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The rights' foundations of solidarity: Social and economic rights in the Charter of Fundamental Rights of the European Union

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Introduction

‘Rights to solidarity’ is a rather new expression, recently minted in the Charter of Fundamental Rights of the European Union. In this chapter, the term will be used to refer to the social and economic rights included in Section IV of the Charter, together with some other social rights included in other sections of the Charter.¹ The basic question that will be posed in this chapter is what the Charter has to say about the tension between social values and market freedoms within the European Union. Does the Charter favour the four economic freedoms or does it enhance the chances of realising the basic social European values, as embodied in national welfare states?

The first section of this chapter establishes the context in which the Charter was elaborated. European integration has been marked by a certain imbalance

¹ On the adequacy of the expression (whether it makes sense to take of *rights* to solidarity, or whether solidaristic behaviour must be, by definition, spontaneous, non-legally coerced, I (embarrassingly) refer to my ‘The Sinews of Peace. Rights to solidarity in the Charter of Fundamental Rights of the European Union’, forthcoming in *Ratio Juris*.

between market-making (usually referred to as *negative economic* integration) and market-redressing (that is, social regulation aimed at framing markets, and eventually rectifying its distributive outcomes). This is especially striking given that all Member States are mature *welfare states*, characterised by a balance of market-making and market-redressing at the core of their socio-economic structure. The second section aims at making legal and normative sense of the provisions on ‘rights to solidarity’ contained in the Charter. The specific status of rights to solidarity, but also of the right to private property, is considered. The Charter reflects somehow the present imbalance of European integration; the literal tenor of the provisions of social rights is weaker than that of the right to private property; however, a contextual interpretation of the provisions of the Charter reveals that social policies might be reinforced, not weakened, by the Charter. Thus, ‘rights to solidarity’ might be affirmed as *the* canon of arguments that require balancing social rights and economic freedoms. The third section deals with the invocation of social rights in the process of constitution-making. Finally, some conclusions are put forward.

I. The context: not-so-social Europe

As is well-known, European integration has led to the creation of a ‘common’ economic market, underpinned by the famous four economic freedoms: free movement of workers, capital and goods, plus freedom to provide services.² Additionally, monetary policy has been ‘federalised’ in twelve of the fifteen Member States. In legal terms, it is not too far-fetched to say that the regulatory framework of all productive factors is already established at the European level (even if this is partially further regulated by national laws).

Economic integration, one could venture, might have helped to foster the national protection of social rights, to the extent that peace and growth are the main preconditions of the welfare state, and the latter were rendered possible by European economic integration. Such a claim seems to be confirmed by the fact that, at the very least chronologically, the fostering of supranational markets came hand in hand with

² This does not mean, quite obviously, that all barriers to trade have been got away with. Not only there remain obvious barriers resulting from the lack of coordination of tax systems, but the preservation of the system of sales taxation at source seems to result in an administrative burden equivalent, in average, to 5% of the value of traded goods. See Ernst Verwaal and Sijbren Cijnossen, ‘Europe’s New Border Taxes’, 40 (2002), *Journal of Common Market Studies*, pp. 309–330.

the affirmation of national social rights.³ However, one must keep in mind that European integration has not resulted in any direct and substantive attribution of competence to the Union to protect social rights. To put it bluntly, *the creation of a common market has not come hand in hand with a European social policy*. This is what is usually referred to as a basic imbalance in European integration. It also tends to be argued that such an imbalance constitutes a risk for the further development, or even maintenance, of national social policies. Such claims are always based on the assumption that market-making and social-deepening, once mutually reinforcing, have become conflicting objectives.

This state of affairs has not always been welcomed by all Europeans. All episodes of economic recession since the oil crises of the 1970s testify to the rather undefined but increasingly intense calls for a more balanced approach to European integration, for some kind of ‘social European policy’. Social pressure has had its limited, but far from negligible effects on Community law. The short, but existing *acquis communautaire* on social standards has been established at such critical turning points: the economic crisis of the 1970s, the stagnation of the mid 1980s, and during the recession of the mid 1990s. Two main achievements have to be referred to. First, the Social Charter, which includes a set of rights for ‘workers’, was approved in 1989. However, British opposition resulted in it being confined to the status of a political declaration, and, more to the point, in the impossibility of developing policy measures aimed at rendering effective the said rights through Union action. Second, the Treaty of Amsterdam inserted an Employment Title in the Treaty of the European Communities. This resulted in an open but weak assumption of social competences by the Union. Several informal processes of co-ordination have resulted from it, among which the rather fashionable ‘Open Method of Co-ordination’.

However, all this amounts to a rather weak competence of the Union on social matters. As a result, we are still in the midst of a tension between market-making and market-redressing. On the one hand, the legal framework applicable to most of the ‘productive factors’ is determined by Community law, and given the *supremacy* of the latter, has *de facto* become inscribed in the constitutional law of each Member State. On the other hand, social protection remains a national competence, and without a

³ See the second chapter of Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez (eds.), *The Chartering of Europe. The Charter of Fundamental Rights of the European Union and its constitutional context*, (Baden-Baden, Nomos, 2003), section 1

proper normative sheltering at the European level. The perils involved in this situation are, if anything, increasing. The dynamics of the common market leads to factual and legal challenges to the economic, social and legal basis of the welfare state. As the law stands, freedom of establishment and free movement of capital allow entrepreneurs to *fish* for lower social standards around the Union. The well-known episodes of Hoover moving from Dijon (France) to Scotland, Digital (Computer) from Ireland also to Scotland, or the closing down of the Villevorde factory of the car manufacturer Renault are illustrative of the extent to which ‘lower production costs’ can be based on ‘lower social costs’, and the extent to which a pressure to reduce social standards might derive from the referred two economic freedoms. Without *European* regulatory disciplining forces on capital, there is no longer a guarantee that higher social standards would not lead capital to *escape* from a given state or region. As a consequence, the lack of a robust *social dimension* in the European project might lead to active social dumping, especially in the aftermath of enlargement, which would result in a wide disparity of productivity rates and of social protection standards within the Union.

Such a context rendered predictable that the inclusion of social rights in the Charter was to be perceived by some as deeply controversial, while for others simply unavoidable. The mandate from the Council stated that:

In drawing up such a Charter account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), insofar as they do not merely establish objectives for action by the Union.

This was sufficiently ambiguous to be interpreted by some as evidence that social and economic rights should not be included *on a par* with civil and political rights. In fact, the Charter Convention⁴ spent a good deal of its time discussing whether and how to include social and economic rights in the Charter.

⁴ As it was already explained in this book, the Presidency Conclusions of the Cologne European Council called upon a ‘body’ to draft the Charter of Fundamental Rights. The ‘body’ quickly renamed itself a ‘Convention’, a term with clear constitutional connotations, even if the concrete connotations vary from country to country.

The main arguments of those sceptical to the inclusion of social and economic rights appear to be three. First, their inclusion was interpreted as leading to an expansion of the competencies of the European Union in the area of social and economic policy. Those who opposed the expansion of EU competencies also opposed the inclusion of social and economic rights.⁵ Second, affirming social and economic rights would also lead to a further role for the European Court of Justice, and in more general terms, of Courts in the process of determining the shape and contours of social and economic rights.⁶ Third, and finally, ideological preferences played a rôle (one might even argue a decisive rôle) in determining the preferences of those against the inclusion of social and economic rights.⁷

At the end of the day, social and economic rights were inserted in the Charter.⁸ Thus, it seems that those affirming the principle of the indivisibility of fundamental rights, characteristic of the *common constitutional traditions*, were able to make their arguments prevail. In the next section, I will consider the extent to which they really managed to have rights to solidarity included in the Charter, and the consequences of their inclusion.

II. The status of rights to solidarity in the Charter

In this section, the status of rights to solidarity in the Charter is considered. I will also review the position granted to the right to private property, as this provides an adequate reference point of comparison. A close look at the provisions of the Charter reveals that not all rights are granted an equal status. A certain degree of elaboration of the system of fundamental rights can be constructed through a close reading of the text.

⁵ In general, see Xenophon Yataganas, 'The Treaty of Nice: The Sharing of Power and the Institutional Balance in the European Union – A Continental Perspective', 7 (2001) *European Law Journal*, pp. 242–291, at p. 266.

⁶ Lord Goldsmith Q.C., 'A Charter of Rights, Freedoms and Principles', 38 (2001) *Common Market Law Review*, pp. 1201–16, at 1212: "[T]he stance one takes on the justiciability of socio-economic rights depends to a large extent on one's theory and understanding of democracy."

⁷ Something which was further corroborated by the discussions in Working Group II of the Laeken Convention, on the question whether the Charter of Fundamental Rights should be incorporated to Community law. UK and Ireland as the only countries opposing such inclusion.

⁸ See "Contribution and Intervention by Lord Goldsmith", CHARTE 4122/00, available at <http://db.consilium.eu.int/dfddocs/EN/04122.EN.pdf> and "Contribution on the Structure of the Draft Charter by Lord Goldsmith", CHARTE 4428/00, available at <http://db.consilium.eu.int/dfddocs/EN/04428.en0.pdf>.

A) A typology of legal positions in the Charter

a) *Fundamental Rights proper*

Among rights statements, those that provide individual citizens with a shield or a sword *vis-à-vis* ordinary statutes (either secondary Community legislation or national laws) must be characterised as fundamental. These rights not only constitute an institutional embodiment of substantive moral claims, but are also given the form of individual claims that could be used against the action of the ordinary legislator.

Clear examples are Article 2, paragraph 2 (“No one shall be condemned to the death penalty, or executed”), Article 7 (“Everyone has the right to respect for his or her private and family life, home and communications”), or Article 39, section 1 (right to vote in European elections).

Whether it is openly stated or not, the characterisation of a right as fundamental does not imply that ordinary legislators cannot *regulate* such a right. In a way, the proper way of respecting a fundamental right is *make it positive*, and to determine the means for its protection. This is clearly reflected in Article 51, section 1, first sentence: “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and *respect the essence of those rights and freedoms.*” This provision reflects the *common constitutional traditions* of the Member States on which Community law rests.⁹

It is in such a light that we have to interpret references such as the one contained in Article 3, section 2, first sentence (right of the patients to informed consent before being subject to medical or biological treatment). The referred provision acknowledges the right “according to the procedures laid down by law”. Such a reference does not imply full discretion to the ordinary legislator, but it implies a mandate to respect the *essence* of the right.

⁹ Similar implications have other style clauses such as “in accordance with the Treaty establishing the European community”.

b) Ordinary rights

Some other rights statements are of a dubious *fundamental nature*. This is the result of the interplay of Article 51 and a series of clauses that refer to national legislation to determine the substantive content of the right.

Some legal statements contained in the Charter end up in one of the following style clauses: “under the conditions established by national laws and practices”,¹⁰ “in accordance with the national laws governing the exercise of such freedom and right”,¹¹ “in accordance with the general principles common to the laws of Member States”¹² or “in accordance with Community law and national law and practices”.¹³ Such clauses do not seem very different from the ones associated with a mandate to the national legislator to respect the *essence* of the right when proceeding to its regulation.

However, the question is complicated by the *division of competencies* between the Union and its Member States. To the extent that such clauses reflect a lack of competence of the Union as law stands, they constitute a reiteration of the basic principle contained in Article 51, namely, that the Charter should not be read as expanding the competencies of the Union to the detriment of the Member States. This might be taken to mean that the fundamental legal statements qualified by such style clauses cannot be read as imposing constraints on national legislators different from those contained in their own constitutional law. But were that so, the legal statements included in the Charter would not increase the judicial sharpness of the referred rights, as they would not add anything to the arguments which individuals could make before courts in order to have legislation set aside in the name of rights.

c) Policy clauses

Moreover, not all fundamental legal statements give rise to *fundamental* rights. We can find norms that require public institutions to achieve a certain objective or goal,

¹⁰ Article 35 (health care).

¹¹ Article 9 (right to marry and found a family), Article 10 (right to conscientious objection), Article 14, section 3 (freedom to found educational establishments).

¹² Article 41, section 3 (right to good administration; making good damages), article 45, section 2 (free movement of nationals of third countries).

¹³ Article 16 (freedom to conduct a business), Article 27 (workers’ right to information and consultation with the undertaking), Article 28 (right to collective bargaining), Article 30 (protection in the event of unjustified dismissal), Article 34, sections 1, 2 and 3 (social security and social assistance).

but without giving direct rise to any subjective fundamental position,¹⁴ basically rights on which they can stand before courts. Although a more refined analysis could establish also different types among them, we could use the general term ‘policy clauses’ to comprise such normative positions.

Some examples from the Charter are: article 11, section 2 (“the freedom and pluralism of the media shall be respected”), article 25 (at least as formulated: rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life), article 26 (protection of the disabled), article 37 (“a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”) or article 38 (“Union policies shall ensure a high level of consumer protection”).

The same argument made in relation to *ordinary rights* can be repeated here. To the extent that the *policy clause* is coupled with a style clause that reiterates the division of competencies between the Union and its member states, it does not have any bite *vis-à-vis* national legal systems. This means that it cannot be invoked at the Community level to review the adequacy of national legislation.

B) The status of rights to solidarity

a) Rights to solidarity

Not all rights to solidarity are recognised in the Charter as fundamental rights. If one looks for a pattern, one should have resort to the two-fold distinction between rights to solidarity pertaining to citizens and residents, as opposed to those where the right-holder is the worker or would-be worker.¹⁵ While most *work-based* rights to solidarity

¹⁴ CHARTE 4414/00, submitted by the representative of the Spanish government, Mr. Rodríguez-Bereijo, seems to have heavily influenced the drafting of social rights. The three-folded typology between fundamental rights, ordinary rights and policy clauses proposed there. But see also *For a Europe of civil and Social Rights*, Report by the Comité des sages (Brussels, European Commission, 1996), pp. 51 ff. (“Rights in the form of objectives to be achieved”).

¹⁵ On the one hand, *work-related* rights presuppose a worker or would-be-worker as rights-holder. This reflects both the *historical origin* of such rights and the *ethical choice* made in certain European welfare states. This is the case with the right to work (article 15), the right to equal treatment of men and women (article 23), the right to fair and just working conditions (article 31), the right to collective bargaining and action (article 28), to information and consultation with the undertaking (article 27), the right to protection in the event of unjustified dismissal (article 30) or the right to special protection of working mothers (article 33, section 2). On the other hand, some other rights are formulated in *decommodified, universalistic terms*, i.e., their rights-holder is the permanent resident, no matter what are its economic circumstances. That is the case of the right to education (article 14), the rights of

are granted status as fundamental, most *universalistic* rights to solidarity are formulated either as ordinary rights, or as policy clauses.

Among the latter, only the right to education and to the well-being of children (Article 24, first sentence) are qualified as fundamental rights. Most other rights are formulated as ordinary rights. Finally, the rights of the elderly, the disabled, consumer protection, and human health protection are conveyed through policy clauses.

Table I. Typology of *universalistic* rights to solidarity

Name	Article	Type
Right to education	14, first and second sentences	Fundamental Right
Rights of Children (well-being)	24, first sentence	Fundamental Right
Right to social security benefits	34.1	Ordinary right
Right to social security benefits when exercising free movement of persons	34.2	Ordinary right
Right to social and housing assistance	34.3	Ordinary right
Preventive health care	35.1	Ordinary right
Access to services of general economic interest	36	Ordinary right/ Policy clause (social and territorial cohesion of the Union)
Rights of the elderly	25	Policy Clause
Rights of the disabled	26	Policy Clause
High level of human health protection	35.2	Policy Clause

Most of the rights to solidarity, the holder of which is worker or would-be-worker, are granted status as fundamental. It is interesting to notice that in such cases, rights tend to be located, not in Chapter IV of the Charter (“solidarity”), but somewhere else. Such is the case of the right to work, the freedom to choose an occupation, and the right to equal payment.

children (article 24, first sentence), the rights to social security and social assistance (article 34), the right to health care (article 35), the right to environmental protection (article 37) the right to access to services of general economic interest (article 36), the rights of the elderly (article 25) and the rights of the disabled (article 26).

Table 2. Typology of *work-related rights to solidarity*

Name	Article	Type
Right to Work (stressing opportunity aspects)	15, sections 1 and 2	Fundamental Right
Right to Work of third country nationals (stressing opportunity aspects)	15, section 3	Fundamental Right
Equality between men and women	23	Fundamental Right
Reinforced protection of mothers	33, section 2	Fundamental Right
Collective bargaining and action	28	Fundamental Right
Access to placement services	29	Fundamental Right
Working conditions respecting health and safety at work	31, section 1	Fundamental Right
Prohibition of Child Labour and protection of young people at work	32	Fundamental Right
Limited working hours and paid holidays	31, section 2	Fundamental Right
Workers' right to information and consultation within the undertaking	27	Ordinary right
Protection in the event of unjustified dismissal	30	Ordinary right
Protection of the family	33, section 1	Policy Clause
Consumer Protection	38	Policy Clause

b) The right to private property

Article 17 of the Charter deals with the right to property. It reads:

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Leaving aside the second paragraph, one must distinguish three different contents of Article 17.

First, it presupposes that the ordinary legislator would introduce a *private property* regime (“her lawfully acquired possessions”). This *institutional guarantee* constitutes an implicit recognition of the *legal* and *human-made* character of property as an institution. Property is created by a system of common action norms regulating the acquisition and transfer of economic resources, and not merely *acknowledged* as a pre-legal reality. The reference to lawful acquisition invites the interpreter to consider the whole legal system and not only the provisions on private property in order to test the lawful character of the acquisition (this is probably motivated by the reference to the First Protocol to the ECHR to the securing of “the payment of taxes or other contributions or penalties”).

Second, it imposes constraints on the action of the ordinary legislator when dealing with *acquired* property rights; the essential content of the right to “own, use, dispose of and bequeath” must be respected.

Third, the right to private property is basically defined as consisting in a stake in the *economic value* of the possessions, more than of the possessions as such. The *takings* clause allows public institutions to *regulate* private property as far as is necessary for the ‘general interest’, but with the obligation to compensate, if publicly aimed regulation amounts to deprivation of the economic substance of the right to private property.

A literal interpretation of Article 17 leads to the conclusion that the right to private property is entrenched as a *fundamental right (including the right to bequeath property)*, and not as an ordinary right, in the Charter. This contrasts with the ordinary status attributed to the freedom to conduct a business (article 16) and the right to intellectual property (article 17, section 2).¹⁶

Table 3. Typology of Private Property related rights

¹⁶ Alberto Lucarelli, in Raffaele Bifulco, Marta Cartabia and Alfonso Celotto: *L’Europa dei Diritti, Commento alla Carta dei diritti fondamentali dell’Unione Europea* (Bologna: Il Mulino 2001), pp. 139 ff, notices that a purely literal interpretation of Article 17 points towards a rather ‘pre-democratic’ conception of the right to private property as a civil, not a socio-economic right. The protection of the ‘individualistic’ element of private property would seem to prevail over the ‘socio-economic’ constrains upon the right. A proper systematic interpretation leads to a different conclusion. However, such ‘divorce’ between literal and systematic interpretation reveals the inadequacy of the drafting of Article 17. I will deal with this in some more extent in the following pages.

Name	Article	Type
Private property	17	Fundamental Right
Freedom to conduct a business	16	Ordinary right
Freedom to found educational establishments	14, section 3	Ordinary right
Intellectual property	17, section 2	Ordinary right

c) Reflecting the imbalance between market-making and market-redressing?

A literal reading of the Charter allows us to conclude two things. First, that social rights have been included in the Charter along with *civic and political rights*. Second, that the right to private property has been formulated as a fundamental right proper, while this is not the case with most rights to solidarity; in most cases, the social rights are stated as principles or ordinary rights. Thus, the literal tenor of the Charter reflects the imbalance between market-making and market-redressing which has characterised European integration.

However, a further contextual analysis of the Charter requires the qualification of such a conclusion. This is so for two main reasons. First, that the Charter as a whole, and consequently also its provisions on social rights and on the right to private property, have to be interpreted systematically, and coherently with the main sources of Community law on fundamental rights protection (i.e., the international treaties and the national constitutions, the jurisprudence of the European Court of Justice, the European Court of Human Rights and national constitutional courts). Second, that the proper balance between the right to private property and social rights has to be struck with explicit reference to the *acquis communautaire* on the right to private property. These two criteria of interpretation are further considered, in reversed order, in the next two sub-sections.

aa) A contextualised balance between social rights and the rights to private property

As has been argued, the Charter must be regarded as a consolidation of positive Community law.¹⁷ This implies a mandate to construct its provisions in line with the *acquis communautaire*. The proper balance between social rights and the right to private property should be established after a ‘contextualisation’ of Article 17 of the Charter.

First, the right to private property is not granted the status as fundamental in an unconditional or unlimited way. Judgments on cases such as *Nold*,¹⁸ *Hauer*¹⁹ or the *Banana saga*,²⁰ have clearly established that the *social* function of property renders acceptable the regulation of agricultural production and markets in the framework of the Common Agricultural Policy.²¹ Thus, and in line with the *common constitutional traditions*, the right to private property is to be balanced and weighted. Therefore, it is to be doubted that the conferral of the status of fundamental right to private property implies a consequent constraint on the scope of public action in terms of regulation of the economy and redistribution of resources.²²

Second, we should consider the *scope* of the right to private property. It is far from obvious that an overly strict interpretation of Article 17 can find support in Article 1 of the Additional Protocol to the European Convention of Human Rights, which deals with property.²³ Not only the *social* function of property is more clearly stressed in the Protocol, but there is no reference to the right to bequeath, for example. Moreover, Article 295 of the Treaty establishing the European Community (ex Article

¹⁷ See Neil D. MacCormick, chapter 1 of Eriksen, Fossum and Menéndez, *supra*, fn 4.

¹⁸ *Nold KG v. Commission* (Case 4/73) [1974] ECR 491.

¹⁹ *Hauer v. Land Rheinland-Pfalz* (Case 44/79) [1979] ECR 3727.

²⁰ *Germany v. Commission* (Case C-280/93) [1994] ECR I-4873 and *Atlanta Fruchthandelsgesellschaft mbH v. Bundesamt für Ernährung* (Case C-466/93) [1995] ECR I-3761.

²¹ In this respect, it is interesting to notice that a good deal of the dealing cases on the right to private property decided by the European Court of Justice originated within the German legal system. This is to be explained by the fact that the 1949 Fundamental Law stands out as one of *formalistic* ones among the post-war constitutions. See Alexy, *supra*, fn. 1, p. 483.

²² The status of private property as a legal and not fundamental right would have an impact upon the capacity of public institutions to pass laws with a clear redistributive impact. The rise of private property to a fundamental status will be translated into a reduction of the threshold to be overcome in order to get access to compensation. See the related argument of Bruce Ackerman, *Private Property and the Constitution* (New Haven and London, Yale University Press, 1977), p. 60.

²³ According to the explanatory memorandum of the Charter, the main source of Article 17 is Article 1 of the Additional Protocol to the European Convention, where one can read the following:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

222) reads: “[T]his Treaty shall in no way prejudice the rules in Member States governing the system of private ownership.” It is clear that membership of the Communities implies compliance with the basic market freedoms, so it could only hypothetically be possible to become or remain a member and introduce a high degree of socialisation of property. The clause must be read as making it clear that *market-making* should not be seen as incompatible with the *social* conception of private property that is entrenched in several national constitutions, as we have just seen. Article 295 must be read as a *limit* on the impact of Community law upon national law, with direct bite in the area of *shared competencies*, but with widespread implications. The way in which Member States define ‘property’ must be respected; this, one could argue, can only be done if a *compatible* definition of the right to private property is entrenched in Community law.

This cautious interpretation of Article 17 seems to pervade the reasoning of Advocate General Geelhoed in *American Tobacco*.²⁴ The Advocate General was required to render her opinion on the compatibility of a Directive regulating the contents of tobacco on sale within the Union, but also the actual contents of tobacco manufactured within the Union. The plaintiffs challenged the Directive on several grounds, among others, the infringement of the right to private property. The Opinion is worth quoting at length:

Article 17 of the Charter of Fundamental Rights does, it is true, recognise (sic) the right to property (and the protection of intellectual property). With regard to the present legal position, however, I attach more importance to Article 6 EU. That article requires the European Union to respect fundamental rights, as guaranteed by, inter alia, the ECHR, as general principles of Community law. One of those fundamental rights is the right to property, as referred to in Article 1, First Protocol, of the ECHR (italics added).²⁵

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

²⁴ Case C-491/01, *The Queen v. Secretary of State for Health ex parte: American Tobacco (Investments) Ltd and Imperial Tobacco Ltd, supported by: Japan Tobacco Inc. and JT International SA*. Opinion delivered on September 10, 2002, not yet reported.

²⁵ Par. 259 of the referred Opinion (italics added).

The italicised paragraph might be read as an implicit criticism of Article 17, more specifically, insofar as its draft is a good restatement of the *acquis communautaire*. While in previous opinions,²⁶ AG Geelhoed had referred to the Charter without further provisos; in this case, she specifically refers to one of the legal sources that the Charter is supposed to have consolidated to, rather than to the Charter itself. At the same time, she circumscribes her argument to ‘the present legal position’, which precludes us from constructing her statement as critical of the Charter as a whole.

bb) A contextual interpretation of the provisions of the Charter

Moreover, the Charter should be interpreted in the light of the previous jurisprudence of the European Court of Justice and of national constitutional courts on fundamental rights protection. It should always be kept in mind that the Charter constitutes a *consolidation* of the *acquis communautaire*.²⁷

This will require further caution in deriving normative consequences from the comparison of the literal tenor of Article 17 and the provisions on rights to solidarity. Community law is clearly inspired by the *common constitutional traditions*, pervaded by notions such as the ‘social function’ of private property and the *fundamental* character of some basic social rights.

III. Implications

A) Social rights as canon of exceptions to market freedoms

The Charter was solemnly proclaimed before the Nice European Council by the European Parliament, the Commission and the Council. The latter failed to render the charter unequivocally binding in legal terms. That would have required proper incorporation into the Treaties. However, and as it has already been argued in this book,²⁸ the lack of incorporation does not mean that the Charter has no legal bite.

²⁶ See Case C-413/99, *Baumbast and ‘R v Secretary of State for the Home Department*, Opinion delivered on July 5, 2001; Case C-313/99, *Mulligan and Others v Minister of Agriculture and Food, Ireland and Attorney General*. Opinion delivered in July 12, 2001.

²⁷ See Koen Lenaerts and Petra Foubert: ‘Social Rights in the Case Law of the European Court of Justice. The Impact of the Charter of Fundamental Rights of the European Union in the Standing Case-Law’, 28 (2001) *Legal Issues of European Integration*, pp. 267–296.

²⁸ See Chapter 2 of Eriksen, Fossum and Menéndez, *supra*, fn 4.

On the one hand, the Charter *consolidates* existing law, and as such, it must be considered as authoritative evidence of the *common constitutional traditions*. The Opinion of Advocate General Tizzano in BECTU, already commented in this book,²⁹ illustrates the influence of the Charter in further clarifying the social rights stemming from Community law. On the other hand, the Charter furthers the development of a more articulated system of fundamental rights, encouraging a *rebalancing* of the different goals of European integration. This is the main object of this section.

In fact, the most innovative feature of the Charter might not be the series of statements on social rights, but the affirmation of *solidarity* as one of the founding values of the Union. The second paragraph of the Preamble introduces an authoritative statement of the founding values of the Union, which are said to be human freedom, dignity, equality and *solidarity*. *Solidarity* is the title of the referred chapter IV, something that opens up for a systemic interpretation of the said rights in the light of such a value. Moreover, The Charter enumerates some rights to solidarity that are not directly relevant within the actual field of competence of the Union. This does not have any *direct* implications, as the overlapping effect of Article 51 and style clauses that refer to national constitutional law rule out such an interpretation. But this, coupled with the decision not to give ‘fundamental’ status to the four economic freedoms,³⁰ reinforces the argument that European integration is not only about negative integration or market-making. All these features of the Charter point to a shift of goals of the action of the Union towards the protection of social standards.

In such a light, the rights to solidarity included in the Charter could be construed as a canon of social exceptions to the basic economic freedoms.³¹ Thus, the set of rights included in chapter IV of the Charter, under the heading ‘solidarity’, could be interpreted so as to provide support to Member States when claiming exceptions to the four economic freedoms in order to further goals of a socio-

²⁹ *Ibidem*.

³⁰ They are only referred to in the Preamble. Some of such freedoms can be subsumed in some provisions of the Charter. Thus, Article 16 (freedom to conduct a business) can be seen as encompassing the freedom of establishment. However, the right is formulated at a higher level of abstraction.

³¹ The representative of the British government in the Laeken Convention, Mr Hain, proceed to slightly twist this argument, claiming that the inclusion of social and economic rights in the Charter, without sufficiently strong horizontal clauses, gave rise to the risk of “our domestic legislation being disregarded on social matters”. See the verbatim reports of the Plenary meeting of the Convention, of October 3, 2002. Available at http://www.europarl.eu.int/europe2004/textes/verbatim_021003.htm.

economic character.³² Such an interpretation will provide a clear shape to the fragmentary set of exceptions elaborated by the Court of Justice. The Court of Justice has moved from an *automatic* affirmation of the four market freedoms to their *balancing and weighting* with other fundamental interests. The Charter might be seen as a more complete and articulated repository of arguments than the ones contained in provisions such as Article TEC 30, TEC 39, section 3 or TEC 46, section 1.³³

The recognition of fundamental rights as a basic principle of Community law in the 1970s opened the way to the weighting and balancing of economic goals against social values.³⁴ On the one hand, such a recognition has been instrumental in the actual recognition of fundamental rights as one of the foundational principles of Union law in Article TEU 6. On the other hand, the European Court of Justice has, in cases of conflict, become increasingly inclined to give more weight to social values, rather than economic freedoms. This ‘balancing’ of economic goals against social values can already be found in the famous *Cassis de Dijon*. The Court argued that in the absence of common rules, obstacles to free movement of goods within the Community must be accepted “in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer”.³⁵ Two clear recent examples of ‘unwritten’ exceptions to the economic freedoms can be found in *Bachman* and *Albany* (cohesion of the tax system³⁶ and promotion ‘throughout the Community of a harmonious and balanced development of economic activities’ and ‘a high level of employment and social protection’.³⁷

This potential use of the Charter rights is indirectly illustrated by the Opinion of the AG Jacobs in *Eugen Schmidberger Internationale Transporte Planzüge v*

³² See O De Schutter : ‘La contribution de la Charte des droits fondamentaux de l’Union européenne à la garantie des droits sociaux dans l’ordre juridique communautaire’, 12 (2001) *Revue Universelle des Droits de L’Homme*, pp. 33–47.

³³ On judicially recognised exceptions, see Oliver Gerstenberg: ‘Transnational Governance and Democratic Accountability in the EU: What Should Constitutionalism Become?’, Paper presented at the Conference on the European Charter of Rights, Oslo, 8-9 June 2001. See also O’Leary and Fernández Martín: ‘Judicially Created Exceptions to the free provision of services’, 11 (2000) *European Business Law Review*, pp. 347–62.

³⁴ See A. Castro Oliveira: ‘Workers and other Persons: Step-by-step from movement to citizenship-Case Law 1995–2001’, 39 (2002) *Common Market Law Review* 39, pp. 77–122.

³⁵ See Case 120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, par. 8.

³⁶ See Case C-204/90, *Hanns Martin Bachmann v Belgian State*, [1992] ECR I-249, par. 21–23; Case C-300/90, *Commission v. Belgium*, [1992] ECR I-305, par. 14–16, 20–22.

³⁷ Case C-67/96, *Albany International BV v Stichting Bedrijfspensionenfonds Textielindustrie*, [1999] ECR I-5751. See par. 54 of the judgment.

Republik Österreich.³⁸ The case concerns the balance to be struck between the basic economic freedoms and the freedoms of expression and assembly, as stated in Articles 11 and 12 of the Charter. A legal demonstration in Austria had resulted in a serious distortion of road traffic between Italy and Northern Europe. An Austrian entrepreneur claimed damages to the Austrian authorities. He argued that the authorities were to be held responsible. By granting the permission to demonstrate, they would have infringed on the freedom of movement of goods. With extensive reference to the Charter, the Advocate General claims that there is a need for a proper weighting and balancing of economic freedoms and fundamental rights. The outcome of such a balancing exercise cannot be predetermined once and for all, but must be undertaken with reference to each specific case. In this concrete instance, AG Jacobs argues that preference should be given to the freedoms of expression and assembly.

Also interesting is the Opinion of AG Geelhoed in *American Tobacco*, to which reference has already been made in a previous section. The reason why it is also interesting in this respect is that the AG revisits the relationship between economic freedoms and social goals in Community law. The AG argues that at its present stage of development, Community law does not aim exclusively at the creation of a single market, but also includes other legitimate goals of Community action, such as the protection of public health. The Union's competence basis might still be related to the fostering of the basic economic freedoms,³⁹ but this does not mean that the *actual exercise* of Community competences is exclusively aimed at market-making.⁴⁰ AG Geelhoed argues that some of the social goals constitute basic preconditions for a single market. This prompts her to hint at a radical change in legal reasoning. Instead of focusing in a first step on whether a given national provision distorts the common market, and only in a second step on whether such a measure can be justified by reference to some legitimate public goal, some paragraphs of the text

³⁸ Case C-112/00, Opinion delivered on July 11, 2002.

³⁹ Par. 100: "The issue boils down to the following: if a (potential) barrier to trade arises, the Community must be in a position to act. Such action must, as I construe the *biotechnology* judgment, consist in the removal of those barriers. Article 95 EC creates the power to do so".

⁴⁰ Par 106: "In other words, the realisation of the internal market may mean that a particular public interest – such as here public health – is dealt with at the level of the European Union. In this, *the interest of the internal market is not yet the principal objective of a Community measure*. The realisation of the internal market simply determines the level at which another public interest is safeguarded" (my emphasis).

invite a direct weighting and balancing of principles.⁴¹ Were this to be later developed by other Advocates General and by the Court, it will advance the *constitutionalisation* of Community law, in the sense of rendering the framework of legal reasoning closer to what is characteristic of national constitutional laws.

The only serious obstacle to such a *use* of rights to solidarity is the restrictive literal tenor of Article 51, section 1, which determines that Member States are bound by the Charter “when they are implementing Union law”. Such a wording is too narrow, as it was well-settled in the jurisprudence of the European Court of Justice that Member States were bound by ‘European’ fundamental rights standards when they invoked an exception to the market freedoms. However, such an objection can be overcome with two further arguments. First, Article 51, section 1 can be read as determining the ‘compulsory’ scope of the Charter. It could not be read as precluding a Member State from invoking it even in an area where it is not bound by it. Second, the literal tenor of the provision should be interpreted as providing a succinct formulation of positive law at the time of the codification. Thus, the scope of the Charter should overlap with the scope of fundamental rights protection established by the Court of Justice. Therefore, ‘implementing’ must be interpreted as comprising also those cases in which Member States claim an exception to the economic freedoms.⁴²

B) Rights to solidarity as a vehicle of constitution-making?

Moreover, the lack of a clear legal status of the Charter has constituted an incentive to clarify the said legal status. Those advocating a rebalancing of market-making and market-redressing within European integration have been especially active in this regard. In most cases, they have vindicated first, but not exclusively, the incorporation of the Charter into a future Constitutional Treaty.

⁴¹ Par. 229: “The value of this public interest [public health] is so great that, in the legislature's assessment other matters of interest, such as the freedom of market participants, must be made subsidiary to it.”

⁴² Some authors have pointed to the formulation of Article 49, section 1 as evidence to the contrary. See the critical remarks of Weiler in a discussion which took place at Harvard. Available at http://www.jeanmonnetprogram.org/wwwboard/seminar01/Vitorino_Discussion.rtf. He finds the drafting of the Charter poor as reference is only made to “implementing Union law”.

The considerable success of the Charter Convention (which starkly contrasted with the relative failure of the IGC 2000) was interpreted by many political actors as final evidence of the need to opt for a different procedure of Treaty amendment. The Charter Convention was perceived as a more legitimate and efficient means of writing the primary law of the Union.⁴³ Thus, the constitution-making process in which the Union is engaged at the time of writing has been partially influenced by the design of the Charter process. But besides this *procedural influence*, the Charter, and specifically its provisions on rights to solidarity, has exerted a considerable influence on the contents of the constitution-making process. Evidence of this can be found in the emergence of social policy as one of the central concerns of the Laeken Convention.

The *partial* disappointment with the number and content of ‘rights to solidarity’ included in the Charter, and also with its status, encouraged the more socially conscious members and observers of the Charter Convention to reiterate their claims in the Laeken process. The more open character of the mandate was in principle favouring their drive for a ‘re-balancing’ of economic and social goals. Public demonstrations parallel to major European meetings were organised around similar themes. Several members of the Convention stressed the importance of a ‘social shift’ in European policies.⁴⁴ The incorporation of the Charter of Fundamental Rights into the forthcoming Constitutional Treaty was referred in most cases as a basic demand, even if to be further complemented by other constitutional provisions.

Quite paradoxically, the demand for attention to social issues was strengthened by an opinion article published by the President of the Convention, Valéry Giscard D’Estaing, in which he affirmed that no member of the Convention had argued for an increased competence of the Union in social matters.⁴⁵ As a reaction to this statement, a number of members of the Convention drafted and circulated a motion to create a

⁴³ See Florence Deloche-Gaudez: ‘La Convention pour l’élaboration de la charte des droits fondamentaux : une méthode « constituante » ?’, in Renaud Dehousse (ed.). *Une Constitution pour l’Europe ?* (Paris, Presses de Sciences Po, 2002), pp. 177–226.

⁴⁴ See, among others, CONV 13/02, by Alain Barrau, pleading for a European Social Treaty; CONV 63/02, which reproduces the plea in favour of a “New Federalism” with a major social content, authored by several Socialist MEPs; CONV 86/02, ‘Socio-economic governance in the constitutional Treaty’, by Ms Anne Van Laecker, who claims that social issues must be dealt with by the Constitutional Treaty, given that they are the main concern of all Europeans; CONV 189/02, authored by several socialist MEPS who are members of the Convention, in which they plea in favour of the European Social Model; CONV 190/02, ‘A Constitutional Treaty for a Social Europe’, by Sylvia-Yvonne Kaufmann, who spells out what a social shift will entail in her opinion.

⁴⁵ ‘La dernière chance de l’Europe unie’, *Le Monde*, 22 July 2002. Available, by subscription, at <http://www.lemonde.fr/abonnes/article/0,9883,3232--285497-,00.html>.

specific working group on ‘Social Europe’. This was submitted to the Praesidium at the end of September, supported by more than thirty signatories.⁴⁶ The question was raised by several members in the Plenary sessions of October.⁴⁷ The Praesidium apparently tried to settle the question by means of devoting some time in the Plenary to a debate on social issues.⁴⁸ But more members of the Convention sent written contributions spelling out their arguments in favour of rebalancing the goals, objectives and policies of the Union in a social sense.⁴⁹ The failure of the Working Group on Economic Governance to advance much on its mandate created further momentum for the initiative.⁵⁰ The European Trade Union Confederation ventured to argue that reference to an “open economy with free competition” in the Treaties should be replaced by reference to ‘a social market economy’, rendering European constitutional law compatible with different ideological orientations on what concerns economic policy.⁵¹

The debate on social issues that took place on November 7th led to the actual creation of a specialised group. It might not be inappropriate to notice that timing favoured the advocates of such a measure, as that very same day the ‘Social Forum’ organised in Florence closed its doors, after a massive demonstration in which half a million people demanded a more social Europe. Even if the decision to constitute a specific group within the Convention might have been taken before that date, popular pressure was perceived as favouring such an outcome. In the debate, only a handful of speakers failed to endorse the case for a working group on social Europe. This led to a perception of some kind of multi-partisan support for such a group, under which the President of the Convention had no option but to accept the proposal.⁵² The Group was effectively constituted on December 6th, 2002, with a mandate to consider the extent to which *social goals* and *instruments* should be included in the Treaty, and

⁴⁶ See CONV 300/02, ‘Motions to the Praesidium according to Article 2 and 15 of the Working Method: Constitution of a Working Group on Social Europe’. Most of the signatories were affiliated with left-wing political parties, or left-of-the-centre, as the Scottish Nationalist Party.

⁴⁷ See Verbatim Report of the Plenary Meeting of the Convention, October 3, 2002, reference in fn. 31.

⁴⁸ See CONV 374/02, ‘Questionnaire for the debate on social issues’, of 29.10.2002.

⁴⁹ See, for example, CONV 388/02, by Pierre Moscovici

⁵⁰ See CONV 375/1/02, REV 1. ‘Final Report of the Working Group on Economic Governance’, and Verbatim Report of the Plenary Meeting of the Convention, November 7th, 2002; available at http://www.europarl.eu.int/europe2004/textes/verbatim_021107.htm.

⁵¹ CONV 433/02, submitted by Emilio Gabaglio, observer to the Convention.

⁵² “J’imagine que nous allons pouvoir, suivant la procédure qui consiste en un débat à la Convention, un débat au praesidium et une proposition, proposer, lors de notre prochaine session, la création d’un groupe de travail sur l’Europe sociale.”

how they should be balanced with the goals related to the creation of a single market.⁵³

Conclusion

The very fact that the Charter included rights to solidarity is quite telling. The inclusion of social rights in the main text, while market freedoms were confined to the preamble, might reflect the progressive shift in Union law from market-making to polity-making. Thus, and with all its shortcomings, the inclusion of social rights reveals the extent to which balancing markets with social objectives is part of the constitutional identity of all Member States.

Having said that, there are reasons to be concerned about the imbalance between the status attributed to the right to private property (a fundamental right proper) and most rights to solidarity in the Charter. Legal creativity would be needed to shield social rights protection from the *negative* implications of such drafting.

Some elements of creativity seem to be already in place. The Charter has started to be used by individuals. Increasing reference to the Charter proves that plaintiffs across Europe regard the Charter not only as a text granting rights, but also as a text empowering them to claim their rights. The Charter is emerging also as a canon of social exceptions to the four basic economic freedoms of the Community. This might encourage a rather radical reappraisal of the weighting and balancing of social and economic objectives by the Court. It is becoming increasingly clear that social rights are deeply dependent on certain public policies, noticeably regulatory and taxing ones. By means of ensuring that political communities can actually pursue such policies within the framework of Community law, appropriate protection is partially granted to social and economic rights.

But legal ingenuity cannot replace political will. Signals of a political mobilisation in favour of an emphasis on social protection at the European level are coming from the present constitutional process. Whether or not they will end up having its say on the final constitution is still to be seen. This article aimed at showing

⁵³ CONV 421/02, Draft Mandate of the Working Group on Social Europe, of 22.11.2002.

that rights to solidarity *should* be regarded as the sinews of European peace and fairness. That is, by the way, what European integration claims to be about.⁵⁴

⁵⁴ On this regard, see the *European Social Agenda*, Official Journal of the European Communities, C series, n. 157, of 30.5.2001, pp. 4 ff.