THE ROLE OF THE EUROPEAN PARLIAMENT IN THE FUNDAMENTAL RIGHTS ARCHITECTURE OF THE EUROPEAN UNION

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1. INTRODUCTION

The European Union is seen by many as primarily an economic community. They still have in mind the European Economic Community that sprung in 1957 from the 1952 European Coal and Steel Community. They point at the importance of a European internal market built on the free movement of goods, persons, services and capital. There is, however, more to the picture. The European Union is a community based on the rule of law. One could add that it is a *sui generis* community. It lacks the rights, competences and obligations of international law of a sovereign State. But still it is a community based on the rule of law including respect for basic rights, with fields of competence on the basis of constitutional treaties which fundamentally exceed the limited competences of international organizations.

The way in which the European Union at present complies with its fundamental rights' obligations has developed incrementally. This is visible in what can be characterised as the 'architecture of fundamental rights' of the European Union. This architecture can be discerned in a multitude of institutions, legal instruments and political practices. Its structure, which will be discussed in this article, includes the European Commission, the Council of Ministers, the European Court of Justice, the European Ombudsman and the European Union Agency for Fundamental Rights. But our contribution will primarily focus on the European Parliament. In our opinion, the European Parliament's role in this domain has often been underrated.

After a few introductory remarks we will discuss the involvement the European Parliament showed with fundamental rights already in the nineteen fifties until a distinct turning point in the middle of the nineteen eighties. Subsequently we will discuss the acceleration that took place in the aforementioned decade and that kept pace until present. We will pay attention to

the case law of the European Court of Justice, to the Charter of Fundamental Rights of the European Union (the Charter) and to the 'friends' of the European Parliament such as the European Ombudsman and the Commissioner responsible for fundamental rights. We will end our contribution with an attempt to recapitulate and look forward.

2. THE EUROPEAN PARLIAMENT FROM THE NINETEEN FIFTIES TO THE NINETEEN EIGHTIES: AN ACTOR IN SEARCH OF A SCRIPT

That the origins of European integration lie in the years following the end of World War II is well known. And it is no coincidence that that also applies to fundamental rights[1] and the European Parliament. Both have developed through the years from humble beginnings to *incontournables*. Fundamental rights, however, were for a long time mainly to be found outside the legal order of the European Union. That has changed drastically when the European Union Charter of Fundamental Rights entered into force on 1 December 2009.

The main external source for human rights has been the European Convention on Human Rights (hereafter the Convention), which was drafted under the auspices of the Council of Europe and signed in Rome on 4 November 1950. Although it entered into force three years later,[2] it took another 21 years before all Member States of the European Communities[3] had ratified the Convention, the last being France on 3 May 1974.[4] Since then ratification of the Convention has always preceded membership of the European Union; this has been formalised as one of the Copenhagen criteria for accession to the European Union.[5] A sore point for the European Parliament has for a long time been the fact that some Member States after acceding to the Convention did not allow for individual actions to be brought before the European Commission of Human Rights, the then *ante chambre* of the European Court of Human Rights (the Strasbourg Court).[6]

In this respect the European Parliament was an early starter. In the first half of the nineteen fifties, its involvement was quite strong but subsided somewhat until mid nineteen eighties when it put fundamental rights back on the agenda.

1 In our contribution we will most often use the term 'fundamental rights'. When using 'human rights', 'fundamental freedoms' or other similar terms, no distinction is implied.

2 3 September 1953.

3 Predecessor of the European Community (1993) and, subsequently, the European Union (2009).

4 This had raised the interest of MEP Vredeling in 1972, written question No. 109/72, JO 1972, 57/3.

5 European Council meeting in Copenhagen, December 1993.

6 Resolution of 29 October 1982, OJ 1982, C 304/253.

In the subsequent decades this field of law gained momentum culminating in the adoption and, a decade later, the entering into force of the European Union Charter of Fundamental Rights. This process cannot be viewed as separated from the institutional development of the European Parliament and the expansion of its decision making powers. Only in 1979 the members of the European Parliament were elected for the first time by universal suffrage. This increased significantly their legitimacy *vis-à-vis* their constituency and strengthened the bond with the target group of fundamental rights, the European citizens. Furthermore the role played by the European Parliament in the decision making process has also changed fundamentally. In half a century, it transformed from a consultative body to a full-fledged co-legislator with all the political leverage that accompanies it.

The Common Assembly, the predecessor of the European Parliament,[7] was set up by the European Coal and Steel Community Treaty and consisted of 78 members of the national parliaments of the six founding states. At the time when it met for the first time in September 1952, it had no legislative powers at all. This changed somewhat when the European Economic Community and the European Atomic Energy Community (Euratom) Treaties entered into force on 1 January 1958. They gave the Common Assembly the modest right to be consulted by the Council of Ministers (hereafter: the Council) in some policy areas. But in the years 1952–1953 the limited formal basis, the European Coal and Steel Community Treaty being only a sectoral arrangement, and the absence of any competencies did not curb the ambitions of the European parliamentarians.

During that brief period of time far-reaching plans were drawn regarding fundamental rights. One can recognise therein already many aspects which would be discussed time and again. Two simultaneous projects can be distinguished here. One was led by the *Comité d'études pour la constitution européenne* which was set up in early 1952 by members of the *Mouvement européen*. It was chaired by Paul Henri Spaak and consisted for example of Altiero Spinelli, a name which will return later, and Fernand Dehousse as well as national parliamentarians and legal experts. The main question for the *Comité d'études pour la constitution européenne* was whether the European Convention on Human Rights should become the beacon in the European Constitution to-be, or that this constitution should consist of an amalgam of human rights mentioned in the various national constitutions. Another question was, whether the constitution itself should formulate these rights or would a reference to an external source suffice? The results of the efforts of the *Comité d'études pour la constitution européenne* were laid down in nine resolutions and in the first an unequivocal reference was made to the Convention. The European

7 In 1962 the successor to the Common Assembly, the European Parliamentary Assembly, renamed itself European Parliament.

Community,[8] as these plans intended, was supposed to play a strong role in the protection of human rights, supervising the Member States and including a supreme court to adjudicate on these matters.[9] At the same time work was being done to carry on along the lines of the European Coal and Steel Community and create a European Defence Community as well as a European Political Community. The European Defence Community was a short-lived idea proposed in 1950 by the French Prime Minister René Pleven to counter American military influence in Europe and German rearmament. The subsequent treaty signed in May 1952, was shelved after its ratification fell through in French Parliament in 1954, a victim of a French fear of loss of national sovereignty and concerns over the possible effects on the neighbouring communist bloc in the East.[10]

The European Political Community on the other hand, was the second project related to fundamental rights and carried more relevant implications, even though it never made it to a treaty. At the request of the Parliamentary Assembly of the Council of Europe the six governments of the European Coal and Steel Community commissioned in 1952 the Common Assembly to draw up a plan for a European Political Community. This was to be done by an Ad Hoc Assembly, an expanded version of the Common Assembly, chaired again by Paul Henri Spaak and assisted by a Constitutional Committee. Their work followed up on what had been produced by the *Comité d'études pour la constitution européenne* in 1952. The European Political Community's general aim was declared to be the protection of human rights and fundamental freedoms in the Member States (Article 2 of the draft treaty). In Article 3 the Convention was incorporated by declaring it to be an 'integral part' of the draft treaty. A Community Court would be set up but the European Court of Human Rights, although not yet functioning at the time,[11] would become the court of last resort according to the European Political Community. The European Political Community draft treaty was less far reaching than the plans designed by the *Comité d'études pour la constitution européenne*. This showed in particular with regard to the extent to which the Member States would be governed by the human rights standards in question. Community intervention in a Member State could only take place at the request of the country in question. And even though the Constitutional Committee had recommended the possibility that Member States could tackle one another before the Strasbourg Court as well as that the Community could take on a Member State the draft treaty, eventually,

8 This was the term used then, but it should not be confused with the European Community of a few decades later.

9 *See* G. DE BÚRCA, 'The Evolution of EU Human Rights Law' in P. CRAIG and G. DE BÚRCA (eds.), *The Evolution of EU Law*, 2nd edition, Oxford University Press, 2011, pp. 467–471.

10 P. CRAIG and G. DE BÚRCA, *EU Law – Texts, Cases and Materials*, 4th edition, Oxford University Press, 2008, p. 8.

11 The Strasbourg Court would become operative in January 1959.

limited itself to provide that a Community court would be competent for actions instituted by natural or legal persons against Community institutions for breaches of the Convention. Accession to the Convention by the Community had been discussed but was not envisaged in this project.[12]

The draft European Political Community treaty was adopted in March 1953 by the Ad Hoc Assembly and sent to an Intergovernmental Conference where it was discussed at various moments in the subsequent 18 months. It met substantial criticism from the French delegation for its supranational character. The human rights provisions, however, seem to have been no bone of contention during that phase. Still, when the European Defence Community collapsed in August 1954 the European Political Community was dragged along as the latter had been prepared on the basis of a provision of the former.[13]

The European Coal and Steel Community therefore remained empty-handed at the time and the protection of human rights was left to that 'other' Europe, to the Council of Europe, as the Convention entered into force on 3 September 1953. European cooperation did continue but took a different, more pragmatic turn, focusing on economic integration and the establishment of a common market. In the European Economic Communities Treaty and the Euratom Treaty no general human rights provisions were to be found, thereby avoiding controversy that would have prevented their genesis in 1958. The prohibition of discrimination on grounds of nationality and the principle of equal pay for men and women can be considered to be exceptions even though their insertion in the European Economic Communities Treaty was economically motivated.[14]

'Once bitten, twice shy' is what comes to mind as fundamental rights remained dormant at the European Parliament in the following years. They admittedly resurfaced now and then, when Members of the European Parliament submitted questions to the Commission and the Council and for example adopted resolutions concerning the state of affairs in third countries which would become Member States in the future.[15] Human rights were also put on the agenda in the context of (economic) bilateral and multilateral ties with countries and

12 *See* G. DE BÚRCA, 'The Evolution of EU Human Rights Law' in CRAIG and DE BÚRCA (eds.), 2011, pp. 472–474.

13 G. DE BÚRCA, 'The Road not Taken: The European Union as a Global Human Rights Actor', *American Journal of International Law*, Vol. 105, No. 4, October 2011, pp. 663–664.

14 The free movement of factors of production such as goods and workers depended on non-discrimination and equal treatment. *See* M. Bell, 'The Principle of Equal Treatment: Widening and Deepening' in CRAIG and DE BÚRCA (eds.) 2011, pp. 611–612 and 629; P.J.G. KAPTEYN and P. VERLOREN VAN THEMAAT, *Introduction to the Law of the European Communities*, 3rd rev. edition, London-The Hague-Boston, Kluwer Law International, 1998, pp. 1070–1071.

15 E.g. on Greece: written question No. 416/72 by MEP Glinne, OJ 1972, C 138/84; on Spain: oral question No. 100/73 by MEP Ansart et al., OJ 1973, C 95/3; on Czechoslovakia: resolution of 17 April 1980, OJ 1980, C 117/46.

international organisations.[16] Often European Parliament interventions concerned countries which were located outside its sphere of influence such as the Soviet Union,[17] South Africa,[18] Chile[19] and Iran.[20] Other questions can be viewed as *cris de coeur* of Members of the European Parliament relating to events taking place in Member States such as an alleged illegal detention of individuals,[21] the right of individuals to appeal to the European Commission of Human Rights (a right which e.g. France had not yet accepted).[22] the *Berufsverbot*[23] in Germany or breaches of human rights during the 'troubles' in Northern-Ireland.[24] Sometimes the questions were tabled in connection with substantive subjects where the European Economic Communities had not yet developed policy or adopted legislation such as privacy[25] while others dealt with topics which (clearly) fell outside the scope of the EEC such as trade unions in the national armed forces.[26] The Members of the European Parliament also tabled time and again the accession of the European Communities to the Convention.[27]

At the end of the nineteen seventies political attention for the protection of fundamental rights had been increasing for some years. By that time it was also becoming possible to discern some aspects and patterns. Some of them are well illustrated by a question put forward to the European Commission by Mr Glinne, a Member of the European Parliament in October 1979.[28] The question was extensively worded with almost two pages in the Official Journal. On top of that, its heading, 'Position of the Commission and the Community in the event of violation of human rights within or outside the Community', was an indication of the broad scope and high ambitions. The answer, on the other hand, was brief, less than half a page. In spite of the many arguments put forward by Mr Glinne, the European Commission clearly saw no reason to elaborate on its commitment to this cause and on its position according to which each violation 'should be dealt with on its own merits and in close consultation with the Member States'.

16 E.g. on Turkey: written questions No. 719–720/78 by MEP Porcu, OJ 1979, C 28/22; on Africa and the Lomé Convention: written question No. 702/79 by MEP Schwartzenberg, OJ 1979, C 316/43; on South-America: written question No. 1025/78 by MEP Dondelinger, OJ 1979, 92/17.

17 Written question No. 330/78 by MEP Dondelinger, OJ 1978, C 199/58.

18 Oral question No. 65 by MEP Ewing, OJ 1980, C 59/28.

19 Resolution of 15 October 1976, OJ 1976, C 259/38.

20 Resolution of 16 November 1979, OJ 1979, C 309/61.

21 Oral question of MEP Ellis on France, OJ 1976, C 53/8.

22 Oral question No. 56 by MEP Linde, OJ 1980, C 117/33; with regard to soon-to-accede Member States, *see* written question No. 1024/78 by MEP Dondelinger, OJ 1979, C 92/16.

23 Written question No. 1/75 by MEP Amendola, OJ 1975, C 170/12; written question No. 744/80 by MEP Wurtz, OJ 1980, C 283/22.

24 Written questions No. 1042/80 by MEP Ansart, OJ 1981, C 60/1.

25 Written question No. 193/73 by MEP Cousté, OJ 1974, C 40/21.

26 Written question No. 647/75 by MEP Glinne, OJ 1975, C 80/26.

27 *Inter alia* oral questions Nos. 11–13/78 by MEP Patijn and others, OJ 1978, C 296/47; oral question No. 38 by MEP Sieglerschmidt, OJ 1978, C 296/30; written question No. 584/79, Glinne, OJ 1980, C 74/5; written question No. 2186/80 by MEP O'Hagan, OJ 1981, C 134/27.

28 OJ 1980, C 80/5.

In other words, 'No grand visions, please'. It was clear that each institution was playing its role, the European Parliament pushing the accelerator and the European Commission the brakes. Mr Glinne lamented over the fact that too often resolutions and questions of the European Parliament on fundamental rights ultimately concerned matters outside the scope of the treaties, and the Member States themselves retained their *freies ermessen*. This touched upon the internal dimension of fundamental rights which has to be distinguished from the external dimension. At a first and superficial glance it may for a long time have seemed that the European Parliament was only concerned with human rights in faraway countries. Mr Glinne's question confirms this impression as the aforementioned cry is only a brief overture to travel further, for instance to the African, Caribbean and Pacific States, South Africa, Vietnam, Tunisia, Uruguay. We underline that the focus of our contribution is on the internal dimension, without wishing to detract from the many achievements of the European Parliament in the field of fundamental rights as a source of inspiration for individuals, people and organisations in many third countries by activities such as setting up the Sakharov Prize, having human rights clauses inserted in bilateral and multilateral agreements, allocating substantial financial funds to programmes carried out since 1994 under the budget heading of European Initiative for Democracy and Human Rights, the many debates held, questions submitted, reports drafted[29] and resolutions adopted.[30]

The first resolution on fundamental rights was adopted by the European Parliament in 1973. It invited the European Commission to take these rights into account when drafting secondary legislation and to submit a report on the matter. In this resolution it viewed these rights as arising from national constitutional law, constituting principles common to all Member States.[31] Connecting fundamental rights to the 'constitutional traditions common to the Member States', the standard phrase used by the European Court of Justice,[32] has for a long time been one of the approaches. Another approach was used by the European Parliament two years later, in a resolution on the European Union. One of the steps that should be taken to achieve such an union was that a 'Charter of the rights of the peoples of the European Community' be drawn up.[33]

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29 In 1983, the first yearly report on the situation of human rights in the world, drafted by MEP Israel was adopted by the EP, OJ 1983, C 161/55, followed by a resolution on the subject, OJ 1983 C 161/58.

30 At the European Parliament, human rights within the Community fell under the competence of the Legal Affairs Committee (now: LIBE (Civil Liberties, Justice and Home affairs) while external human rights belonged to the Political Affairs Committee (now: AFET (Foreign Affairs).

31 4 April 1973, OJ 1973, C 26/7.

32 CoJ, *Internationale Handelsgesellschaft*, judgment of 17 December 1970, Case C-11/70, [1970] ECR 1125, para. 4.

33 Resolution of 10 July 1975, OJ 1975, C 179/28.

A third road, explored in the nineteen fifties as we have described above, was for the European Community to accede to the Convention. This was proposed by the European Parliament in a resolution in 1979.[34] And in a joint declaration in 1977, the first of its kind on fundamental rights, the European Parliament, the Council and the European Commission found common ground by being less outspoken than the aforementioned resolutions of the European Parliament but using the same sources of inspiration: the national constitutions and the Convention.[35]

After the first direct elections in 1979 the European Parliament became more active in this field. Having adopted a resolution on a Community charter of regional languages and cultures and on a charter of rights of ethnic minorities[36] in 1981 the European Parliament continued a year later with a resolution repeating its determination that the European Community should accede to the Convention.[37] By the end of its first mandate based on universal suffrage, in 1984, the European Parliament adopted with a large majority the so-called Spinelli Draft.[38] This 'Draft Treaty establishing the European Union' had been written under the guidance of Altiero Spinelli, who also had been involved in the first peak of European Parliament activism in the nineteen fifties. The draft contained a provision, Article 4, in which the various approaches to protect fundamental rights were collected. For the Union the main source would be the common national constitutional principles as well as the Convention. Furthermore, the economic social and cultural rights derived from the national constitutions and the European Social Charter[39] were to be maintained and developed. The Union was to decide whether or not to accede to the Convention among others, but was also held to adopt its own declaration on fundamental rights. All in all, this was a versatile approach with something to suit all tastes. The Spinelli Draft, however, never evolved beyond a draft as Italy was the only Member State that backed it. But as a political declaration it influenced many future treaties.[40]

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34 27 April 1979, OJ 1979, C 127/69. This resolution followed upon the Memorandum on the accession of the European Communities to the ECHR, adopted by the European Commission on 4 April 1979, Bulletin of the EC, Suppl. 2/79. The European Commission declared itself in favour of such a step.

35 5 April 1977, OJ 1977, C 103/1. This joint declaration followed upon the report of the European Commission of 4 February 1976, The protection of fundamental rights as Community law is created and developed, Bulletin of the EC, Suppl. 5/76, which did not aim to change the *status quo* of the standard of protection of fundamental rights.

36 16 October 1981, OJ 1981, C 287/106.

37 29 October 1982, OJ 1982, C 304/253.

38 14 February 1984, OJ 1984, C 77/33.

39 Drafted by the Council of Europe, it was signed on 18 October 1961, and revised in 1996. Not to be confused with the Community Charter of Fundamental Social Rights (1989).

40 Building Parliament: 50 Years of European Parliament History 1958–2008 (2008), pp. 113–114.

The institutional aspects of the Single European Act,[41] signed in February 1986, built to a large extent upon the Spinelli Draft, leaving out the more supranational aspects. It was the first major change of the EEC, ECSC and Euratom Treaties, introducing among others the cooperation procedure and the assent procedure and giving the European Parliament more say in the decision making process. The preamble to the Single European Act mentioned for the first time fundamental rights based on the triplet of the national constitutions, the Convention and the European Social Charter. This echo of Spinelli was, however, as far the amending treaty went but it was nonetheless an important turning point.

3. THE EUROPEAN PARLIAMENT FROM THE NINETEEN EIGHTIES TO THE PRESENT: BRINGING FUNDAMENTAL RIGHTS HOME

In the years following the Single European Act, fundamental rights became the subject of increased activity and not only at the European Parliament. Treaty changes occurred in a relative rapid succession. The Treaty of Maastricht (1992) introduced fundamental rights as guaranteed by the Convention and common national constitutional traditions as being general principles of Community law.[42] This was developed further in the Treaty of Amsterdam (1997): the European Union was founded on among others the respect for human rights and fundamental freedoms[43] while Member States violating seriously and persistently the Union's founding principles could expect the Council to take measures against them.[44] The Treaty of Nice (2000) in itself did not add anything on fundamental rights in the existing treaties but its signature coincided with the proclamation of the Charter of Rights by the European Parliament, the Council and the European Commission.

Accession to the Convention remained during those years on the agenda of the European Parliament. It considered such a step of great importance because that would demonstrate that the Community had matured and abided by the rule of law.[45] A resolution adopted by the European Parliament in 1994 was quite ambitious in this respect.[46] It stated that preventing contradictory judgments by the Luxembourg Court and the Strasbourg Court, was one of the arguments for accession. The European Parliament even envisaged the Court of

41 OJ 1987, L 169/1. The SEA entered into force on 1 July 1987.
42 Article F(2) EU Treaty, later Article 6(2) EU Treaty.
43 Article F(1) EU Treaty, later Article 6(1) EU Treaty.
44 Article F.1 EU Treaty, later Article 7 EU Treaty.
45 Resolution of 9 July 1991, OJ 1994, C 240/45.
46 Resolution of 18 January 1994, OJ 1994, C 44/32.

Justice to become subject to supervision by the Strasbourg Court. And the accession to the Convention was viewed once more in tandem with the adoption by the Community of its own Declaration of Human Rights and Fundamental Freedoms.[47] Also in 1994 the Council requested the Court of Justice to give an opinion on the accession to the Convention. The Court considered that the Treaty did not contain any provisions to enact rules or conclude international conventions in the field of human rights. Furthermore using Article 235 EC,[48] the general catch-all provision, as a legal base, would be a bridge too far. According to the Court of Justice only an amendment of the Treaty would make accession possible.[49] Eventually this was settled in the Treaty of Lisbon, since the solution had been included in the ill-fated European Constitution for which the European Parliament had strived hard. This is at present provided for by Article 6(2) of the Treaty, which is paired to the entry into force of the Charter (Article 6(1) of the Treaty of the EU).

The need for a separate catalogue of fundamental rights had been advocated by the European Parliament since 1975. In that year the European Parliament called in an ambitious resolution for elections by direct universal suffrage and the establishment of an European Union, and expressed its hope for a 'Charter of the rights of the peoples of the European Community'.[50] The European Parliament repeated this call many times in the following years,[51] especially since 1991 when it set out to draw up annual reports on the human rights situation within the European Community.[52] A provisional climax was reached with the resolution of 12 April 1989. Thereby a Declaration on Fundamental Rights and Freedoms was adopted, containing some twenty rights and principles. It was the first attempt of the European Parliament for such a codification, being to some extent, the response to the statement the European Commission had made in 1976 that it befell on the European Parliament to set up such a catalogue.[53]

The European Council meeting in Cologne in June 1999 assigned the drafting of such a document to a so-called ad hoc Convention. This group met under the name of European Convention and with Roman Herzog as a chairman and consisted of members and observers of European institutions and the Member States. The European Parliament underlined the importance it attached

47 This had been declared previously, *see* the resolution of the European Parliament of 12 April 1989, OJ 1989, C 120/51.

48 Now: Article 352 TFEU.

49 Opinion 2/94, [1996] ECR I-1759.

50 Resolution of 10 July 1975, OJ 1975, C 179/28.

51 For example in the resolution of 12 March 1987, OJ 1987, C 99/157, para. 22; Resolution of 19 November 1997, OJ 1997, C 371/99, §12, 8th indent.

52 Resolution of 9 July 1991, OJ 1991, C 240/45; resolution of 11 March 1993, OJ 1993, C 115/180, §8. Reports on human rights in the rest of the world had started in 1983.

53 Report of the EC 'The protection of fundamental rights as Community law is created and developed', 4 February 1976, COM(76) 37, *Bulletin of the EC*, Suppl. 5/76, para. 37.

to such a text at various moments[54] and played an active and often decisive role in the preparation of the various provisions.[55] By October 2000 the European Convention had adopted a draft which was subsequently signed and proclaimed as the Charter of Fundamental Rights by the presidents of the European Parliament, the Council and the European Commission in December 2000 in Nice.[56] But one thing was missing, the Charter was not legally binding.

The European Parliament continued its fight, this time to have the Charter attributed the same legal status as the Treaties. In its resolution of 23 October 2002 the European Parliament expressed the opinion that it would be in accordance with various developments to have the Charter become enforceable under European Union law. It argued among other things that the Court of Justice was increasingly relying on the Charter, that it was becoming a reference document for the Council and other institutions and organs of the European Union and that it would be an inspiration for both present as future Member States.[57] This plea has to be viewed against the following background. Since February 2002 talks were taking place in the so-called Convention for the Future of Europe. At the European Council in Laeken in December 2001 a Declaration had been adopted on the basis of which this Convention, under chairmanship of Valery Giscard d'Estaing, would start working on a Constitution for Europe. By July 2003 a Draft Treaty establishing such a constitution was presented and subsequently signed by the Member States. It was, however, eventually abandoned in June 2005 when referenda in France and the Netherlands had delivered negative results. This 'Constitutional Treaty' was supposed to replace the existing treaties and had contained the Charter that therefore automatically would have become legally binding.[58] For the European Parliament this was the whole point of including the Charter in the Constitutional Treaty. It was considered unthinkable and falling short of having the necessary and desirable effect to have a modern constitution of the European Union without a binding Bill of Rights.[59]

The Constitutional Treaty falling through did not deter the European Parliament. In a resolution of March 2007 it promoted the further development of a 'fundamental rights culture'. It underlined the importance of a legally binding Charter but, *faute de mieux*, the resolution focused on the entire European Union legislative process. The Commission with its sole right of initiative should therefore assure that its proposals complied with the fundamental rights of the Charter.[60] But the European Parliament should also

54 Resolution of 16 September 1999, OJ 2000, C 54/93; resolution of 16 March 2000, OJ 2000 C 377/329.

55 *Building Parliament: 50 Years of European Parliament History 1958–2008* (2008), pp. 234.

56 The CFR was published in OJ EU 2000, C 364/1.

57 OJ 2003, C 200 E/432.

58 OJ 2004, C 310. The CFR constituted Part II of the Constitutional Treaty.

59 OJ 2003, C 200 E/432, §7.

60 This would be done on the basis of a 'Fundamental Rights Check-List', *see* the 2010 Report of the European Commission on the Application of the EU Charter of Fundamental Rights, COM(2011) 160, p. 2.

have a responsibility in this process.[61] Actually, the obligation to use the Charter as a compass had already been laid down in its 2004 Rules of Procedure.[62] But only three months later, the aforementioned resolution was overtaken by developments at the level of the European Council. At its meeting in June 2007 the European Council agreed on the mandate for the next Intergovernmental Conference to prepare what eventually would be the Treaty of Lisbon. One of the topics was to ensure that the Charter would become legally binding, but without incorporating it into the new Treaty. This was welcomed by the European Parliament[63] and on 12 December 2007 the Charter was proclaimed once more by the Presidents of the European Parliament, the Council and the European Commission.[64] That was only one day before the signing of the Treaty of Lisbon which finally gave the Charter force of law as from 1 December 2009.[65]

The importance of the Charter as a source of directly enforceable rights cannot be underestimated. Nor can the role that the European Parliament played in achieving this, as has been described above. The present status of the Charter can be considered the apotheosis of the European Parliament's travails. But the European Parliament is not satisfied with 'well enough' and persists to keep the Charter on the agenda. In a resolution adopted in December 2010, it draws the new post-Lisbon fundamental rights architecture. The Charter forms the main part of this architecture as 'the most modern codification of fundamental rights, offering a good balance between rights and solidarity and encompassing civil, political, economic, social and cultural rights as well as "third generation" rights (i.e. the rights to good administration, freedom of information, a healthy environment and consumer protection)'.[66] According to the European Parliament everybody should contribute to develop and implement these rights in any way they can: the Council, the European Commission, the Member States, national parliaments, the Court of Justice, the Fundamental Rights Agency of the European Union, Frontex, the Council of Europe and the Strasbourg Court.

4. THE EUROPEAN PARLIAMENT: WITH A LITTLE HELP FROM ITS FRIENDS

In its fight for fundamental rights the European Parliament has often been supported by, or made use of other institutions and bodies. It has done so in various ways, directly or less directly, together with the Luxembourg Court, the

61 Resolution of 15 March 2007, OJ 2007, C 301 E/229.
62 European Parliament, Rules of Procedure 16th edition, July 2004, rule No. 34, OJ 2005, L 44/1.
63 Resolution of 11 July 2007, OJ 2008, C 175 E/347, §8.
64 OJ 2007, C 303/1.
65 Article 6(1) TEU. The present version of the CFR was published in OJ 2010, C 83/389.
66 Resolution of 15 December 2010, 'Fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon', P7_TA(2010)0483, para. 6.

European Ombudsman, the Fundamental Rights Agency and the Commissioner responsible for fundamental rights, to mention the main ones.

At first sight one might expect the Court of Justice to be by nature an ally of the European Parliament in protecting fundamental rights. In practice that is correct only up to a certain point. The Luxembourg Court is bound by the law as it stands and that prevents the Court to go as far rights activists would want or hope. In the years 1969–1974 the Court of Justice took the first steps of acknowledging the existence of fundamental rights in the legal order of the European Economic Community. According to this case law these rights form an integral part of the general principles of Community law. The Court of Justice found inspiration in the dichotomy of the 'constitutional traditions common to the Member States' and 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'.[67] It has been submitted that the Court of Justice 's role in this has been 'stimulated' by the possibility that otherwise national constitutional courts, especially the Italian and the German ones, would take on this role with all the ensuing fragmentary consequences. Gradually the Convention became the main international treaty of its kind the Luxembourg Court referred to, but when doing so, always in conjunction with the evolving European integration.[68]

In the years following the adoption of the Charter in 2000 the European Parliament went to the Court of Justice in four cases to have Community legislative acts reviewed in the light of fundamental rights. The European Parliament was on the whole unsuccessful in its actions but the cases underlined how serious the parliament was about these rights.

Case C-540/03, European Parliament against Council

The European Parliament seeks annulment of some provisions of Directive 2003/86/EC on the right to family reunification. These provisions permit Member States to apply national legislation by restricting family reunification on the ground of age and thereby derogate from the Directive. In the preamble to the Directive article 8 of the Charter is explicitly mentioned. The European Parliament claims violation of the right to family life (article 8 ECHR, article 7 Charter) and the right to non-discrimination (article 14 ECHR, article 21(1) Charter). The Court of Justice dismisses the action as the provisions in question cannot be regarded as running counter to fundamental rights. It relies on the Convention and on case law of the Strasbourg Court. The Charter is mentioned explicitly because it should be considered to be on a par with the Convention.

ECJ Case C-540/03, EP/Council [2006] ECR I-5769, judgment of 27 June 2006.

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67 CoJ, *Stauder*, judgment of 12 November 1969, Case C-29/69, [1969] ECR 419; CoJ, *Internationale Handelsgesellschaft*, judgment of 17 December 1970, Case C-11/70, [1970] ECR 1125; CoJ, *Nold*, order of 11 January 1977, Case C-4/73, [1974] ECR 491.

68 A. Clapham, *Human Rights and the European Community: A Critical Overview*, Baden-Baden, Nomos, 1991, pp. 29–30 and 46–48.

Opinion 1/04, Passenger Name Record (PNR) Agreement
In March 2004 the European Commission submits to the European Parliament for consultation a proposal for a Council Decision on the conclusion between the European Union and the United States of America of an Agreement on the processing and transfer of Passenger Name Record data by air carriers to the United States of America. The Council asks for an urgent procedure with a time-limit but the European Parliament instead requests in April 2004 the Court of Justice for an opinion. One of the two questions is whether the Passenger Name Record Agreement is compatible with the right to protection of personal data (article 8 ECHR). The Council does not wait for the Opinion and adopts in May 2004 the decision on the conclusion of the Passenger Name Record Agreement. The request for an Opinion is subsequently removed from the register of the Court of Justice.
OJ 2004, C 118/1; OJ 2005, C 69/12.

Joined Cases C-317/04 and C-318/04, European Parliament against Council resp. European Commission (PNR Agreement)
In a sequel to the facts of Opinion 1/04 the European Parliament, supported by the European Data Protection Supervisor, goes to the Court of Justice requesting the annulment of two measures: 1) the Council Decision on Agreement mentioned previously, and 2) a related Commission Decision on the adequacy of United States' data processing. One of the arguments of the European Parliament is breach of fundamental rights more in particular the right to protection of personal data (as guaranteed by article 8 ECHR): the amount of data required by the United States of America is excessive, the data are kept far too long and there is no judicial review possible. The Advocate General concludes that no breach has taken place as Council and Commission enjoy a wide discretion in combating terrorism and other serious crimes. The Court of Justice, however, annuls the Council Decision because of an incorrect legal basis and the Commission Decision as it has been adopted *ultra vires*. It does not consider the fundamental rights aspects.
ECJ Joined cases C-317/04 and C-318/04, EP/Council [2006] ECR I-4721, judgment of 30 May 2006.

Since the Charter originally saw the light the Court of Justice has often used it, usually as an extra argument and complementing the Convention.[69] But since it entered into force in 2009 the impetus is provided by litigants aware of the possibilities it offers as an autonomous source of rights. European as well as national case law has accordingly proliferated.[70]

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69 For example CoJ, *British American Tobacco*, judgment of 10 December 2002, Case C-491/01, [2002] ECR I-11453.

70 2011 Report of the European Commission on the Application of the EU Charter of Fundamental Rights, COM(2012) 169, pp. 6, 8 and 14; A. PAHLADSINGH and H.J.TH.M. VAN ROOSMALEN, 'Het Handvest van de grondrechten van de Europese Unie twee jaar juridisch bindend: rechtspraak in beweging?' [The Charter of Fundamental Rights of the European Union, Legally Binding for Two Years: Case Law on the Move?], *Nederlands Tijdschrift voor Europees Recht*, 2012, pp. 56–65.

A close friend of the European Parliament is the European Union Fundamental Rights Agency whose objective is to provide data and information on the respect in practice for fundamental rights falling within the competence of the European Union. In accordance with the Charter[71] the various European Union institutions and bodies as well as the Member States when implementing European Union law, fall under the scope of the Fundamental Rights Agency. The Agency is the successor to the European Monitoring Centre on Racism and Xenophobia that had been set up in 1997.[72] The mandate of the Monitoring Centre (a network of existing national bodies with its headquarters in Vienna) was more specific than the Fundamental Rights Agency. It had to collect and analyse data on racism, xenophobia and anti-Semitism to enable the European Community to meet its obligations to respect fundamental rights. The establishment of the Monitoring Centre was the consequence of the Treaty of Maastricht (1992). The European Parliament subsequently set up its Committee on Civil Liberties, Justice and Home Affairs to deal with Third Pillar policies and strongly endorsed the establishment of the Monitoring Centre as being instrumental to fight discrimination.[73] The conversion of the Monitoring Centre into the Fundamental Rights Agency was something the European Parliament had campaigned for and the institution was actively involved with several of its demands being satisfied, in the adoption of the founding Regulation 168/2007[74] even though its legal basis, Article 308 EC only required consultation of the European Parliament.[75] The European Parliament has strong ties with the Fundamental Rights Agency and often calls in the latter as an ally to contribute with facts and data to its discussions and stances on fundamental rights.[76] It has also been seeking to have the Fundamental Rights Agency's mandate reviewed and strengthened to have it adapted to the new requirements of the Treaty of Lisbon and the Charter.[77]

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71 Article 51(1) CFR.

72 Regulation (EC) No. 1035/97, OJ 1997, L 151/1.

73 Resolution of 9 May 1996, OJ 1996, C 152/57.

74 Regulation (EC) 168/2007, OJ 2007, L 53/1.

75 *Building Parliament: 50 Years of European Parliament History 1958–2008* (2008), p. 238. This was in stark contrast to the highly critical attitude of the Dutch Parliament because of overlap with the Council of Europe and the possibility that the Fundamental Rights Agency would have competence on national issues that had no relationship with Community law. *See* P. VAN SASSE VAN YSSELT, 'Het EU-grondrechtenagentschap: te luxe waakhond zonder tanden?' [The European Fundamental Rights Agency: A Superfluous Cerberus Without Teeth?], *NJCM-Bulletin* 2009, No. 5, pp. 579–584.

76 F. CAMPORESI, 'The European Parliament and the EU Charter of Fundamental Rights' in G. DI FEDERICO (ed.), *The EU Charter of Fundamental Rights – From Declaration to Binding Instrument*, Dordrecht, Springer, 2011, pp. 90–91.

77 Resolution of 15 December 2010, Fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon, P7_TA(2010)0483, para. 31.

The origins and the functioning of the European Ombudsman are also closely linked to the European Parliament. In 1979 a resolution was adopted requesting that such a body was set up to protect the fundamental rights of the citizen when subject to maladministration of Community law by public authorities.[78] Eventually it was established in 1993 on the basis of the Treaty of Maastricht as an independent body. The European Ombudsman is appointed by the European Parliament after each election and he reports on a yearly basis to the European Parliament.[79] It has therefore been characterized as an institution within an institution.[80] That the protection of the fundamental rights of the citizens when dealing with European Union institutions and bodies is at the centre of its mandate is illustrated for example by recent investigations it has started on Frontex,[81] and the European Commission.[82] The main provisions of the Charter relevant for the European Ombudsman are Articles 41 (right to good administration) and 42 (right of access to documents).

Finally one may think of the Commissioner responsible for fundamental rights. During her confirmation hearing before the European Parliament in January 2010, Viviane Reding pledged her allegiance to the Charter. She was to be re-appointed for the third time as a Member of the European Commission but this time as the first European Commissioner for Justice, Fundamental Rights and Citizenship. This was in line with the changes brought about by the Treaty of Lisbon that had entered into force a month earlier and had placed the Charter on the same footing as the European Union treaties. On the basis of her presentation during the hearing the European Parliament gave her a warm welcome.[83] This commissioner represents for the European Parliament the best hope for the European Union's development of a comprehensive fundamental rights policy.

5. THE EUROPEAN PARLIAMENT AFTER LISBON: STAYING ALERT

After the Treaty of Lisbon came into force and the Charter became legally binding the European Parliament kept fundamental rights on the agenda. Some issues can be mentioned briefly here to illustrate this. One regarded the Hungarian constitution and media legislation. In several resolutions in 2011–

78 Resolution of 5 June 1979, OJ 1979, C 140/153.

79 Article 228 TFEU.

80 *Building Parliament: 50 Years of European Parliament History 1958–2008*, 2008, p. 102.

81 European Ombudsman press release No. 4/2012 of 13 March 2012, on the implementation by Frontex of its fundamental rights strategy.

82 European Ombudsman press release No. 2/2012 of 12 January 2012, on the Early Warning System, an internal mechanism, which identifies persons deemed to pose a threat to the financial interests of the European Union.

83 *Financial Times*, 15 January 2010.

2012 the European Parliament expressed its deep concerns about the independence of the Hungarian central bank, the establishment of a national media and telecommunications supervisory authority and the early mandatory retirement age of judges and prosecutors. At stake were the independence of the central bank, the existing data protection authorities and the judiciary as well as the freedom of expression and of the press.[84]

Another issue was in line with the cases the European Parliament had brought to the Court of Justice in the previous decennium. Data protection and privacy are causes that have often been debated in the European Parliament, lately in the context of the fight against terrorism or telecommunication legislation. In February 2010 for example an interim agreement between the Council and the United States of America on banking data transfers to the United States of America via the SWIFT network was rejected by the European Parliament as it was not in accordance with the Charter, in particular Article 8 (protection of personal data).[85] After stronger safeguard improvements had been made as requested by the European Parliament, the agreement was approved in July 2010.[86]

A third issue concerned the treatment of Roma people in several Member States, something the European Parliament has demanded attention for at various occasions. The European Parliament condemned the discrimination, expulsions and deportations this minority was subjected to. Deploring the lack of political will to take steps to solve the problems, the European Parliament repeatedly urged to uphold the values and principles laid down in the Charter and to develop a strategy that would be in accordance with it.[87]

The last issue that can be mentioned here concerns the launching of a website by the Dutch Party for Freedom (PVV) in early 2012 where citizens could report their (negative) experiences with Central and Eastern European workers in the Netherlands. This action caused many sharp reactions not only in the Netherlands itself but also in other Member States as well as from European institutions. Among others, Viviane Reding condemned the intolerance, the President of the European Parliament, Martin Schulz, discussed the matter with the Dutch Prime Minister, Mark Rutte, and the European Parliament adopted a resolution airing its concern not only about the xenophobic character of the hotline in question but also about the lack of response by the Dutch government.[88] The statement by the European Commissioner for Justice, Fundamental Rights and Citizenship, however, prompted a question by a

84 Resolution of 10 March 2011 on media law in Hungary, P7_TA(2011)0094; resolution of 5 July 2011 on the Revised Hungarian Constitution, P7_TA-PROV(2011)0315; resolution of 16 February 2012 on the recent political developments in Hungary, P7_TA-PROV(2012)0053.

85 Resolution of 11 February 2010, P7_TA(2010)0029.

86 OJ 2010, L 195/3.

87 Resolution of 9 March 2011, P7_TA(2011)0092; Resolution of 9 September 2010, P7_TA(2010)0312; Resolution of 25 March 2010, P7_TA(2010)0085.

88 Resolution of 15 March 2012, P7_TA-PROV(2012)0087.

Member of the European Parliament representing the PVV and drawing the attention of the European Commission to the freedom of speech and expression as guaranteed by the Charter which should also benefit such a website.[89] This shows that fundamental rights often have to be weighed against each other.

6. REVIEW AND APPRAISAL

The cornerstone of the European Parliament's vision on fundamental rights after it came into force of the Treaty of Lisbon is without doubt the resolution it adopted on 15 December 2010.[90] Paragraph 5 reads as follows:

> 'Reiterates that the entry into force of the Treaty of Lisbon on 1 December 2009 has fundamentally changed the legal face of the EU, which should establish itself increasingly as a community of shared values and principles; thus welcomes the new, multi-level EU system of fundamental rights protection that emanates from multiple sources and is enforced through a variety of mechanisms, including the legally binding Charter; the rights guaranteed by the ECHR, recognition of which flows from the Union's obligation to accede; and the rights based on the Member States' constitutional traditions and their interpretation according to the jurisprudence of the ECtHR and the CJ;'

In this resolution the European Parliament underlined once more the importance of accession to the Convention. One of the reasons is that only then will it become possible to lodge 'a complaint with the Strasbourg Court in relation to a violation of human rights derived from an act by an EU institution or a Member State implementing EU law ...' (§9). The resolution was also directed to the Council of Ministers and the European Court of Justice, calling to 'review and strengthen the mandate of the Fundamental Rights Agency of the European Union,' highlights the enhanced role of the national parliaments and mentions a large number of policy fields in which measures should be adopted on fundamental rights. These include data protection, combating trafficking of human beings as a form of slavery, protecting the rights of refugees and migrants and the rights of the child, eliminating all forms of discrimination, and the inclusion of Roma.

Some of the more general measures can also be mentioned here, such as the initiative of the European Commission to develop a fundamental rights impact assessment.[91] And the yearly report on the application of the Charter of

89 Article 11 CFR. Question by MEP Zijlstra, E-001874/2012, 16 February 2012, answered by Viviane Reding on 12 April 2012.

90 Resolution of 15 December 2010, Fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon, P7_TA(2010)0483.

91 Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of fundamental rights, COM(2009) 205.

Fundamental Rights published by the European Commission. But this does not suffice. In our opinion the aforementioned instruments should be complemented with a monitoring system that charts the relevant aspects as part of the fundamental rights policies of the Member States and when necessary tackles these.[92] On the other hand, the idea of a Special European Union Representative on Human Rights[93] besides the existing Commissioner responsible for fundamental rights, does not appeal to us.[94] One objection is that that would duplicate the competences of the Commissioner responsible for fundamental rights. Another objection is that such a separate office could be abused as an 'alibi' by the European Commission and other European Union bodies for their inaction.

In all this European Union fundamental rights remain at risk. This is based on the incoherence between the fundamental rights policy *vis-à-vis* third countries on the one hand and the internal fundamental rights policy. That imbalance does not specifically concern the European Parliament, on the contrary. But for a long time one can notice, however, that the Member States when gathering in the Council are very active with regard to violation of fundamental rights outside the European Union, but reluctant to develop an internal transparent policy in this field.[95] In our view: what you claim internationally, you should show internally!

On the basis of the above one can conclude that the European Parliament has been a central actor for the protection of fundamental rights within and outside the European Union, since the beginning of its existence 60 years ago. The European Parliament acts as a sort of a 'European conscience'.[96] It has shown to be a driving force and will certainly continue to show institutional leadership in this domain. We are confident that Pieter van Dijk will appreciate this element of European democracy.

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92 The Human Rights Policy of the European Union – Between Ambition and Ambivalence, Advisory Council on International Affairs, No. 76, July 2011, 63, The Hague 2011, p. 63.

93 European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the European Union's strategic human rights policy, P7_TA-PROV(2012)0126.

94 The Human Rights Policy of the European Union – Between Ambition and Ambivalence, Advisory Council on International Affairs, No. 76, July 2011, 63, The Hague, 2011, p. 72.

95 Ph. Alston and J.H.H. Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy', *European Journal of International Law*, Vol. 9 (1998), pp. 702–709; The Human Rights Policy of the European Union – Between Ambition and Ambivalence, Advisory Council on International Affairs, No. 76, July 2011, 63, The Hague, 2011, pp. 57–59.

96 F. Camporesi, 'The European Parliament and the EU Charter of Fundamental Rights' in: G. Di Federico (ed.), *The EU Charter of Fundamental Rights – From Declaration to Binding Instrument*, Dordrecht, Springer, 2011, p. 88.