Editorial

The Future of the Protection of Fundamental (Social) Rights in the European Union

1. During the first few months of this year, those involved in the development of the European Union were getting increasingly drawn into the discussion on the Intergovernmental Conference which started at the end of March. Much of the attention is focused on accession of new Member States, constitutional reform and increased transparency of the decision making procedures. The social policy issue which is drawing most attention is the development of conditions for an employment policy that would lead to tangible results at European level.

2. More in the background, but undeniably very important, are the discussions on the protection of fundamental rights in the legal order of the European Union. Various conferences, documents and declarations have come to life in the last few months. While some discussions concentrate on the protection of the 'classic' civil and political rights, others are concerned mainly with the protection of 'modern' economic and social (and cultural) rights.

3. At a Colloquium held in Amsterdam in February, legal experts, social partners and governmental representatives came together to discuss various options and problems in relation to the protection of fundamental social rights in Community/Union law.

4. The issue is not a new one. It is, in effect, as old as the Community itself. The drafters of the original treaties did consider including fundamental rights in the provisions of, in particular, the EEC Treaty, but the idea was rejected — *inter alia* — because they thought Community law would nog effect the fundamental rights of individual citizens.

5. They were proven wrong at an early state: in the 1950s and 1960s the EC-Court of Justice had to express itself a few times (Case 1/58 (*Stork*), Joined Cases 36-38 and 40/39 (*Nold I*), Case 40/64 (*Sgarlata*) on the protection of fundamental rights in the law of the Communities. It had to deny the request of parties to review Community law in the light of fundamental rights, as these did not form part of the treaties.

6. The Court made a *volte face* in the case of *Stauder* v. *The City of Ulm* (Case 29/69) when it declared that fundamental rights formed part of the general principles of Community law. Since then, the Court has not looked back. It has built its case law, using foundations for protection such as general principles of law, common Constitutional traditions, common Constitutional norms and standards, etc. The Court turned its attention to international law as well, in particular to the European Convention for the Protection of Human Rights and

Fundamental Freedoms (ECHR), which, as a treaty signed by all Member States, provided guidelines for the protection of fundamental rights in Community law.

7. Many years later, after a reference to the ECHR had been included in the preamble of the Single European Act, the Court could take a much firmer stand. It declared flatly that respect of family life was one of the fundamental rights which are recognised by Community law (Case 249/86 *Commission* v. *Germany*).

8. The Court's case law contains an impressively long list of references to the ECHR and it may be submitted that the protection of fundamental rights in Community law is now established by the ECJ case law which used the ECHR, not only as a guiding principle, but as a binding treaty.

9. The picture for fundamental *social* rights is very different. The Court's references to the European Social Charter (ESC), which was also expressly included in the above-mentioned preamble of the SEA, are limited to two (Case 24/86 *Blaizot* and Case 49/77 *Defrenne III*). That does not necessarily mean that the Court takes this category of rights less seriously. It can simply be that there have been no more cases brought before it in which it was requested to pronounce itself on the protection of these rights.

10. The Community's political institutions, however, have made it abundantly clear that they do not put the protection of both categories on the same footing. The equal standing with the ECHR, enjoyed by the ESC in the preamble of the SEA was shortlived. In the Maastricht Treaty the reference to the ESC disappeared and only the ECHR is mentioned in Art. F of the Treaty. It is not too difficult to hazard a guess as to how this came about.

11. The important question which somehow refuses to go away, is whether it is necessary to include the provisions on the protection of fundamental rights explicitly in the Treaty. Or indeed, whether it is necessary for the Community to accede to the ECHR as well as to the ESC. Accession to international treaties creates a number of problems which are not easily solved, but which are not 'unsurmountable' as one distinguished author put it nearly twenty years ago (Henri G. Schermers, *The Communities under the European Convention on Human Rights*, LIEI 1978/1, pp. 1-8).

12. At the above-mentioned Amsterdam Colloquium there was widespread disagreement among legal experts. Some held that the difficulties involved in accession should no longer be used as an excuse; others submitted that there were better solutions than accession. The point to make here, however, is that the discussion is again focused on the ECHR. This leaves the problem of protection of social rights unresolved, even though the ECHR contains a number of rights which can easily be defined as 'classic-social' rights, such as the right to freedom of association (Art. 11) and the prohibition of slavery, servitude and compulsory labour (Art. 4), while the right to a fair and public hearing (Art. 6) has proved its importance for the protection of social rights as well.

13. Accession to the European Social Charter (not to be confused with the Community Charter on Fundamental Social Rights for Workers) creates different kinds of legal problems, and the political will to overcome these seems to be even less than is the case with accession to the ECHR.

The draft for a new European Social Charter expressly invites the European Community to accede, but, again, there seems to be insufficient will to do so. (Also, it seems doubtful that the invitation will survive the amendments to the new draft Charter.)

14. At the time of writing, we are waiting for the Court to express its Opinion on whether or not the Community should accede to the ECHR (Opinion 2/94); if it answers in the affirmative, the political arguments not to do the same with regard to the ESC would have to be strong, if the Community still maintains that it considers social rights as important as civil and political rights.

15. In both cases, there is the problem of possibly conflicting case law with the difference that the case law of the European Court on Human Rights are binding judgments expressed in a court of law, while the political element in the case law on the European Social Charter is far too dominant for this to have the same standing and status. It remains to be seen whether the EC Court of Justice is prepared to be bound by the interpretations of the ESC supervisory bodies.

16. Another option to be considered is to use the ILO Conventions which have been ratified by all MS as a basis for the protection of fundamental rights of workers. The Community/Union could declare that it recognises these Conventions as a higher principle of law, in the light of which Community/Union law must be judged and/or created. In a less far going option the Conventions could be used as guidelines. Formal accession of the Community/Union to the International Labour Organisations creates even more problems than accession to the Council of Europe. In the context of the ILO, the problem of the tripartite composition of the ILO bodies, which is a constitutional feature of that organisation, is just one of the many problems which need to be solved. The question whether the ECJ would subject itself to the ILO case law on these Conventions poses problems which are similar to those which arise with regard to the European Social Charter: the supervisory procedure of the ILO contains a strong political element.

17. At present, the search for the best solution is still in great disarray with many people advocating different solutions. Some still favour accession to international treaties as the best solution, others opt for a legally binding Bill (or Catalogue) of Rights, some advocate fall-back positions such as inclusion of the Bill of Rights in the Maastricht Agreement. My choice would be to incorporate a comprehensive Charter of Rights in the legal order of the European Union and to make it very clear that protection of human rights and fundamental freedoms forms the basis of this European legal order. That does not exclude respect for the rights as contained in international treaties on the protection of fundamental rights as is already present in the Court's case law. Of course, the British would argue that you do not need a written document for this (or, at least, not a recent one). However, 14 of the 15 Member States do have a written constitution and it would be entirely within the constitutional traditions of all Member States minus one, to have the protection of fundamental right written into the Treaty. Are there many left who would argue that the EC Treaty is not the (albeit imperfect) Constitution of a new, separate legal order?

18. A Catalogue of fundamental rights would have to contain all categories of rights: civil and political rights and as economic and social rights as well as more modern rights, such as the right to a safe and clean environment. Obviously, the

justiciability is not the same for all these categories of rights. A Community Catalogue would offer the ideal opportunity to re-examine fundamental rights in the light of their justiciability and to leave behind the old division between civil and political rights on the one hand and economic and social rights on the other.
From a legal point of view, the exercise is extremely interesting and not overly complicated. The crucial question is, however, whether it would convince the politicians who are involved in the further development of the European Union.

19. At present, it does not exactly look that way. It seems that only the principle of non-discrimination is fully accepted as a candidate for inclusion in the Treaty. This creates a number of problems: the predominant opinion is that the non-discrimination principle should be extended to all persons legally residing in the Union. That will have huge consequences for the Union which has always embraced the principle that there were two categories of persons: those who were citizens of the Member States (now citizens of the Union) and those who were not.

20. If politicians are not prepared to discuss a wider range of fundamental rights, they will have lost a chance to diminish the 'Legitimations Defizit', a term coined, I think, by the late Professor Sasse in the 1970's (*Grundrechtschutz in Europa*, Frankfurt 1977, p. 53) and spelled out by the German Constitutional Court in its *Solange I* decision. And if they continue to ignore the importance of this legitimation deficit, they should not be surprised if the citizens of the Member States never really feel that they are citizens of the Union.

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