

# CHALLENGES AND PERSPECTIVES FOR RIGHTS IN THE EUROPEAN UNION<sup>1</sup>

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## **Abstract**

*The terrible violations of rights in the XX century are going to bring something very important to Europe: the reflection on the difference between human rights and fundamental rights. While human rights are defined by the characteristics of universality, fundamentality of purpose, abstractness, moral validity, and priority in the face of positive law, fundamental rights, for their part, following the line of Robert Alexy<sup>2</sup>, will be characterized by the processes of their protection, given that, as stated in the Anglo-Saxon proverb, “If there is no remedy, there is no right,” or, to the same effect, “rights are worth what their judicial guarantees are worth”<sup>3</sup>.*

**Keywords:** *human rights, fundamental rights, moral validity.*

The historical development of the protection system of fundamental rights in the European area culminated with the drawing up of a Charter of Fundamental Rights of the European Union. This Charter managed not only to ennumerate a list of rights, but to broaden those within the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. However, we cannot close our minds to the reformulation of fundamental rights with regard to the experiences and necessities in the European Union, especially if we consider the historical dimension of said rights.

It is extremely important that the European Union—since it now enjoys legal status after the Treaty of Lisbon has taken effect on 1 December 2009—has, in art. 6, given the green light to the process of adhesion, on the part of the EU, to the European

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<sup>2</sup> ROBERT ALEXY: <<Sobre el desarrollo de los derechos humanos y fundamentales en Alemania>>, in *Diálogo Científico*, vol. 11, n° 1/2, Centro de Comunicación Científica con Ibero-América, Tubinga, 2002, pp. 15-16. Regarding the characteristics of universality, inalienability, and fundamentality of purpose, see the pages of FRANCISCO LAPORTA: <<Sobre el concepto de derechos humanos>>, *Doxa. Cuadernos de Filosofía del Derecho*, n° 4, Centro de Estudios Constitucionales y seminario de Filosofía del Derecho de la Universidad de Alicante, Alicante, 1987, pp. 32-44.

<sup>3</sup> ALBERTO LÓPEZ BASAGUREN: <<Comunidad Europea, integración de ordenamientos y pluralidad de jurisdicciones en la protección de los derechos fundamentales>>, JAVIER CORCUERA ATIENZA (Coordinador): *La protección de los derechos fundamentales en la Unión Europea*, Dykinson, Instituto Internacional de Sociología Jurídica de Oñati, Madrid, 2002, p. 121. As the author explicitly states straightaway: “Truly, the effectiveness of a legal institution is decided by the efficiency of the mechanisms of protection established for it by the legal code, mechanisms that cannot come down to a simple precautionary measure in the interest of what is being dealt with, rather it must be capable of articulating a *complementary* instrumentation directed at strengthening the possibility of the materialization of regulatory protected interest.” p. 121.

Convention on Human Rights of 1950. In March, 2010, the process of adhesion to this Convention began. In my view, this adhesion will help consolidate the protection of citizens' fundamental rights with regard to acts adopted at the European level; it will bring into plain view the moral and ethical commitment of the European Union; and, furthermore, it will allow the European Court of Human Rights to control the possible discrepancies between its jurisdiction and that of the Court of Justice of the European Union<sup>4</sup>. We cannot ignore the plurality of jurisdictions in the matter of fundamental rights and the consequent necessity of establishing an organized regulatory order that avoids potential conflicts between the jurisdictions<sup>5</sup>. While the Charter of Fundamental Rights itself does not resolve the judicial war between both courts<sup>6</sup>, it is the adhesion of the European Union to the Convention that will end said war once and for all, obtaining legal security, a desired, harmonic relationship between the jurisdictional organs and "a true, external control"<sup>7</sup> of respect for human rights.

In any case, it must be assumed that the adhesion will imply some kind of subordination or hierarchal submission of the Luxemburg Court to the Strasbourg Court, in the same way that the national Constitutional Courts currently submit to the European Court of Human Rights<sup>8</sup>.

Furthermore, the adhesion of the European Union to the European Convention on Human Rights will introduce an additional legal control in the area of protection of fundamental rights in the EU. The European Court on Human Rights will become a competent entity to examine whether the acts of the institutions, entities, and organs of the EU, including the decisions by the European Union Court of Justice, respect the European Convention on the Protection of Human Rights. The adhesion will place the EU on the

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<sup>4</sup> Vid. ÁNGEL RODRÍGUEZ VERGARA: <<Ordenamiento comunitario y convención europea de derechos humanos>>, in JAVIER CORCUERA ATIENZA (Coordinador) *La protección de los derechos fundamentales en la Unión Europea*, op. cit., p. 116.

<sup>5</sup> ALBERTO LÓPEZ BASAGUREN reflects on this in <<Comunidad Europea, integración de ordenamientos y pluralidad de jurisdicciones en la protección de los derechos fundamentales>>, in JAVIER CORCUERA ATIENZA (Coordinador): *La protección de los derechos fundamentales en la Unión Europea*, ibid., and is of the opinion that: "In this sense, the perspective of integration of the different codes in the protection of fundamental rights can be nothing other than trying to achieve the composition of an integrated system of protection of fundamental rights in Europe. This demands the recognition of the consistency of their own requirements in each one of the codes involved, always within the framework of an adequate position of relevance of interests in each system in each matter that arises in a conflictive manner. In this sense, the recognition in the European system of the capacity of determining a minimum *standard* of protection of fundamental rights seems to be unavoidable, to which they must necessarily submit, not only the constitutional codes, but also the community codes." p. 150. Thanks to the CFREU, we can say that the European Union can already count on it.

<sup>6</sup> It must be kept in mind that the CFR only mentions, in its art. 53, the ECHR as a minimum level of protection of human rights. On that, see ÁNGEL G. CHUECA SANCHO: <<Por una Europa de los Derechos Humanos: la adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos>>, NATIVIDAD FERNÁNDEZ SOLA (Coordinadora): *Unión Europea y Derechos Fundamentales en perspectiva constitucional*, Dykinson, Madrid, 2004, pp. 52-53; SUSANA SANZ CABALLERO: <<La contribución del Consejo de Europa al acervo de la Unión Europea en materia de Derechos Fundamentales: sinergias y divergencias de ambos sistemas>>, NATIVIDAD FERNÁNDEZ SOLA (Coordinadora): *Unión Europea y Derechos Fundamentales en perspectiva constitucional*, ibid. p. 78.

<sup>7</sup> On that, see ARACELI MANGAS MARTÍN: *La Constitución Europea*, Iustel, Madrid, 2005, pp. 223-224.

<sup>8</sup> SUSANA SANZ CABALLERO: <<La contribución del Consejo de Europa al acervo de la Unión Europea en materia de Derechos Fundamentales: sinergias y divergencias de ambos sistemas>>, NATIVIDAD FERNÁNDEZ SOLA (Coordinadora): *Unión Europea y Derechos Fundamentales en perspectiva constitucional*, op. cit., pp. 88-89, pages specifically dedicated to the distrust on the part of the EU members toward the adhesion to the ECHR and to the indirect control of the European Court of Human Rights over the actions arriving from the EU.

same plane as the member States with respect to the system of protection of fundamental rights supervised by the European Court on Human Rights. This will permit that the voice of the EU is heard when cases appear in the Strasbourg Court<sup>9</sup>. It will also suppose a new possible legal recourse for the citizens who, in the case that they consider that the EU has violated their fundamental rights—and once the national actions are exhausted—will be able to pursue legal remedies before the European Court of Human Rights.

Now, in order to protect rights in the European area, I do not believe it is sufficient just to have good texts (such as the Charter or the European Convention on Human Rights), rather it also requires that the institutions work well<sup>10</sup>, that there is effective control on the part of the parliaments (national and European) and the ombudsman<sup>11</sup>, and that fundamental policy is not neglected<sup>12</sup>.

It is also important that the indivisibility of the rights is accompanied by the interdependence among them. The realization of rights such as those relative to education, healthcare, and social security contributes to the enjoyment of civil and political rights. In the same way, the respect for the latter contributes to the application of economic, social, and cultural rights<sup>13</sup>. In my opinion, it is important that social change is directed through discourse and the policy of social rights<sup>14</sup>, legally and economically guaranteeing the enjoyment of such rights at the same level of protection as civil rights, since we find ourselves immersed “in a context of the supremacy of economic reasoning, which degrades them”<sup>15</sup>.

Furthermore, solidarity must be considered as a central value since this could enter into conflict with the highly competitive market economy supported as a basic objective; more so keeping in mind that we operate in a globalized environment in which competition is one of the philosophical foundations of an economic system that contributes to highlighting the economic and social differences among citizens to a greater and greater extent. Just as the ex-president of the European Parliament, Nicole Fontaine, defended, we must make liberty and solidarity compatible; that is, to achieve a balance between

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<sup>9</sup>After the adhesion, the EU will become signatory number 48 of the ECHR. The EU would have its own judge in the European Court of Human Rights of Strasbourg.

<sup>10</sup> As LEO TINDEMANS already observed at a conference on May 2, 1991 in the Diputación Foral de Bizkaia, titled <<Constitución Europea>>, and published in *Constitución Europea. Presente y futuro del Parlamento Europeo*, Universidad de Deusto, Diputación foral de Bizkaia, Bilbao, 1991, p. 24, the European Union will only reach its objectives if the institutions manage to adapt themselves to the new necessities.

<sup>11</sup> This was shown by the “Human Rights” sector in the plenary session of the European Convention on the 24th and 25th of June, 2002, in Brussels.

<sup>12</sup>As much rights as policies are integral parts and are intimately related to the only system of fundamental norms for which the activities of the EU hold sway. Put another way: the EU must include the dimension of human rights in areas pertinent to its policies. For example, we think that the approach the EU has on terrorism must be compatible with human rights and fundamental liberties, despite its toughness and inflexibility.

<sup>13</sup> <<Informe anual sobre derechos humanos en la UE (1998-1999)>>, adopted by the Council on October 11, 1999, Office of Official Publications of the European Communities. 2000, p. 31.

<sup>14</sup> We cannot forget, as JAVIER RUIPÉREZ ALAMILLO points out in <<La “Constitución Europea” y la teoría del poder constituyente>>, JAVIER CORCUERA ATIENZA (Coordinador) *La protección de los derechos fundamentales en la Unión Europea*, op. cit., that social rights have as an end “that of guaranteeing some minimum conditions for citizens to be able to fully develop their existence.” p. 497.

<sup>15</sup> The article by MIGUEL ANGEL GARCÍA HERRERA is of great interest: <<Derechos sociales y tratados comunitarios: evolución normativa>>, JAVIER CORCUERA ATIENZA (Coordinador): *La protección de los derechos fundamentales en la Unión Europea*, ibid., to which I refer you for an understanding of the problem that the future of positivization and protection of social rights in the EU entails. See especially, p.359. Likewise, see GONZALO MAESTRO BUELGA: <<Constitución económica y derechos sociales en la Unión Europea>>, JAVIER CORCUERA ATIENZA (Coordinador): *La protección de los derechos fundamentales en la Unión Europea*, ibid. pp. 371-417.

economic freedom and solidarity, as well as helping the member States with less resources<sup>16</sup>. Likewise, though the globalization process is unstoppable and the economies must adapt themselves in order to survive, we should not believe that market forces by themselves dictate the way of life of societies, culture or fundamental values. In this sense, it is important that the process of modernization and globalization does not overlook these necessities and social values.

The European Union should also keep in mind that a catalog of fundamental rights is not sufficient to guarantee the effectiveness of their protection. The Court of Justice must be competent to decide any case put forward by an individual seeking to prove that one of the fundamental rights has been violated by acts of the EU<sup>17</sup>. We must remember that in the EU, the individual currently must meet a cumbersome legal standard to assert his or her rights when a member State has infringed upon European Union Law. It is truly lamentable that the position of individuals continues to be so weak due to a lack of direct recourse and, even when an action of annulment is successful, due to limitations on the implementation of such an action, as legal standing is reserved only to subjects that, individually and directly, are involved in an act of the European Union.

As far as the European Union's foreign relations are concerned, it is necessary the respect for fundamental rights should play the same role as it does in internal matters, such that the acts of the EU are coherent and credible. One interesting and useful measure for this purpose is the <<democracy and human rights clause>> in the agreements reached between the European Union and third States. The European Union should remain proactive in promoting human rights in its bilateral relationships with third countries and sanction violations wherever they occur. The Charter of Fundamental Rights of the European Union can be viewed as a standard by which to measure the level of protection of fundamental rights in third countries and as a sign of the European Union's commitment to human rights in its foreign policy<sup>18</sup>.

Last, but not least, the European Union's policies must have us human beings as their principle focus<sup>19</sup>. Already from the very beginning, as the Union was being formed, proposals for constructing a unified Europe that revolves around the dignity, freedom, and rights of the individual were made (Monnet). Now, thanks to the Treaty of Lisbon, this dream can be made real<sup>20</sup>. As Oreja Aguirre observed: „The emphasis must be put on the

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<sup>16</sup> <<Europa, según Nicole Fontaine>>, ABC, August 5, 2001. p. 46.

<sup>17</sup> See European Parliament Work Document–Studies Headquarters- <<¿Qué Carta Constitucional para la Unión Europea? Estrategias y opciones para reforzar el carácter constitucional de los Tratados>> done by the Robert Schuman Center. European University Institute, December, 1999.

<sup>18</sup> This position, for example, has been defended by AGUSTÍN JOSÉ MENÉNDEZ in his paper <<Fundamentando Europa. El impacto de la Carta de Derechos Fundamentales de la Unión Europea>>, Natividad Fernández Sola (Coordinadora): *Unión Europea y Derechos Fundamentales en perspectiva constitucional*, op. cit., pp. 116-119.

<sup>19</sup> RAINER ARNOLD in <<El desarrollo de la protección de los derechos fundamentales en la Unión Europea>>, a paper taken up in JAVIER CORCUERA ATIENZA (Coordinator): *La protección de los derechos fundamentales en la Unión Europea*, op. cit., where he wisely advises: “With the recognition that the individual is the supreme and only end of the State and of each code that affects the situation of the person, as with the supranational power of the European Union, the requirement to protect them in their dignity and freedom is a necessary and original part of this code.” p. 30.

<sup>20</sup> As JAVIER CORCUERA ATIENZA explains in <<El reconocimiento de los Derechos Fundamentales en la Unión Europea: el final de un túnel>>, JAVIER CORCUERA ATIENZA (Coordinador): *La protección de los derechos fundamentales en la Unión Europea*, op. cit., Monnet, in a speech in Washington, April 30, 1952, declared that the European construction “tried to unite men, more than States, but little constitutional feeling could a Community offer that lacked a Constitution, not only by not guaranteeing fundamental rights, nor

citizen, that is, we must substitute an essentially bureaucratic system for a democratic system”<sup>21</sup>. Regarding this last aspect, I believe that it is absolutely essential that this system be constructed from <within> and from <<below>>. That means, as Peter Häberle has specified, that Europe has to be “lived more intensely by the citizen from his or her *national* Constitution; only in this way will the much quoted <<Europe of citizens>> emerge, the <<Europe of regions and of local entities>>”<sup>22</sup>. In other words: the <<Europe of citizens>> and the <<Europe of regions>> advance if Europe grows from below, that is, from within the national constitutional texts and from the federal States, which will then correlate with progress at the supranational level. This means, then, to commit more to “the Europe of citizens and less to <<the Europe of individual countries>>, which has triggered so many wars”<sup>23</sup>. For that, it is important to analyze the role of the local and regional parliaments in the process of European integration<sup>24</sup>. Following Cruz Villalón, one can already speak about a “constitutional *continuum* at several levels, in which the center of gravity, which is and will continue to be state constitutionalism, finds above an extension in a constitutionalism of the Union, and below an autonomous constitutionalism”<sup>25</sup>.

As Oreja Aguirre has specified: “The European Union must be that ethical goad that stimulates the vitality of the European nations by reminding them of their common,

articulating a separation of powers worthy of the name, but because the non-existence of a project of articulation seemed to express, especially, the absence of will to have a Constitution.” p. 61.

<sup>21</sup> MARCELINO OREJA AGUIRRE: <<Estado actual del proceso de construcción europea. Europa y el mundo en 1993>>, in the collective work directed by Marcelino Oreja himself, *La Constitución Europea*, op. cit., pp. 25-27.

<sup>22</sup> PETER HÄBERLE: <<Programas sobre Europa en Constituciones y proyectos constitucionales recientes. El desarrollo del “Derecho Constitucional nacional sobre Europa”>> en *Retos actuales del Estado Constitucional*, Selección y supervisión de Iñaki Lasagabaster Herrarte, Traducción de Xabier Arzoz Santiesteban, Herri Arduralaritzaren Euskal Erakundea (IVAP), Oñati, 1996, p. 125. Original title: <<Europaprogramme neuerer Verfassungen und Verfassungsentwürfe –der Ausbau von nationalem <<Europaverfassungsrecht>>. Publicado O. Due/M. Lutter/J. Schwarze (eds.), en FS für Ulrich Everling, Nomos, Baden-Baden, 1995, pp. 161-173. As the author reiterates in another passage: “What is decisive is that the constitutional States dare to create more constitutional Law relative to Europe in the sense expressed and that with this they advance the <<Europe of citizens>> (through references to the ECHR) or the <<Europe of regions>> (articles on European regionalism) and the <<Europe of local entities>> (<<Europe of the municipalities>> in the sense of A. Gasser). In the area of fundamental rights, one can make absolute reference to the member countries’ fundamental rights as <<general principles of Rights>> in the sense of the CJEC (cfr. art. F. Apt. 2 TUE), the reception of <<principles of public order>> would also be possible, which the European Court of Human Rights has begun to develop. In this way, Europe could find new impetus <<from below>> and make itself understandable, accessible, and that it can be experienced by the citizen in light of its own Constitution,” p. 130. On this, see Prologue of ANTONIO LÓPEZ PINA: <<La vocación cívica universal de Pedro Häberle>> al libro de Peter Häberle, titulado, *Libertad, igualdad, fraternidad. 1789 como historia, actualidad y futuro del Estado constitucional*, op. cit., p. 17.

<sup>23</sup> PREDRAG MATVEJEVIC: <<Europa vista desde la otra Europa>>, Sección de Opinión de *El País*, June 14, 2003, p. 13.

<sup>24</sup> It is of significant importance to reflect on the role that the regions and municipalities have as fundamental democratic entities in the European structure, situated on a third level of power after the EU and the national States. This means, according to VALÉRY GISCARD D’ESTAING in <<La futura Europa constitucional>>, *Anuario El Mundo 2003. Constitución y Convención*, Madrid, 2003, that it is not enough that regions and municipalities are conceived of as administrative entities, rather it is indispensable “reconize them as institutions and essential entities for a democratic European Union and legitimate governance,” p. 29. Vid. <<Informe sobre el papel de los poderes regionales y locales en la Constitución europea>>, A5-0427, Nápoles, 4-12-2002.

<sup>25</sup> Vid. PEDRO CRUZ VILLALÓN: <<El Espacio Constitucional Europeo>>, *El País*, December 6, 2003, p. 19. The author adds: “Both, for us, have turned into irreversible processes and phenomena, stemming from the same state origin. The question, however, is what exactly is the level of the Union that we are, at this historic moment, building.”

foundational values. It can represent a starting point for the renewal of that entirety of reasons that give meaning to our co-existence in society”<sup>26</sup>. In order to proclaim these values, we have provided the Union with a Charter of Fundamental Rights. We cannot forget that the text recognizes the existence of a community of values for the European Union, rooted in human dignity, liberty, equality, and solidarity, and based on the principles of democracy and of the Rule of Law<sup>27</sup>. The principles that serve as the base of European civilization are thus consecrated. Likewise, humanism, diversity, and universality could be considered as the basic principles of the Treaty on European Union, those which “have prevailed throughout these past decades as <<the essential to be European>> and those that must guide us toward the future”<sup>28</sup>.

To conclude, for all of the above reasons, it is the responsibility of all the citizens that make up the European Union, and not only our political leaders, to fight for a community of values that unites our continent with great pride. What is more, I believe that our goal has to be the consolidation of a true Union among the European peoples. Many years ago, Ortega y Gasset<sup>29</sup> pointed out that Europe was, since centuries ago, a single *entity*, but that it had to be something more: a *Union*. In his famous treatise of 1930, *The Revolt of the Masses*, he proposed that nations by themselves are insufficient, and that problems need to be addressed and resolved conjointly within Europe as a whole, thereby making the strong plea for a European Union or a United States of Europe. To quote the distinguished philosopher: “The time is ripe for Europeans to convert Europe into a national idea... only a decision to build a great nation with a group of continental peoples would once again resuscitate the beat of Europe”<sup>30</sup>. So, let us not forget and keep in mind that with a true Union at the European level, we will achieve a Europe based on a real coexistence and freedom.

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<sup>26</sup> MARCELINO OREJA AGUIRRE, ex-European commissioner: <<Los valores de Europa>>, *ABC*, June 12, 13, 2000, p. 3.

<sup>27</sup> We must not lose sight of the fact that the Rule of Law constitutes Rule of Law with values, basing itself essentially on those values safeguarded by fundamental rights. There cannot be a community of Law that is not at the same time a community of fundamental rights. On that, see RAINER ARNOLD: <<El desarrollo de la protección de los derechos fundamentales en la Unión Europea>>, in JAVIER CORCUERA ATIENZA (Coordinador): *La protección de los derechos fundamentales en la Unión Europea*, op. cit., p. 29; FRANCISCO BALAGUER CALLEJÓN: <<Derecho y Derechos en la Unión Europea>>, in JAVIER CORCUERA ATIENZA (Coordinador): *La protección de los derechos fundamentales en la Unión Europea*, ibid., p. 41.

<sup>28</sup> MARCELINO OREJA AGUIRRE: <<Palabras finales>>, in *La Constitución Europea*, , Actas, Madrid, 1994, p. 331.

<sup>29</sup>I would like to highlight that, within the Spanish intellectual scene, both ORTEGA Y GASSET as well as MIGUEL DE UNAMUNO, while philosophically divergent, were always equally pro-European, insisting that it would be necessary to overcome the image of Spain as anachronistic, traditional, and exceptional. While for this last point the mental poverty of Spain proceeded from the barrier that the Inquisition put up to block the entrance of the Reformation, ORTEGA would consider that Europeanization was not only a cultural question, but also political and social. Unamuno, as MARAGALL affirmed, was without a doubt, “the most Europeanized Spaniard of his time and the most exceptional defender of Europe.” For his part, ORTEGA Y GASSET would strongly defend his unequivocal program <<Spain is the problem, Europe the solution>>. See SALUSTIANO DEL CAMPO: <<El proyecto europeo de España>>, in the magazine *Cuenta y Razón del pensamiento actual*, n° 102, Fundes Club de los 90, Madrid, Spring of 1997, pp. 85-90.

<sup>30</sup> See JOSÉ MARÍA ÁLVAREZ DEL MANZANO: <<La Europa de las ciudades y su fundamento, el principio de subsidiariedad>>, in the journal *Cuenta y Razón del pensamiento actual*, n° 104, Fundes Club de los 90, Madrid, Autumn of 1997, p. 36.