It is difficult to tell whether this decision will serve as a precedent in future constitutional rulings. Chilean constitutional law lacks a clear doctrine of the value of precedents, and Chilean lawyers and judges are not trained to articulate the ratio of a decision and to distinguish reasoning from dicta. Sections of this decision may be quoted out of context in future decisions of the Court, contributing to the high level of uncertainty that afflicts Chilean constitutional law.

The political significance of the decision is clearer: It has placed responsibility for the approval or rejection of the Rome Statute into the hands of the right-wing opposition, whose votes are needed to approve the required constitutional amendment. Until now, the opposition’s strategy has been to erect legal barriers to approval rather than opposing the statute on its merits. After the decision of the Court, it will be difficult for the opposition to maintain this strategy. Unless the government complicates the approval by proposing a complex constitutional amendment, the opposition will be forced to be candid as to its opinion on the merits.

European Union

Beate Rudolf*

European Union Law—Fundamental Rights—European Union proclaims a charter of rights as a step towards European constitutionalism.—Charter of Fundamental Rights of the European Union. ¹

On December 7, 2000, the presidents of the European Parliament, of the European Commission, and of the Council of Ministers proclaimed the Charter of Fundamental Rights (the Charter), and deferred for one year the question of giving the text binding force. ² In December 2001, the question was assigned to the European Constitutional Convention and the Intergovernmental Conference for further discussion. ³ To many observers the Charter is a first

* Lise-Meitner-Fellow at Heinrich-Heine University of Dusseldorf, Germany, and S.J.D. candidate, Tulane University School of Law, United States.

¹ 2000 O.J. (C 364) 1, also available at http://www.europarl.eu.int/charter/default_en.htm [hereinafter Charter]. Hereinafter, the term “Article” without further specification refers to those of the Charter.

² It was deferred to the European Council meeting at Laeken/Brussels, in December 2001, see Treaty of Nice, Declaration No. 23, para. 5, 2001 O.J. (C 80) 85.

political step toward a European constitution, and its drafting procedure has become a blueprint for the—legally distinct—“Post-Nice-Process” of consolidating the founding treaties of the European Communities (E.C.), which may lead to the elaboration of a constitution for the European Union (E.U.).

The explicit purpose of the Charter is to strengthen fundamental rights. Implicitly, it aims at enhancing the legitimacy of the Union and at reinforcing a common European identity by spelling out shared values. Building on the constitutional traditions of E.U. member states, the Charter emphasizes human dignity (Chapter I and Article 1), which is a core concern of the German Constitution and other modern constitutions in Europe. The titles of Chapters II, III and IV (“Freedoms,” “Equality,” and “Solidarity”) evoke the French revolutionary slogan of “liberté, égalité, fraternité.” The fifty substantive provisions of the Charter encompass classical civil rights, the prohibition of discrimination, social rights, citizens’ rights, and procedural rights, covering the substance of the European Convention on Human Rights (E.C.H.R.), the European Social Charter, and the two international covenants. The Charter also addresses new threats to human rights such as those posed by reproductive cloning (Article 3(2)) or the need to protect personal data (Article 8).

The wording of the Charter provisions suggests fundamental differences in their character. While civil rights are framed as individual rights, most social rights are guaranteed only “in accordance with Community law and national laws,” thus remaining entirely within the lawmakers’ discretion. This structure is a compromise between those who want to put social rights on an equal

---

4 See, e.g., Koen Lenaerts & Eddy De Smijter, A “Bill of Rights” for the European Union, 38 C.M.L. REV. 273, 299–300 (2001) (with further references). This expectation was already reflected in the fact that the drafting body chose to call itself “Convention,” thus echoing the name of historical constitution-making bodies.

5 The Convention that drafted the Charter was created by the Cologne European Council in 1999, infra note 6. It is not identical to the European Constitutional Convention that was installed by the Laeken European Council in 2001, supra note 3. The political connection between the two processes lies in the fact that a catalogue of fundamental rights has become an essential part of modern constitutions.


footing with civil rights and those who fear that social rights might be used to extend the powers of the Community or promote a centralization of Europe. Still other provisions do not protect rights but contain policy directions, such as Article 37, according to which “a high level of environmental protection...must be integrated into the policies of the Union,” or Article 38, which states that “Union policies shall ensure a high level of consumer protection.” Consequently, each provision has to be scrutinized carefully so as to determine its nature and legal significance.

The Charter does not spell out in detail the guaranteed rights. Instead, Article 52(1) contains a general limitation clause reflecting the case law of the European Court of Justice (E.C.J.), most notably the requirement that any interference must be proportionate and must pursue an objective of general interest recognized by Community law. Moreover, the scope of the rights protected must, as a minimum, be the same as the protection afforded under the E.C.H.R. (Article 52(3)). This provision tries to counter the fundamental objection against an E.U. Charter that it would undermine the E.C.H.R. Mindful of the fear that the powers of the Union might be extended through the concept of fundamental rights as positive obligations, Article 51 emphasizes that the Charter does not alter the powers of the Community and the Union as defined by the treaties. Furthermore, the Charter applies only “to the institutions and bodies of the Union” and to the member states “when they are implementing Union law” (Article 51). This formulation seems to leave out member states’ actions when legislating in the areas of the four freedoms, but the explanations to the official text clarify that it refers to the member states’ actions “in the context of Community law.” Finally, Article 51 includes Community actions within the “second” and “third” pillars (common foreign and security policy and police and judicial cooperation in criminal matters, respectively).

---

11 See, e.g., Christoph Grabenwarter, Die Charta der Grundrechte für die Europäische Union—Fragen der Konzeption, Kompetenz und Verbindlichkeit [The Charter of Fundamental Rights for the European Union—Questions concerning Concept, Powers and Binding Force], 116 DEUTSCHES VERWALTUNGSBLATT 1, 2 (2001). The “four freedoms” are the free movement of goods, of persons, of services, and of capital, as listed in Articles 3(1)(c) and 14(2) of the Treaty establishing the E.C.
thus going beyond the protection of fundamental rights as developed by the E.C.J. (jurisdictional *acquis communautaire*), which could not evolve in these areas because they were outside the jurisdiction of the E.C.J. 13

Although the Charter lacks binding force, it will have an important impact on the development of Community and Union law. It is generally expected that the E.C.J. will use it as a point of reference when determining the content of fundamental rights under the E.C. Treaty in the same way it used the 1977 Common Declaration on Fundamental Rights. 14 The Advocates General have already done so through different approaches. Some refer to a Charter provision without drawing any conclusion from its existence. 15 Others point to the Charter so as to reinforce their interpretation of an applicable provision of the E.C. Treaty. 16 A third approach is to use a Charter provision as an indication that a principle is generally recognized 17 or that a human right is of fundamental character, 18 with the possible consequence of requiring strict scrutiny of a municipal law. 19 Finally, these approaches can be combined, for example, by conferring on a treaty provision a high status in the hierarchy of Community norms and


15 See, e.g., opinions of Advocate General Stix-Hackl, Case C-131/00 (Nilsson v. Länstyrelsen i Norrbottens län), footnote 9, Case C-60/00 (Carpenter v. Secretary of State for the Home Department), footnote 29, and Case C-459/99 (Movememt contre le racisme v. Belgium), footnote 26, opinion of Advocate General Léger, Case C-309/99 (Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten), footnote 176, and opinion of Advocate General Geelhoed, Case C-313/99 (Mulligan v. Minister of Agriculture and Food, Ireland and the Attorney General), para. 28. All opinions and judgments cited here and in notes 16–21 are not yet reported but are available at http://www.curiain.int.

16 See, e.g., opinion of Advocate General Geelhoed, Case C-413/99 (Baumbast and ‘R’ v. Secretary of State for the Home Department), para. 110 (using Articles 45 and 52(1) in the interpretation of Article 18 EC).

17 See, e.g., opinion of Advocate General Jacobs, Case C-270/99 P (Z. v. European Parliament), para. 40 (with respect to Article 41(1)—right to have one’s affairs handled impartially, fairly and within a reasonable time by the Union), Case C-50/00 P (Unión de Pequeños Agricultores v. Council of the EU), para. 39 (Article 47—right to an effective remedy before a tribunal), and opinion of Advocate General Mischo, Joined Cases C-20/00 and C-64/00 (Booker v. The Scottish Ministers), para. 126 (Article 17—protection of property).

18 See, e.g., opinion of Advocate General Jacobs, Case C-377/98 (Netherlands v. EP and Council of the EU), para. 197 (Articles 1 and 3(2)—human dignity and requirement of consent in the field of medicine and biology), and opinion of Advocate General Léger, Case C-309/99, supra note 15, para. 175 and n. 181 (Article 47—right to a legal adviser).

19 See, e.g., opinion of Advocate General Stix-Hackl, Case C-131/00, supra note 15, n. 18 (concerning the principle of legality laid down in Article 49(1) with respect to sanctions imposed).
concluding that this status necessitates an extensive interpretation of the provi-
sion. Until now, only the Court of First Instance has explicitly drawn inspira-
tion from the Charter to identify “general principles that are observed in a State
governed by the rule of law and are common to the constitutional traditions of
the Member States.” In contrast, the E.C.J. has remained silent on the issue of
the Charter. This restraint is commendable because the debate on whether and
how to give the Charter force of law is complex and still open. By refraining from
using the Charter as a substantive source of law, the Court upholds the need for
a formal decision to render the Charter legally binding.

The Charter undoubtedly has made human rights more visible within the
E.U. legal order, as its initiators sought. Yet, the need to consult the E.C.H.R. to
determine the permissible limitations of the rights runs counter to the purpose
of clarifying the human rights protected within the E.U. For this reason, critics
fear that the lack of clear limits will lead citizens to misjudge the extent of the
rights protected and, consequently, to have unrealistic expectations of the
Charter. But such criticism overlooks the fact that all human rights catalogues
require interpretation to determine the reach of their provisions and that there
is no evidence that this weakens citizens’ trust in these texts.

The second purpose of the Charter—to reflect the common values of the
E.U. member states so as to contribute to a common identity of its citizenry—
fares no better. Although hailed for its purported symbolic value, there is
little evidence that the Charter has taken root in the European consciousness
outside legal and political circles. Worse, the Charter’s lack of binding force is
counterproductive: it is surely troubling that the E.U. member states were not
able to agree on a binding instrument even though they intended merely to
codify pre-existing and legally recognized human rights. Moreover, this
“refusal to take rights seriously” undermines the political standing of the

20 See opinion of Advocate General Léger, Case C-353/99 P (Council of the EU v. Hautala),
paras 51, 73, 77, 80–7 (Article 255 EC and Article 42—access to community documents as a
fundamental right).

21 Case T-54/99 (max.mobil Telekommunikation v. Commission of the EC), paras 48 and 57. In an
earlier case, however, the Court of First Instance refused to take the Charter into account because
the contested measure preceded its adoption, see Case T-112/98 (Mannesmannröhren-Werke AG
v. Commission of the EC), para. 76.

22 See, e.g., Manfred Zuleeg, Zum Verhältnis nationaler und europäischer Grundrechte: Funktionen einer
EU-Charta der Grundrechte [On the Relationship between National and European Fundamental Rights—
Functions of a EU Charter of Fundamental Rights], 27 Europäische Grundrechts-Zeitschrift 511, 516
(2000).

23 Eckhard Pache, Die Europäische Grundrechtscharta—ein Rückschritt für den Grundrechtsschutz in
Europa? [The European Charter of Fundamental Rights—A Step Backwards for the Protection of

L.J. 95, 96 (2000).
E.U. in its human rights policy vis-à-vis other countries: if a nonbinding catalogue of rights is sufficient for the E.U., why should other states be held to binding standards?\textsuperscript{25}

But the third objective of the Charter—enhancing the legitimacy of the Union—has been achieved. In Western constitutional theory, human rights have become an important source of legitimacy for public power.\textsuperscript{26} This understanding reflects the social contract: the need to protect an individual’s rights against infringements by others is one of the justifications of the state. But this justification presupposes that the state’s powers are limited, too. Otherwise, citizens would not receive the protection they sought when they created the state but would only have exchanged one threat to their rights for another. Human rights have come to be seen as one of the most important means of restricting state power. These restrictions already existed for Community organs to the extent that the E.C.J. had recognized human rights in its case law and could enforce them. But the Charter is tangible proof that the E.U. is subject to the same type of constraints as states, and that, therefore, its exercise of authority enjoys similar legitimacy.

It may be asked whether the drafting procedure used for the Charter can and should serve as a model for future revisions of the founding treaties. The use of a “Convention” with an overwhelming majority of members of the European Parliament (16) and national legislatures (30), over national governments (15) and the Commission (1), as well as the participation of civil society, enhanced the democratic legitimacy of the final text. In addition, the openness of the debate ensured the acceptability of the outcome and set the standard for transparency in future negotiations.\textsuperscript{27} Yet there were deficiencies in the Convention. The swift drafting process was made possible by forgoing traditional parliamentary speech and counterspeech, which gave tremendous power to the presidency,\textsuperscript{28} by dodging the most controversial points, such as the legal status of the Charter and the enforceability of its provisions, and by the “lip service” paid to social rights by leaving them largely to the discretion of national legislation.

Moreover, the task of drafting a catalogue of human rights was relatively limited—hence easy—as compared to the task of the “Convention on the Future of Europe,” which will have to tackle all fundamental questions of

\textsuperscript{25} Pache, supra note 23, at 486. But see Editorial Comments, supra note 7, at 5–6.


\textsuperscript{27} For an analysis of the drafting process see Grúinne de Búrca, The Drafting of the European Union Charter of Fundamental Rights, 26 EUR. L. REV. 126 (2000).

\textsuperscript{28} For criticism, see, e.g., Jo Leinen & Justus Schönlau, Die Erarbeitung der EU-Grundrechtscharta im Konvent: nützliche Erfahrungen für die Zukunft Europas [The Drafting of a EU Charter of Fundamental Rights: Useful Experiences for the Future of Europe], 24 INTEGRATION 26, 28 (2001).
contemporary Community and E.U. law. Although the new Convention is to prepare a text for submission to an Intergovernmental Conference, it could set the path for a turnaround in European politics: it could contribute to reinstating the primacy of legislatures in the elaboration of constitution-like texts by giving them a decisive influence in the negotiations, instead of leaving them with the mere choice of “take it or leave it” in the ratification process. If the Convention manages to produce a comprehensive text, it will put political pressure on the governments of the member states to accept that text, which would be endowed with European democratic legitimacy. Viewed from this perspective, the drafting of the E.U. Charter was only a dry run, but a useful one. The true test of whether and to what extent the legislatures can reclaim the constitution-making power from the executives on the European level is still to come.

See the list contained in the Declaration of Laeken, supra note 3.

Germany
Christine Langenfeld*

Freedom of Profession—Freedom of Religion—Ritual Slaughter in Germany and Europe—German Constitutional Court rules that Muslim butchers may obtain exception to rules on the slaughtering of animals.—Decision of January 15, 2002.1

In January 2002, the German Constitutional Court ruled on a constitutional complaint brought by a Muslim butcher concerning the right to obtain an exception permit to perform ritual slaughters (Schächten).2 The Court found that Muslim butchers may be permitted to perform ritual slaughters in exception to the general rules on the slaughter of animals. Coming at a time when the integration of Muslims into German society is under heated discussion, the decision is of fundamental importance in setting the parameters of religious accommodation.

*Professor, University of Göttingen Law Faculty, Germany.


2 Ritual slaughters are carried out by Muslims and Jews. In ritual slaughter, the animals, after being blessed, must have their throats slit; they must be killed with a single stroke of a very sharp knife in such a way that an immediate, clean, and deep cut is made through the trachea, the oesophagus, the carotid arteries, and the jugular veins, so that the greatest possible quantity of blood is allowed to flow out.