Restricting fundamental rights by reference

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This article reflects purely the personal views of its author and does not represent, in any way, the views of the Institution to which he belongs.

I. The limitation of fundamental rights in general

Generally speaking, most constitutional or international provisions on fundamental rights contain, besides the right itself, some qualifying conditions, which either allow the State to interfere in a foreseen way with the right concerned or serve as guidance for the completion of its content by the constituted powers. Both functions of the qualifying conditions may well overlap, since the possibility of interference also restricts and defines the way a right is exercised, as well as the determination of its specific outlook amounts to a limitation of the way in which it can be exercised. In the case of the genuine freedoms ("status negativus"), the formulation of the interference conditions as such will of course mainly aim at the protection of the citizens against State interference whereas in the case of the citizens' or the solidarity rights the qualifying conditions mainly serve to provide the rights concerned with some content.

It should also be recalled that most national legal orders recognise the possibility to regulate the exercise of (eventually conflicting) fundamental
rights regardless even of any explicit qualifying conditions therefore (so called "inherent limitations").

In most cases, according to the "rule of law" principle, it is the Legislator that is entrusted with the fulfillment of both functions of the qualifying conditions\(^1\).

Moreover, the limitations shall, according to Art. 52 (1) of the Charter, respect the essence of those rights and freedoms\(^2\) and pass the “proportionality test”, which are quite undefined concepts that prohibit in the abstract any “excessive” limitations; this is why we are here focussing on the formal restrictions by reference to other legal instruments.

II. General and specific limitations by reference according to the Charter

The European Charter of fundamental rights, which includes rights of all sorts, also foresees limitations for their exercise. Rights based on the Community Treaties or the Treaty on European Union shall, according to Art. 52 (2), be exercised under the conditions and within the limits defined by those Treaties. These contain important limitations, in particular in the field of free movement (see Art. 45 and, to a certain extent, Art. 15). More importantly, any limitation on the exercise of the rights and freedoms shall be provided by law, according to Art. 52 (1). In order to better understand the Art. 52 (1) reference to limitations provided for by law, it appears necessary to go through the individual provisions of the chapter, to see whether and how they address such limitations themselves. In this respect, the following categories can be observed:

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\(^1\) "Gesetzesvorbehalt", "domaine de la loi", "riserva di legge", "reserva de la ley".

\(^2\) "Wesengehaltsgarantie" in german law.
Human dignity, which is not a real right as such (Art. 1), as well as the prohibitions of torture and slavery (Art. 4 and 5), are, as one could well expect and see in the respective explanations, not subject to any limitations by law at all. By contrast, an explicit reference to such limitations by law accompanies the right to data protection [Art. 8 (2)], the right to legal protection (Art. 47) and the provision concerning legally foreseeable criminal offences and penalties (Art. 49).

Alongside these few rights comes another category of provisions, referring explicitly to national laws: these are firstly the right to marry and to found a family (Art. 9), the right to found educational establishments and to educate children (Art. 14 (3). The reference to national laws can be explained by the obvious lack of competence at European level in these fields according to a separation of powers that the charter has to respect [Art. 51 (2)]. Indeed the Charter has undertaken also to address issues that in principle are not subject to European integration, even if some of them are gradually coming under the scope of European regulation under the Title on Justice and Home Affairs. The present incongruency between the competences at Union level determining the scope of the Charter (Art. 51) and the rights proclaimed in it can even result in systematic inconsistencies, as can be seen in the case of the right to property (Art. 17): it is indeed difficult to understand why the expropriation conditions have to be provided for by law and not by “national law”, which would have been more reasonable, since such property questions are left with the Member States (Art. 295 EC).

Then comes an important category of freedoms, like the right to liberty and security (Art. 6), the right to respect for private life (Art. 7), the freedoms of thought and religion (Art. 10), of expression (Art. 11), of
assembly and association (Art. 12). In contrast to the previous two categories they do not contain any specific references to limitations by law (whether national or not); the same applies for the citizen’s rights to vote and to stand as a candidate, the right of good administration (Art. 41) and the right to access to documents (Art. 42). Without the extensive explanations on the respective provisions, the ordinary citizen might well get the impression that all these rights and freedoms are “unconditional”, whereas it is well known that the unlimited exercise of these rights of the so called “status negativus/positivus” is impossible.

To better understand the legal situation, one needs to read the respective explanations that mostly refer to the ECHR, which not only foresees substantive limitations on the exercise of the different important freedoms, but also on the necessary statutory instrument thereto, namely the law (see explanations to Art. 6,7,11,12). Under these circumstances, one may lament some lack of consistency and, above all, of transparency and openness in the Charter.

Even if it may have been intended to be a text which is lighter and easier to read than the ECHR, the question remains: Why do some provisions contain a reference to limitation by law, whereas others don’t? Of course, neither of the national constitutions are perfect in this respect; that’s why the legislator is also permitted to regulate in cases where the respective constitutional provisions do not provide for his action. Nevertheless, for important rights of the “status negativus” in particular, the reference to the law as the only basis for the possible limitations has traditionally been explicit in most constitutions, in order to guarantee the freedoms from
any arbitrary encroachment by public authorities. At least in the case of such rights, the possibility of restrictions and the necessary instruments therefore should not be kept from the eyes of the ordinary citizen, who should not be obliged to read detailed interpretations referring to other texts in order to realise the basic content and the limits of his rights.

Against this criticism, which could be disqualified as being of a mere “technical"or "legalistic" nature, the defenders of the Charter may point to our starting point, Art. 52 (1) referring to law for “any limitation on the exercise of the rights, and freedoms recognised” therein. Such a general provision appears to be indeed necessary in view of the many rights that do not specifically foresee limitations by law. Even at this stage, however, improvements would be possible: the wording of Art. 52 (1) focuses on the instrument to be used for limitations on the Charter freedoms and rights but does not really address the question whether such limitations can be decided at all (and possibly under what basic conditions in each case). It is through an interpretation based on (inter-)national precedents that one can read this Article as also implying the general possibility of taking restrictive measures by law for all the fundamental rights.

III. The lack of a "law" concept

More importantly, the limitation method by reference to the law gives rise to a more substantive question concerning the law concept in the Charter, which is not defined. Whereas in the different Member States this concept is clearly defined as meaning the formal law, i.e. the instrument decided by the democratically elected Parliament, the situation

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3 This principle was formally enshrined in ancient Athens after the fall of the Thirty Tyrants (402 b.C.)
is much less clear at Union level, where the concept of law as such is, formally speaking, unknown.

Since according to Art. 52 (3) of the Charter the rights which correspond to the ones guaranteed by the ECHR have the same meaning and scope of those laid down by the said convention, one could be tempted to transpose the law concept of the Convention. Nevertheless, this concept appears to be much wider than the one followed by the Member States. The Court of Strasbourg, in an effort to accommodate different legal traditions, has also accepted that regulatory instruments of the Executive (so called “material laws”), even sufficiently precise customary laws in the “common law” countries, can be considered as satisfying the protection standards of the Convention⁴.

Compared to this standard, the situation in the Community is making substantial progress: not only are there no doubts about the quality of Community regulations and directives as laws in the material sense, that create rights and impose obligations (at least the regulations and, to a more limited extent –mainly for rights creation- the directives) but also they are all the more adopted following the co-decision procedure (Art. 251 EC)⁵, which gives the European Parliament a standing equal to that of the Council and in reality makes the texts adopted thereby “formal laws” albeit not bearing this name.

Under these circumstances it would be legitimate to expect from a Charter of fundamental rights of the European Union to courageously

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⁴ ECHR (30) 1979, p. 30 (Sunday Times); Malone 1979 2, E R 620, Commission's Report of 17.12.82; about the limitations under ECHR see Frowein/Peukert, EMRK-Kommentar, Strasbourg.
⁵ NB. The reference to such a Community law concept is also consistent with the function of Union law as co-defining the level of protection guaranteed by Art. 53 of the Charter.
address the question of the law concept; even if the Charter could not affect the horizontal separation of powers between Community institutions [see Art. 51 (2)], it would at least be for the European Parliament to raise the issue and try to ensure that any limitations to the fundamental rights – regardless of any other Treaty provisions – are (co-) decided by the democratic legislator⁶. If there is still some “democratic deficit” in the EU, a Charter of fundamental rights does offer a golden opportunity for its elimination, provided that this opportunity is seized through a democratic definition of the law. This definition could come from the European Parliament or, why not, from the Court of Justice, which has already shown its sensitivity for questions of democracy by even, sometimes, correcting the Treaty⁷.

Last, but not least, the Charter contains – under its solidarity chapter - social rights like the right to free education [(Art. 14(2))] and to protection against “unjustified” dismissal (Art. 30), the right to social security (Art. 34) and health care (Art. 35) as well as access to services of general economic interest (Art. 36), to social and housing assistance and to a decent existence (Art. 34(3). As their enforceability is, in general, not automatically admitted, all of them have, according to the text of the Charter, to be specified by Community law and national laws and practices. An implicit reference to law (also secondary Community legislation) should also be admitted for the apparently unconditional right to fair working conditions (Art. 31), as well as for the only generally formulated environmental and consumer consumer.

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⁶ For a general approach see D. Triantafyllou, Des compétences d’attribution au domaine de la loi, Brussels, Bruylant 1999 (eiusd. Vom Vertrags-zum Gesetzesvorbehalt, Baden-Baden, Nomos 1996)
For these rights, the reference to national practices could give rise to uncertainties. The reference to practices might only be understandable in the case of collective negotiations guaranteed by Art. 28 which are founded on self-regulation. Nevertheless, the reference to "practices" also leaves the Administration free to set the substantive conditions for spending in the social field through mere circulars. It is interesting to note that other linguistic versions refer, in this respect, not to laws, but to a wider notion of regulatory instruments. This confirms that in the social field the Charter does not require an action by the Legislator, but recognises the autonomy of the Executive. Here again, the Charter follows a minimalistic approach accommodating, possibly, some national legal orders, but ignoring, at the same time, the requirements imposed by the Court of Justice on social expenditure; according to its jurisprudence, the programming of such expenses that extend over many years and thus go beyond the merely preparatory or experimental activity of the Commission has to be decided by the Council and the Parliament as Legislator, not by the Commission itself. If one wanted to transpose in the Member States the democratic "rule of law" principle in this field, following a large number of academics, the Charter would have also been an opportunity for this.

7 Concerning, for instance, the right of the Parliament to bring an action before the Court, case 70/88, Parliament vs Council, Rep. 1990, p. I-2041
8 This is also particularly true for the freedom to conduct a business (Art.16) containing the same reference
9 "Rechtsvorschriften" in german.
IV. CONCLUSION

In conclusion, the provisions for some important rights and freedoms are not always transparent enough as to the way in which they can be restricted or specified. The reference to the ECHR made in the explanations is certainly not the most appropriate way to achieve the desired openness for the public. Moreover, the use of the reference to the “law” appears to be rather casual, whereas the addition of the adjective “national” thereto is not always consistent with the existing EU competences.

As for the ill-formulated horizontal Art. 52 about the possibility of limiting all rights and freedoms by “law” it might have been necessary, whilst, as it now stands, it does not however guarantee the role of the democratic legislator either at Union/Community or at national level, since it ignores the “acquis communautaire” in some respects.

Apart from any comments on the legal drafting, these conclusions show that a Charter of fundamental rights of the EU would have been better formulated, if accompanied by a comprehensive reform of a constitutional nature defining more clearly the separation of powers between the EU and its Member States, on the one hand, and between the different Union institutions, on the other.