in the construction of Europe to justify one body (the EU) trying to reinvent the wheel. Likewise, they are too important for the other body (the Council of Europe) to stand on the past and not to recognize that the future is constantly being made. It would, of course, have been useful if Churchill had also outlined the "next step".
