# Silvia Borelli, The role of the Union's Charter of Fundamental Rights in the process of European integration: objectives, instruments and protagonists

## The role of the Union's Charter of Fundamental Rights in the process of European integration: objectives, instruments and protagonists (1)

European integration may be described as a dynamic and continuing process whose point of departure was the Schuman Declaration of 9 May 1950 but whose point of arrival is not yet in sight. The 'fluidity' of the process is accentuated by the variable nature of the objectives pursued. Patently, those objectives have changed completely as the European Communities and then the European Union have developed, reflecting the functionalist approach adopted by the founding fathers. Consequently, not only is there no end in sight, but the process of European integration steers a variety of courses that can constantly be adjusted as that process continues. Although the process is 'fluid' in nature, it is still possible to identify two fixed points: the first, as has been said, coincides with the start of European integration, inspired by commercial goals (the creation of a single market in which goods, services, people and capital are able to move freely); while the second may be identified in the proclamation and the inclusion of the Union's Charter of Fundamental Rights in the treaties.

However, any reading of the process of European integration based on its objectives will necessarily be incomplete. A proper understanding of the process requires closer consideration of both protagonists and instruments. Thus, it is necessary to identify the protagonists in the process, as well as the resources available to them in order to achieve the relevant objectives. Federico Mancini suggested using a comparative table of 'objectives — instruments — protagonists' as a way of evaluating one element of the process of European integration, namely employment law, in the General Report presented to the 12th Congress of the International Federation for European Law, in 1988 (Mancini, 1989). Mancini began by defining the aims of the Treaty:

'The employment law drafted in principle in Rome and further developed in Brussels was not the product of criticism of an unequal relationship that provoked major conflict at the heart of the capitalist system […]. The Treaty, and the amendments introduced by the Single European Act, have just one real objective: to create a European market, founded on competition and characterised both by the liberalisation of trade among the Member States and the introduction of a common customs tariff in relation to the rest of the world. Clearly, employment — and work under an employment contract, in particular — is inextricably linked with that objective. It is therefore logical that the Treaty and secondary Community legislation should deal with this issue, but it is also logical that they should deal with it only in so far as it is linked with that objective, focusing, above all, on how the physical and legal situation of workers may affect attainment of the objective.' After identifying the objectives that underpinned the original treaties, Mancini draws attention to the wealth of instruments available to Community law, the provisions of which 'do not constitute a homogenous system, but derive from different sources'. His description of the range of instruments available is accompanied by another significant comment: selection of the appropriate instrument is directly linked to the objective pursued. For instance, when the Community legislature wishes 'to have a direct and immediate impact on the legislative position in the Member States' it opts for a regulation; 'but, where uniformity of legislation has not seemed to be essential', or 'this has not been possible because of legislative or, more often, political difficulties, Brussels has resorted to the more flexible instrument, namely the directive'.

Alongside the legislative instruments are the other 'methods' of European integration and, more particularly, the decisions of the European Court of Justice, reviewed in the second part of the study. Here the link between instruments and objective is clear from the method of interpretation based on function ('every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and its state of evolution at the date on which the provision in question is to be applied' (judgment of 6 October 1982 in Case C-283/81, *Cilfit*, in [1982] ECR 3415). Interest in the protagonists of European integration subtends the whole of the study, becoming apparent here and there when Mancini cites the advocates of taking decisions that reflect the original objectives of the treaties ('Europe's founding fathers but also the Council and the Commission'). According to Mancini, 'until recently, Luxembourg was synonymous with judicial activity at full throttle. Even in the field of employment, that activity has frequently been motivated by the desire to extend the competences of the Community, as if to compensate for the retreats in terms of decision making that the

states have forced on it from the time of the Gaullist revolt. But it is also true that the Community judges have thoroughly understood the vast human implications of the problems resulting from the movement of workers. What I have written about the social indifference of the founding fathers does not apply to the judges. I will go further: if this Europe of ours is more than just a Europe of traders and if it is a good thing that this is not so, then the judges deserve the credit for this.' Thus, Mancini cites the role of the Court as a driving force to counterbalance (or contrast with) the attitude of the states that wish to contain the powers of the Union, in defence of their own national sovereignty. In this paper, I propose to use the comparative table of 'objectives — instruments — protagonists' to consider the influence on the process of European integration of the Union's Charter of Fundamental Rights, proclaimed in Nice and inserted into the Treaty establishing a Constitution for Europe, approved in Brussels.

**1. The protagonists**

The protagonists are certainly the aspect of my proposed comparative table that appears least controversial in terms of evaluating the Charter. We know that the Cologne European Council of 3 and 4 June 1999 decided to set up an appropriate body to draw up the Charter, and that the body was called a 'Convention'. This unprecedented procedure won great acclaim, so much so that it was again suggested for the purpose of amending the treaties and thus identified as a binding method for treaty revision (Article IV-7 of the Treaty establishing a Constitution for Europe). The Convention is therefore one of the protagonists in the integration process, together with the States and the Community institutions; taking the form of a 'constituent assembly' (2), it represents one of the formative moments in the Union's history.

The success of the first Convention is basically linked to its democratic nature, as it was largely made up of representatives of the national parliaments and the European Parliament (Rodotà 2001, p. 64) (3). Another important factor is the transparency of its working method: meetings of the Convention were held in public and all the minutes of those meetings, as well as the official documents, were available on the Internet and therefore easily accessed by any interested party. I should finally mention the interest in participating, which resulted in the applicant countries (some of which became Member States as of May 2004) and various representatives of civil society being consulted.

The importance of the drafting method led the subsequent Convention, set up for the purpose of amending the treaties, to incorporate the Charter in them, respecting the whole of the text of the Charter, without re-opening the debate on its provisions, except for any adjustments needed for its insertion into the Treaty. The Charter in fact 'represented a consensus reached by the previous Convention, a body which had special expertise in fundamental rights and served as a model for the present Convention, and endorsed by the Nice European Council' (Final Report of Group II).

But the method used to draw up the Charter leaves completely unresolved the 'question of "who" takes constitutional decisions in the European Union and what legitimacy that decision-taking body enjoys' (Bifulco, Cartabia, Celotto 2001, p. 32) — a question that concerns the Charter's impact on the instruments of the integration process.

**2. The objectives**

The Charter's impact on the objectives of the process of European integration, and thus on the direction of that process, is generally held to be substantial. In that connection, 'the European Union's decision to focus on fundamental rights, recognised in a specific text and with a view to giving them constitutional status, marks a break with the model based solely on the rationale of the market' (Rodotà 2001, p. 72) (4). The Charter thus sets out a 'table of values', indicating ' the criteria around which the Union will finally be structured' (Rodotà 2001, p. 87): consequently, there will be a shift from 'market-based integration' to 'integration based on rights' (Manzella 2001, p. 53).

In support of those arguments, emphasis has been placed on the importance of affirming the 'principle of the indivisibility, interdependence, correlation and complementary nature of fundamental rights', as well as the 'equal status — based on the central and unifying principle of the dignity of the individual — accorded to

civil, political, economic and social rights' (Giubboni 2001, p. 621). The 'technique of applying values or principles' that the Convention utilises — that is to say the method of grouping rights around six fundamental values — has made it possible to place all rights on an equal footing, 'avoiding the historical contrast between social rights, whose legal status is frequently the subject of controversy in the legal orders of the Member States, and all other fundamental rights' (Bifulco, Cartabia, Celotto 2001, p. 16). At the same time, the 'universal nature' of the rights is asserted, as they are recognised in respect of 'all who live within the confines of the Union', thereby expanding the very concept of European citizenship (Rodotà 2001, p. 73).

The decision to list in a 'written catalogue' the indivisible and universal values on which the Union is based and the fundamental rights it safeguards (see the preamble) 'satisfies the need for certainty', 'the need for clarity and, above all, the requirements of *visibility*' (Bifulco, Cartabia, Celotto 2001, p. 20). The 'catalogue' appears at once complete and open. The fact that it appears complete makes it possible, on the one hand, to curb the dominance of economic rights, with the result that 'cultural and social rights are also taken properly into account in the application of fundamental rights', and, on the other, to move forward in the process of European integration without having to amend the catalogue of fundamental rights (Grimm 2003, p. 9). In fact, since the Charter's openness derives from its principle-based structure, it is possible to include 'the future requirements for articulating and specifying the principles thus established in its legislative fabric' (Manzella 2001, p. 40). But even supporters of the Charter's complete and open nature recognise that some of its provisions lag behind those contained in the most advanced national constitutions. 'The impossibility of overcoming at a stroke deep-seated cultural differences which are given different expression in the different legal systems' is said to have led the authors of the Charter to identify a 'cultural compromise', but they made sure that it would not result in a lower level of protection than Community citizens already enjoy, by including a clause safeguarding existing rights (Article 53) (Rodotà 2001, p. 82).

What those who recognise the importance of the Charter in the process of European integration consider to be a 'constitutional compromise' is indicated by others (Somma 2003, p. 97) as a sign of the Charter's inability to make inroads into the system determined by the ECT. Consequently, there is still 'hostility towards the definition of rights to benefits and approval only for equality of opportunity in relation to the operation of the capitalist institutions', as well as 'timidity as regards the issue of social rights and refusal to countenance any legislative policy in which the subject of the free market does not take pride of place' (Somma 2003, p. 97). Basically, social rights will continue to be framed 'as exceptions to the fundamental freedoms of movement and competition which define an internal market in which competition must not be distorted'. Their ability to curtail economic freedoms will, therefore, be tolerated subject to restrictive conditions (De Schutter 2003, p. 210). With the added disadvantage that, by setting out a catalogue of fundamental rights, the Charter arguably freezes 'the list of social interests adjudged sufficiently important to justify a restriction on the economic freedoms of movement and competition' (De Schutter 2003, p. 210).

Further criticism has been levelled at the 'irrational distinction' between rights and principles in Article 51, resulting in a contrast between 'perfect individual rights' and 'individual positions which will be fully protected only if the relevant constitutional "programme" is implemented' (Sciarra 2003, p. 16). As long pointed out by writers on constitutional law, there is no reason for the distinction between preceptive rules and programmatic principles (a category that ought to include social rights) since, on the one hand, social rights also impose 'negative obligations on those players in relation to whom they may be enforced' and, on the other, civil and political rights too 'may be subject to a gradual process of implementation through the adoption of measures extending them and enabling the holders of those rights to exercise them in full' (De Schutter 2003, p. 195; Bin 2000) (5).

Finally, the inappropriate wording of many provisions of the Charter is cited, where reference is made to 'national laws and practices' for the purpose of determining the ways in which fundamental rights may be exercised. Although the range of options for implementation is not open-ended, since it is not possible to affect the 'essence' of the rights conferred by the Charter (Article 52) (6), that reference provides 'a more or less blank sheet', leaving the difficult task of establishing how those rights are to be interpreted (Del Punta 2001, p. 339).

## 3. The instruments

The capacity of the Charter to have an impact on the instruments involved in the process of European integration basically depends on the effectiveness of the Charter itself, that is to say the ways in which it manages to ensure that its provisions — and thus the protection of fundamental rights — are genuinely effective. And so I must spend just a little time on the final provisions. The first bodies to be bound by Charter's provisions are the Community institutions; the Member States, however, are required to respect the Charter's content 'only where they are implementing Union law' (Article 51). Despite its restrictive wording, that provision assimilates the case law of the Court of Justice on incorporation (Cartabia 2001, p. 348). According to that case law, the Member States are required to implement Community fundamental rights only when their activities 'fall within the scope of Community law' — only those activities and state acts that affect issues lying outside Community law and that fall within the exclusive competence of the Member States, are exempt (judgment of 18 December 1997 in Case C-309/96 *Annibaldi*). The literal interpretation of the provision limiting respect of fundamental rights to the implementation of Union law makes it impossible 'to take account of a situation in which the fundamental rights conferred in the Community legal order no longer constitute *limits* imposed on the national authorities, but actually work in such a way as to *authorise* those authorities to adopt or retain certain measures' (De Schutter 2003, p. 197).

It is likely that the Court of Justice will interpret Article 51 in a manner consistent with its existing case law, and thus overcome the restrictions arising from the text. However, there is less certainty regarding the approach it will take where the need to protect human rights is cited as justification for restricting economic freedoms: 'depending on whether in fact the citing of concern for the protection of social rights is well founded and the national legislation in question is actually necessary to secure that protection, or that solution is a mere pretext, masking an attempt to protect a sector of the domestic economy' (De Schutter 2003, p. 198). Similarly, the Court of Justice will be asked to rule on situations in which the level of social protection has been lowered in the interest of pursuing economic policy objectives, by setting the minimum threshold of protection (the 'essence' referred to in Article 52), thereby preventing 'the national legislation designed to protect social interests being subject to the market test — more specifically, to competition between the states as a result of the adoption of a regulatory system in which the economic operators active in their respective territories are inevitably the prime beneficiaries' (De Schutter 2003, p. 199).

The Court will have to intervene to resolve two basic and closely connected problems: in the first place, it will be required to identify the essential and intangible core of social rights (Article 51). Once it has done that, it will have to define the relationship between economic freedoms and social rights. That will provide a response to the various arguments set out above in relation to the definition of social rights as exceptions to economic freedoms and, therefore, the real impact of the Charter on the process of European integration. Identifying the 'essence' of the rights will then make it possible to ascertain the margin of discretion accorded to the Member States, as a result of the reference to the national legislations, for the purpose of determining how the rights conferred by the Charter's provisions are to be exercised. The Court will also have to intervene to resolve the disagreements that have emerged concerning the distinction between rights and principles — hoping here to see the most recent guidelines in constitutional theory accepted.

The activity of both the Court of Justice and the national courts ought then to facilitate the *multilevel protection of fundamental rights* provided for in Article 53, and therefore 'safeguard pluralism in the protection of fundamental rights in Europe, allowing different forms of protection and different standards of protection to be maintained, within the respective area of jurisdiction of each Bill of Rights' (Cartabia 2001, p. 363). It will be for the courts to ensure that human rights and the fundamental freedoms conferred by the law of the Union, by international law, by international agreements and by the constitutions of the Member States, are not restricted or undermined by the Charter's provisions. That is no easy task: the case of night work by women shows how difficult it is to set maximum standards of protection when there are conflicting values at issue, complicated in that particular instance by the difficult dialogue between the Italian Constitutional Court and the Court of Justice (Ballestrero, 1998). Although able to prevent the courts doing as they please, the limits the legislature has set on their intervention — such as, in particular, Article 51(2), which prohibits the use of the Charter to extend the powers of the Union, and Article 54, according to which nothing in the Charter is to be interpreted as implying any right to engage in any activity or to perform any

act aimed at the destruction of any of the rights and freedoms recognised in the Charter or at their limitation to a greater extent than is provided for therein (7) — do not appear to impinge on the activity of creative interpretation, for which greater scope is allowed as a result of the margins of discretion the Charter's 'flimsy' provisions permit.

Having set out the role of the courts in relation to the Charter's capacity to influence the process of European integration, let me now point out the limitations, since the issues must first reach the courts and, in any event, while the courts can engage in creative interpretation, they cannot take the place of the legislature in implementing fundamental rights. As far as the first point is concerned, we should bear in mind the importance that has been attached to the open methods of coordination (OMCs) in the field of social law (Giubboni 2004, p. 9). This prevents intervention by the Court of Justice and the national courts where what are at issue are not binding provisions but 'soft' procedures (Sciarra 2003, p. 9). Here, then, the judicial instruments described above cannot guarantee the Charter's effectiveness; the ways in which the Community institutions (and first and foremost the Commission) are bound to respect the Charter in their activities in the context of the OMCs remain to be analysed (8).

The second point seems to be more complicated, concerning, as it does, the need to implement fundamental rights, ensuring that they are effective by adopting measures that will make it easier to exercise them — a particularly important element if social rights are to be effective in a context in which 'the demands of the market threaten gradually to erode those rights in so far as they are basically protected at the level of the individual Member States' (De Schutter 2003, p. 214). The enlargement of the Union to 25 and the most recent amendments to the Treaty establishing a Constitution for Europe have the effect of 'paralysing' qualified majority voting. In that sense, Weiler (2003, p. 636) was right to argue that 'the Charter serves as a pretext, as an alibi for failing to do what is genuinely needed, were its objective really to strengthen protection of the Union's fundamental rights'. According to Weiler (2003, p. 636), the real problem is 'the absence of a human rights policy with all that involves', and thus the absence of 'programmes and bodies to deliver those rights and not just prohibitions which are enforced by the courts'.

More generally, the proclamation of the Charter of fundamental rights and its incorporation in the treaties does not change the reality that the documents establishing the Union are agreements between states, nor does it enhance the Union's democratic basis (Grimm 2003, p. 18). The process of European integration is still entrenched in the position Mancini describes: he considers that the only real adversaries of the states (or rather the national governments that make up the Council) appear to be the Court of Justice and the national courts. Basically, there is a failure to meet the author's call (Mancini, 1998) to transform the Union '*into a democratic entity*', 'by freeing it from the last — but still powerful — vestige of its original structure: its fundamentally international character which is branded into its decision-taking machinery.' Only then will the Union be able (that is, will it have the instruments enabling it) to implement the fundamental rights laid down in the Nice Charter. Only then will the protagonists of European integration be not just the nation-states but all of the Union's citizens, represented within the European Parliament.

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(1) This paper is the outcome of the interesting discussion on the occasion of the seminar on '[t]he influence of Community law on national employment law: principles and methods of protection', which took place on 25 and 26 June 2004 at Verona University's Law Faculty.
(2) Manzella (2001, p. 35) describes the method used to draft the Charter as an 'interparliamentary procedure for "constitutional" revision', based on cooperation and compatibility between the European Parliament and the national parliaments, in contrast with the intergovernmental method, at the drafting stage at least.
(3) The Convention was made up of 15 representatives of the Heads of State or Government of the Member States, one representative of the Commission, 16 Members of the European Parliament and 30 members of the national parliaments.
(4) The Charter is not, however, a complete innovation since the protection of human rights within the ambit of the Union was already guaranteed by the case law of the Court of Justice, which 'succeeded in developing a Community system of protecting human rights, with its own special features', and 'it is undeniable that *the task of including or excluding* different elements, which the Convention performed, proved to be creative overall: the elements it decided to include in the Charter were automatically accorded higher legal standing that those that were excluded from it' (Bifulco, Cartabia, Celotto 2001, p. 15). In fact, the effect of 'codifying fundamental rights in force in the Union, in a single text, is more than to confer them, or recognise the constitutional nature of the Union. Fundamental rights are no longer something "outside" the legal order of the Union which the Union must simply "respect" (Article 6 TEU). They are now "within" the Union's legal order and the Union has the task of "protecting" them as the "prerequisite for its own legitimacy"' (Manzella 2001, p. 33).
(5) We can agree with Giubboni (2004, p. 15) when he argues that, despite the wording of Article 52(5), according to which the principles 'may be implemented' by the legislature and must be observed by the court only where it has decided to intervene, 'once constitutionally established, even the basic (social) "principles" must always and in any event be respected and observed by the court before which they are cited, in its interpretation of the law.'
(6) Article 52(1) sets the four 'counter-limits' on possible limitations on the exercise of fundamental rights. They are: stipulation by law; the intangibility of the essence of the rights conferred; respect for the principle of proportionality; and the existence of objectives of general interest recognised by the Union (Manzella 2001, p. 44).
(7) 'The bizarre reference to the explanations furnished by the Praesidium of the earlier Convention, and contained in the Charter's preamble, will prove to be less effective in curtailing the interpretative (and creative) power of the Community courts' (Giubboni 2004, p. 16): 'the claim to dictate to the courts rules on how to interpret legislation is the hallmark of a fearful and culturally

primitive legislature and, in addition, has sooner or later been contradicted by experience' (Pinelli and Brazzoni 2003, p. 40).
(8) Aware of the need to guarantee adequate protective measures to safeguard the effectiveness of social rights, Sciarra (2003, p. 16) proposes that 'soft law procedures should immediately be flanked by the monitoring of state of implementation of fundamental rights in the national systems', both by requiring the Member States, when drafting the national plans to be submitted to the European institutions for scrutiny, to make provision for verification of respect for fundamental rights, and by setting in place disciplinary machinery in line with the open method of coordination procedures. That could involve both the Committee on Employment and the spring European Councils.