

THE LANGUAGE OF RIGHTS AND EUROPEAN INTEGRATION

Gráinne de Búrca

(Forthcoming in G. More and J. Shaw, Eds., *New Legal Dynamics of European Union*, Oxford University Press 1996).

1. Introduction:

Dissatisfaction with the concept of rights, and in particular the critique which has been developed over the last few decades, has not had much effect on the debate about the role of rights in European Community law. This critique of rights emerged largely within the Critical Legal Studies Movement, but has been developed also by feminist, communitarian and postmodernist writers, amongst others (Kennedy, 1979; Hutchinson and Monahan, 1984; Perry, 1984; Tushnet, 1984; Olsen, 1984; Smart, 1989; Kingdom, 1991; Faraday, 1994; Gaete, 1993). One explanation for its absence in EC law is that the lack of critique is not something which is peculiar to the topic of rights within Community law, since, as has been pointed out by various commentators, there has been in the past a notable absence of genuinely "critical" approaches in Community legal scholarship, and little critical scrutiny of the Community project as a whole (Snyder, 1990: Chap. 1; Weiler, 1993: 430-433; Ward, 1994).

However, even accepting the broader context of European Community legal scholarship, it is arguable that the reason why the familiar critique of "rights talk" has not been seriously considered or applied in the context of Community law, is that the legal system established by the EC Treaties in the 1950s was heavily market-driven, and that other moral or social considerations were, at best, of secondary or subsidiary relevance. In the face of the apparently overwhelmingly economic impetus of the Community, the language of fundamental rights offered the potential to articulate and to establish a place for other values.

Perhaps as a result, the emergence of the language of rights within the Community's judicial, legislative and institutional processes was widely welcomed by those commenting on Community law. Criticism has focused, on the whole, on matters such as the "space" given to rights issues being too small, or that legal developments in the area do not go far enough, that a written catalogue of rights is needed, that too few rights are being protected, or that the "wrong" rights are being protected (Weiler, 1986, 1987; Schermers, 1990; Clapham, 1990; Lenaerts, 1991; Coppel and O' Neill, 1992; Phelan, 1992). The deeper critique of rights referred to above, which has generally focused on the individualistic and adversarial nature of rights, and which maintains that rights discourse is empty rhetoric concealing both the exercise of power and the reality of disempowerment, has had little impact in the context of Community law.

What I propose to do here is to examine the language of rights as it appears within Community law, and to look at the varying contexts in which it is used, since different observations may be made about these different contexts. I will focus not only on the "fundamental rights" declared and constituted by the Court of Justice as part of the general principles of Community law, but on the language of rights more widely as used throughout the Community legal system, by the institutions in the legislative process, and in the application of Community law to the Member States. This will include not just those rights which have been declared by the Court to have fundamental or "constitutional" status, but also those rights which are created, conferred or declared by Community legislative and other measures. Indeed, the legislative rights which are created at Community level generally acquire a form of constitutional status at the national level where they take priority over national law. This also entails consideration of those areas of Community law in which the language of rights has, perhaps surprisingly, not figured very largely or at all.

What is particularly of interest is why the language of rights has come to be used so widely within these areas of Community law, and why it continues to be expanded and developed by the judicial and political institutions. Two partial explanations will be suggested, which focus on how that language is perceived as both a legitimating and an integrating force. Finally, I wish to consider what impact that language may have in reality, and whether a more critical or even sceptical approach is called for.

2. Different contexts and categories of rights within Community law.

It is important to be specific about what is taken to be meant by rights in Community law, given that the vocabulary of rights is very fluid. Looking at some legislative instruments and at decisions of the ECJ, as well as some of the literature on Community law, it is clear that rights in EC law, and even "fundamental" rights in EC law, can mean many very different things. Set out below is a range of different contexts in which issues of rights have arisen in Community law, or rather at a range of different usages of the language of rights, and mention is also made of a number of areas in which this language has not yet been used. In separating out some of the different usages in this way, consideration of their actual impact, and of the extent to which they perform the suggested functions of legitimation and integration, may be made easier.

The categories are roughly drawn and clearly overlapping in part, but the division may nonetheless be useful for considering in a general way the function, scope and possible impact of these main groups of "rights" which are claimed to be protected within EC law. What is particularly of interest, for present purposes, is the fact that in these different contexts, the language of rights is used, or, in certain cases, that it is not used. The focus will be primarily on the use of that language, considering critically the possible reasons for its use, its meaning and its impact in the context of European integration.

(a) The first category includes economic, commercial and property rights, such as the right to trade, the right to use land and economic liberty. Examples of these in Community language are mostly to be found in the case law of the Court, in which they are deemed by the Court to be fundamental Community rights. They have arisen generally in the context of challenges to Community policy, such as *Nold*,¹ *Hauer*,² *Internationale Handelsgesellschaft*,³ or to Member State action which is implementing such policy e.g. *Wachauf and Bostock*.⁴ As in the case of the next two categories, these have been judicially constituted as EC rights, without necessarily having any other formal political or constitutional Community foundation, although the Court often claims to derive them from other national and international legal sources.

(b) The second category includes what might be called rights of defence, such as the privilege against self-incrimination, the right to a hearing, freedom from search and seizure, confidentiality of information and protection from excessive penalties. Like the first category, these rights have been claimed both against the Community and against the Member States. Claims to such protection as "fundamental rights" have most frequently been made by companies in the context of the exercise by the Commission of its investigative and other powers in competition proceedings: e.g. *A.M. & S*,⁵ *Hoechst*,⁶ *Dow Benelux*,⁷ *Al-Jubail*⁸ etc. Again, these have been declared in the case law of the Court of Justice to be fundamental rights. Such "rights of the defence" have also been invoked by individuals against Member States when those States are implementing or restricting Community rules, e.g. *Pecastaing*⁹ and *Heylens*.¹⁰ Recently in *Gallagher*,¹¹ for example, the English Court of Appeal sought from the Court of Justice a preliminary ruling on whether certain of an individual's rights of the defence had adequately been satisfied in deportation proceedings.

(c) The third category includes traditional civil and political liberties, often drawn from the rights provisions of the European Convention on Human Rights such as human dignity, privacy, freedom of expression, the right to family life. The 1977 Joint Declaration on fundamental rights by the Community institutions,¹² the preamble to the Single European Act and the Treaty on European Union, Article F of the Treaty on European Union and the frequent Court of Justice references to the European

Convention confirm the desire of the Community institutions that these should be seen to be part of the Community legal framework. Such rights have also been cited in Community legislation, such as Article 10 of the Convention on Human Rights on freedom of expression in the preamble to the Broadcasting Directive.¹³ Reference to rights of this kind are to be found in the context of challenges to Community acts and policies, e.g. Stauder¹⁴ (dignity), Oyowe and Traore¹⁵ (freedom of expression), X v. Commission¹⁶ (privacy). They also arise in the context of Member State policies which are said to interfere with or derogate from Community rules in a way which is alleged to infringe such rights, e.g. Grogan¹⁷ and ERT¹⁸ (freedom of expression), Commission v. Germany¹⁹ (right to family life).

(d) The fourth (as well as the fifth) category contains rights which are conferred or created by Community legislation. The fourth category includes principally the express "Treaty-given" rights such as the rights of free movement for workers, services, students, non-discrimination on grounds of nationality, and rights of citizenship such as voting. Examples of these are in Articles 7, 8A, 48, 52, 59, 127, although they are developed in more detail in secondary Community legislation. These specific Treaty rights can be seen as aiming to protect and further what are essentially the economic interests of the Community's market actors, but they can also be seen as aiming to extend beyond market rights and to encompass and reflect other social concerns.

(e) The fifth category covers what are usually called social rights, such as those expressed in the (non-binding) Community Charter of Fundamental Social Rights for Workers, in Article 119 and the related secondary legislation, in legislation passed under Articles 100a, 118a and 235 of the EC Treaty and under the Agreement on Social Policy annexed to the Protocol of the Treaty on European Union. Examples are workers' rights on transfer of undertakings, rights to health and safety at work, pregnancy and maternity rights, equal pay and equal treatment of women and men in employment related matters. With the exception of equal treatment, these are not generally declared to be fundamental rights or principles common to all of the Member States, but instead are seen as legislatively given rights. Most are conferred by legislation and other legal instruments, rather than by the Treaty itself. Thus categories four and five, unlike the first three categories, concern rights which are not purely judicially constituted at EC level, but which have some legislative or political pedigree, even if they are shaped by the Court through its interpretation.

(f) There are many other important issues which are generally viewed as human rights concerns, but which have not yet been classified or dealt with within Community legal processes or instruments as "rights issues",²⁰ although these may emerge in the coming years as the expansion of Community areas of competence continues. Five such areas will be considered here.

(i) A first sphere into which the language of rights has not yet really filtered is that of general immigration and refugee policy. Legislative action by the Union has been commenced in this area with the proposal for a decision under K3 of the T.E.U. to establish a Convention on the crossing of external frontiers of the Member States.²¹ And although at present these issues fall mainly to be dealt with under the provisions in Article K.9 of the T.E.U. and thus on an intergovernmental basis under the "third pillar" of the European Union, they can be brought within the sphere of Community action under the provisions of Article 100c of the EC Treaty.²² Even if not yet part of current Community rights discourse, issues of immigration and refugee policy are likely gradually to be discussed in terms of rights, in particular since Article K.2 uses that language by referring to the European Convention on Human Rights and to the Convention on the Status of Refugees. Earlier attempts by nationals of states outside the Community to invoke the language of rights when their status under agreements made between the Community and those other states was being considered, were rejected by the Court of Justice.²³ Such agreements often create specific limited rights of access to work and of non-discrimination on grounds of nationality for citizens of those states, but they were treated, until recently, differently and less favourably than similar rights of Community nationals set out in the EC Treaty. However, in contrast to the restrictive reading of the rights of a Moroccan national under the EC-Morocco Cooperation Agreement given by the Advocate General, the Court of Justice in Kziber brought the scope of the rights in question closer to that of similar rights accorded to Community nationals.²⁴ On the other hand, the language of fundamental human rights is certainly not yet evident

in the context of such Association or Cooperation Agreements, even if the Court has taken a less restrictive approach than before to the express rights - e.g. to work and to reside - accorded by such agreements to these "non-Community" workers.²⁵

(ii) A second area from which the language of human or fundamental rights used within Community law has been noticeably absent is that of race, and of ethnic and minority rights. There have been various forms of "soft" law, such as declarations on racism and xenophobia, but as yet no developed Community policies on race which are backed up by law.²⁶ The Commission has taken the view that express competence under the Treaty would be required before substantive measures could be introduced, since it stated in its 1994 White Paper on Social Policy that it intends to urge the adoption of special Treaty powers to combat racial discrimination.²⁷ However, it does apparently intend to consult on the adoption of a Code of Employment Practice against racial discrimination, presumably similar to its Code against sexual harassment.²⁸ Similarly the Court of Justice - which has had the most prominent role in deeming various rights to be part of Community law - has not used the language of fundamental rights in the context of race.²⁹

(iii) Reference to lesbian and gay rights has rarely been made, other than in an indirect way in the context of other Community legal issues: e.g. the right to privacy or human dignity which has been raised in certain staff cases concerning AIDS testing.³⁰ Substantial arguments have been made to the effect that homosexuality and lesbianism are issues which fall within Community competence, and therefore that gay rights should be recognised and actively promoted within Community law - (Waaldijk and Clapham, 1993) (Tatchell, 1992:53) (Contrast Bamforth, 1995). The European Parliament, weakest amongst the institutions in terms of its legal powers, is the institution which uses the language of rights most widely, and it has done so in the context of gay rights too. In its Report on Equal Rights for Homosexuals and Lesbians in the European Community (A3-28/94), the European Parliament's Committee on Civil Liberties and Internal Affairs included a motion for a resolution on Equal Rights,³¹ including calling for the setting up of a European Institution to ensure equal treatment without reference to nationality, religion, colour, sex, sexual orientation or other differences. It also called on the Commission to present a draft Directive on combatting discrimination on the basis of sexual orientation.

(iv) The claims and interests of people with disabilities do not seem to have attained the same status of "fundamental rights" which are protected within Community law, although the Community has asserted competence in the field of disability. In the context of vocational training policy under Article 127 (previously 128) of the EC Treaty, the Council has established three action programmes for disabled people, the most recent - which refers in its preamble to the Community Charter of Fundamental Social Rights for Workers - having been adopted in 1993.³² However, although the Council adopted a recommendation in 1986 on the employment of disabled people in the Community, recommending the elimination of negative discrimination and suggesting certain positive action, a recommendation is a relatively weak form of Community soft law which, apart from its indirect interpretive effect, has not been backed up by other measures binding on the Member States.³³ Further, the Court of Justice has touched only indirectly on disability in its case law, principally in the context of social benefits for workers under Regulations 1612/68 and 1408/71. Indeed, one possible reading of the Court's ruling in the case of *Bettray* is that disabled people who are in rehabilitative sheltered employment, which is tailored to their needs rather than to the needs of the market, might not constitute "workers" within the meaning of Article 48 of the EC Treaty, and consequently would share none of the rights granted to workers under Community law.³⁴

(v) Other issues which have emerged as issues of importance within general human rights discourse have not acquired that status or been discussed in those terms in Community legal vocabulary and instruments, even where those issues fall within Community competence. An example is that of cultural and language rights, which are generally conceived of as group rights rather than individual rights. The language of "protection" rather than the language of rights has been used here - see for example the mention of protection for minority languages by the Court in *Groener*.³⁵ Article 128 of the Treaty similarly refers to "respect" for regional diversity rather than the rights of regions;

Article 130R uses "protecting the quality of the environment" rather than the language of environmental rights, and Article 129 refers to "human health protection" rather than to rights.

The mention of "excluded categories" such as these is not necessarily an argument that they should be considered as fundamental rights within Community law. It is simply to note that these issues have not achieved the same status within Community law, either in legal instruments or in the language of the Court of Justice, as have the "Community rights" set out in the first five categories. Whether the Community's field of action should encompass an explicit programme of human rights protection in areas such as race, sexual orientation, disability, the environment or culture is another question altogether. The answer to that question depends on broader and more fundamental political and ideological questions about the reason for the Community's existence, what its legitimate aims are, what its role should be, and what the relationship between state or local powers and Community central powers should be. But it is worth noting that since the Community asserts competence in the field of human rights in areas such as those set out in the first five categories above, this raises questions about why other issues and areas which are more widely considered to be "human rights" concerns are not discussed in those terms within Community law and policy.

3. Two explanations for the expansion of rights in Community law.

Consideration of the role of rights in Community law generally begins by examining how the terminology of rights, which was not to be found in the original three Treaties, was introduced into Community law. As a result, the focus of discussion is usually on the challenge to the supremacy of Community law which first came from the German legal system, in which constitutionally recognised rights were allegedly infringed by Community measures. However, the specific historical trigger for the emergence of a vocabulary of rights in Community law is only one part of the picture. It does not fully account for the continuance and expansion of the role of rights within Community law, and for the fact the judicial and the political institutions have increasingly brought the language of rights into their decision-making and formalised it in legal instruments. This expansion can be seen in the case law of the Court, in declarations and recommendations issued by the Council, the Parliament and the institutions jointly, in the preamble to the Single European Act and Article F of the common introductory provisions to the Treaty on European Union, as well as in the request by the European Council - acted on subsequently by the Council of Ministers - to refer the compatibility of accession by the Community to the European Convention on Human Rights to the Court of Justice under Article 228.36

Bearing in mind the various usages of the language of rights in Community law set out in the categories above, two general reasons for the prevalence of the language of rights within Community legal discourse will now be considered. These two explanations relate to what may be seen as the legitimating force and the integrating force of that language.

(a) Legitimation.

In tracing the emergence of fundamental rights as a subject within Community law, it has been suggested that the failure in the early 1950's of the European Political Community, with its express adoption of the rights provisions of the European Convention on Human Rights, led to the pursuit instead of a less ambitious European project (Dausen, 1985). The explicit federalist approach of the early 1950s was replaced by a functionalist and subsequently a neo-functionalist approach, in other words by a more gradual sector-by-sector approach to European integration. In this way, the existing Coal and Steel Treaty was followed by the Atomic Energy Treaty and the expressly Economic Treaty in 1957.

Partly in keeping with the strategy of the neo-functionalist approach, a limited spill-over effect occurred so that, even without formal Treaty amendments, some expansion of the powers and competence of the Community into other areas followed. Community activity moved beyond specific

economic boundaries to affect various other areas of formerly exclusive Member State competence (Weiler, 1991: 2431-2453). Such expansion - perhaps particularly because some of it came about through judicial action rather than political consensus - required legitimation. A second reason for the perceived lack of legitimacy of Community law, in addition to this extension of competence beyond what appeared to be the express parameters of the Treaty, was that its law-making processes were not particularly democratic and lacked accountability (Keeling and Mancini, 1994). Legitimation of the Community's powers was important not just so that those affected and regulated by Community law would accept its status and authority, but also in order that the Community could acquire and maintain a degree of moral standing in its international relations and in the eyes of the rest of the world. If the Community was to fulfil its aspirations and to develop into a single economic bloc and into a unified political power which would take its place on the international stage, it would have to establish a more secure ethical or moral foundation (Twomey, 1994). In the late 20th century, an increasingly integrated quasi-federal organisation such as the Community would have to take on board what has been called the "global human rights constituency". The status of human rights internationally had become such that no state and no developed political entity, especially not such an ambitious emerging supranational order, could afford not to assimilate its language and to acknowledge its values.

Thus, for example, the Community in its dealings with countries outside the Community, either in the conclusion of aid agreements or association or cooperation agreements, sometimes makes these conditional upon the third country in question apparently improving its "human rights" record. This has been the result of the European Parliament, on occasion, using its power of assent to such agreements, by threatening to withhold assent unless a so-called human rights clause is inserted into the agreement. This apparent exportation by the Community of its proclaimed human rights standards would seem to be an assertion of the Community's moral standing in its international relations. The inclusion by the Treaty on European Union of Article 130U(2) on development cooperation in the EC Treaty formalises this assertion, by declaring that "Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms".

Clearly, the very use of the language of rights denotes a certain moral content to Community laws and policies. To be able to point to decisions of the Court which purport to protect fundamental rights, and to legal instruments of the Community's institutions and of the Member States which claim to respect such rights, appears to enhance the status of the European legal order. Whether the use of this language and the formalisation of the status of rights in law actually has a real impact on the nature of the Community, on the way in which law and policy is made, and on the lives of those within the Member States, is of course another question.

(b) Integration

The idea of rights as an integrating force is a common one, and one with which many federal societies are familiar. It has been suggested that "there is hardly anything that has greater potential to foster integration than a common bill of rights, as the constitutional history of the United States has proved" (Cappelletti, 1989, p.395); another commentator has expressed the view that "the question of common values protected by the legal system cannot be avoided if the process of integration is to continue towards the creation of a union to which all citizens feel a common allegiance" (Frowein, 1986, p.231) and more recently has spoken of "the shaping of a European identity in the protection of human and fundamental rights" (Frowein, 1990, p.358); yet another has expressed the view that "talking about human rights may sometimes bestow identity on Community citizens" (Clapham, 1990, p.311); and a fourth, writing on the desirability of the adoption of a code of Community rights, has suggested that "by encapsulating the nature of the legal order which it underpins, a code would create an integrationist culture of rights currently lacking at the Community level" (Twomey, 1994, p.129).

As with the integrating experience of the Bill of Rights in the US mentioned by Cappelletti, the adoption of a Charter of Rights in Canada more recently has generated debate over its political purpose, rather than the "legal" purpose of protecting rights of citizens against government: "the larger political

purpose...was to strengthen national unity by providing constitutional support to a new definition of Canadians as a rights-bearing citizenry regardless of location" (Cairns, 1992: 49). Although the comparison between the European Union and Canada clearly has its limits, given the differences between a single federal nation (albeit one with distinct cultural and linguistic traditions and under the perennial threat of disintegration) and the European Union, there are useful similarities to be observed in considering the role of rights in contributing to the creation of an identity across national or provincial barriers. The language of European "citizenship" has entered official Community vocabulary with the introduction by the Treaty on European Union of Articles 8-8e into the EC Treaty, and if the formal rights conferred on that citizenry are as yet extremely thin, its rhetoric may have considerable force.³⁷ This formal incorporation into Community law of the language of citizenship, which is currently in vogue on account of its ability to capture the idea of the individual as part of a broader political community involving reciprocal rights and duties, was evidently a significant ideological move.³⁸

So the concept of human and fundamental rights may be seen to have the potential to give a moral grounding to a legal order which on its face was established principally to support the pursuit of economic goals, and also to forge an identity which could simultaneously (i) have a cross-national appeal to individuals and to groups within the Community and (ii) emphasise shared or common values already existing within the Member States.

This use of rights as an integrating tool can be seen both in the Court's stressing of the "common constitutional traditions" of the Member States, as well as in the adoption by the political institutions of this language in their declarations and by the Member States in later Treaties such as the Single European Act and the Treaty on European Union. The emphasis on shared or common values can be seen in the fact that many of the provisions and principles which are invoked are drawn from those agreements which all Member States have signed, such as the European Convention on Human Rights and the Council of Europe's European Social Charter. The European Parliament too - being the institution most vocal in its call for greater legitimation of the Community's legal and political system, especially since, as the democratically elected institution, an increase in parliamentary powers is likely to be a part of any such reform - frequently calls for accession to the E.C.H.R., and in 1989 adopted its own Declaration of Human Rights.³⁹

The use of the idea of common constitutional traditions has been variously described as a "comparative phenomenological approach" (Cappelletti, 1989, xiv) or a "ius gentium" approach (Barrington, 1992: 259), and it can be seen to have both a descriptive and a prescriptive function: it claims to draw on rights and principles which exist and which are recognised in constitutional traditions, and on the other hand it elevates these into general principles of Community law and in so doing, aims to forge a "common law" or perhaps a "common bill of rights" for the European Community and, in turn, for its Member States.

4. Assessing the reality: the impact of the language of rights on European integration.

The themes of integration and legitimation are connected, in that the idea of fundamental rights is likely to have little success in contributing to the creation of a political allegiance and a sense of identity across the Community, unless it is seen to be of some real value. In considering whether the creation of a vocabulary of rights has in fact had a practical, beneficial impact within the Community, it is necessary to think about what it means to say that rights are protected. In a legal context, this generally means that instruments exist which declare that certain values are recognised by law as "rights" which are to be protected or advanced, with the result that those who feel aggrieved may pursue a claim through legal processes by relying upon the notional right. It would be difficult, if not impossible, to assess whether the lives of those whose rights are said to be protected is improved, but perhaps the important practical question in so far as Community law is concerned is whether the values which these fundamental rights purport to represent are actually reflected in the course and in the

results of the Community's political and judicial processes, and whether they prevail over other very different values (usually "market" values) which are also central to Community policy.

Given that the express concerns of the original three Treaties were largely economic, the enunciation of a broad range of fundamental rights within Community law, drawn from various constitutional sources and human rights treaties, certainly holds out the promise that the pursuit of economic and other powerful interests will not always prevail over other fundamental human concerns. But although this promise may create for the Community, as an aspiring political and international actor, a better ethical and constitutional profile, the success of the Community project depends not just upon its external and international stature, but upon a substantial degree of internal commitment from its participant states and populations. It is from this point of view that the integrating influence of the concept and language of fundamental rights is crucial.

One of the familiar claims of the developed critique of rights to which reference was made at the beginning of this paper, is that whilst the language of rights lends legitimacy to power and to law, it is purely rhetorical and has little real impact. The question which this claim raises in the Community context is whether the appeal to common Community fundamental rights is empty rhetoric with little substantive impact, so that rather than creating "an integrationist culture of rights" or "bestowing identity on Community citizens", its effect is negligible and may even be disintegrating. A related aspect of the critique is that whilst the rhetoric of rights may have symbolic force, such language often conceals the unfairness of the status quo. Further, it is argued that what purport to be universal rights may benefit principally the powerful rather than the disempowered. Whether these criticisms are borne out in the Community context cannot be precisely answered, but only in a broadly impressionistic manner. However, a general consideration of the issues arising from the various groups or categories of rights set out above might suggest some tentative answers.

(a) Rights as an integrating or a divisive force?

Consider, initially, the invocation of those rights categorised in the first three groups above, when claims are being made against the operation of Community policies. These groups included commercial and property rights, rights of the defence, and traditional substantive civil rights. The methodology used by the Court of Justice in the case of *Hauer*,⁴⁰ in which reference was made to property rights derived from a comparative analysis of Member State constitutions and the E.C.H.R., shows the integrating potential of the language and the concepts used. The reference to "common constitutional traditions" emphasises the Member States as the source of these rights, and the reference to the E.C.H.R. and to other international agreements signed by all Member States in cases such as *Nold*,⁴¹ *Handelsgesellschaft*,⁴² *Al-Jubail*,⁴³ and *Dow Benelux*,⁴⁴ invokes an image of consensus and of shared values. Further, the context in which these concepts are being invoked is that of a challenge to Community action, with the result that Community policies appear to be required to conform to the rights and common traditions of the Member States. The same is particularly evident of the "rights of the defence" in group two, when pleaded against the actions of a powerful and unelected Commission. The use of the language of procedural rights and the derivation of these concepts from "the legal interpenetration of the Member States", to quote the terminology of the Court of Justice in *A. M. & S.*,⁴⁵ clearly expresses the ideal of integration. The context in which this ideal is expressed is attractive to the Member States and to the interests which are affected by Community law, since it appears to curb Community powers by reference to rights deriving from national sources.

When the same language of rights described in those three groups is used in the context of challenges to Member State action, on the other hand, the methodology becomes more problematic. In this context, the rhetorical appeal to common constitutional traditions may lose its force, if the State in question does not share the particular conception of the right in issue. Such problems have arisen in diluted form in situations like *Pecastaing*,⁴⁶ in the German Housing⁴⁷ case and in *Wachauf*,⁴⁸ in which the right in issue is not contested but there are some differences amongst States as to what its particular requirements in a specific context is. More serious tensions may arise where the flexibility of the language of rights used by the Court conceals very stark differences amongst Member States as to the concrete realisation of a constitutional right or principle "common to the Member States".

Freedom of expression may be said to be a fundamental right to which all Member States subscribe in the E.C.H.R. and within their own constitutional framework, but the question of freedom of expression within Community law for commercial broadcasting companies in ERT,⁴⁹ for advertising associations in Bond,⁵⁰ for video distributors in Cinéthèque⁵¹ or for pregnancy counselling and abortion information services in Grogan,⁵² has anything but an integrating force throughout the Community (Clapham, 1990: 311).

The language of rights used in the context of the fourth group above - which includes mostly the Treaty-given rights - can equally cause controversy. While it seems clear that the conferral of the status of fundamental rights on some of the central aims of the Community may give them added legal weight and rank, this is also a divisive technique, given the economic focus of these aims and their expansive nature. The clash of Community and national values to which the promotion of market-oriented Treaty rights of free movement has given rise has been well documented elsewhere (Phelan, 1992; Coppel and O'Neill, 1992). However, the issues and the apparent clash of values are not always clear cut. It may be that the use of the language of fundamental rights in the context of some of these Treaty-given rights is partly intended to express the existence of other values, rather than simply market values, alongside (and perhaps in tension with) the Community's single market aims. In other words, the free movement of workers and their families may be partly constructed as a social right rather than purely as a market-integrating technique; similarly in the case of non-discrimination in access to education; and the right to equal pay may be also a social and a moral right rather than purely a means of equalising the conditions of competition for employers. However, although to recognise the possibly complex nature of such Treaty rights may acknowledge their social and moral dimension in addition to their market-integrating thrust, it does not resolve the tensions which may exist between the different State and Community values. For example, even if the tension is not between a purely commercial Community right to buy a medical service and a national constitutional right to life, but between the latter and a human right in Community law to personal autonomy or to receive information, an undeniable tension and potential for divisiveness still exists. Whatever the nature of the tension, it cannot be said that the expression of Treaty rights as fundamental Community rights has a clearly unifying and integrating effect.

In the fifth category above, the language of rights is used in relation to Community primary and secondary legislation which creates what are usually referred to as social rights. Insofar as they are contained in Community legislation which is applicable to the Member States, they generally acquire constitutional status at the national level. The integrating potential of rights in this context is evident when some of the effects of Community sex discrimination law and employment law are considered. The benefits which have been derived from such legislation, and the language of rights used, have had an appeal to constituencies which cross state boundaries. Groups representing women's interests and workers' interests, for example, can mobilise and pursue action at a Community-wide level, transcending national frontiers.⁵³ On the other hand, pulling against the unifying potential of Community social rights is their tendency to give rise to resistance and dissent on the part of Member States - in particular the U.K. - which question the scope of the Community's legislative competence in the sphere of social policy. A further challenge to the integrating potential of such social rights may arise from the cross-Community groups on which rights are said to be conferred, if, for example, it is felt that the harmonising process across the Member States will lead to a lowest common denominator approach rather than to the enhancement of existing rights.

It is evident even from such very general observations that the language of rights has both an integrating and a divisive potential. The appeal to common constitutional traditions and the appeal to individuals and groups across national boundaries expresses a unifying ideal. The promotion of single market freedoms as fundamental rights also pushes in the direction of market integration. But these tendencies are in tension with the divisive effect of the appeal to rights, in particular when Member State policies which express very different values are undermined, or when the articulation and creation of Community rights are seen to impinge on what is considered to be primarily a matter of State competence.

On a Durkheimian analysis of law, law exists largely as the expression or the visual symbol of an underlying organic social solidarity. Organic solidarity existed, in Durkheim's view, in a society which was interdependent and where the society shared the values reflected in the law (Durkheim, 1893). The process in the Community sometimes appears as the reverse, in which an attempt is being made to create solidarity through law, by declaring common principles and rights in the hope that these will influence the legal systems of the Member States as an integrating force. In creating by law the concept of European citizenship, it is hoped to encourage the people of one Member State to feel a sense of common cause with those in another state. Clearly, however, there may be a danger in the attempt to express and create uniform rights and values where there is diversity. Pahl has criticised the Community's concern with social cohesion, and has argued that its desire to ensure the same social rights across the Member States as a means to European integration is based on the assumption that social consensus is self-evidently a good thing, as well as "on the further assumption that such cohesion and consensus already exists at the nation state level" (Pahl, 1991: 358). However, it is possible that the Community's appeal to common values and to uniform rights does not necessarily assume or rely on the existence of cohesion at a national or local level, since the appeal of rights to specific groups (women, workers etc.) across national boundaries may have a certain integrating effect Community-wide without there being a consensus nation-wide on any given issue. Equally, for example, people living in Northern Ireland might seek to identify themselves through the idea of European citizenship as a way of transcending the conflict of national identities.

It is true that the exposure of national divisions and fractures does not necessarily undermine the overall degree of cohesiveness or commitment to a measure of integration within the European Community. Indeed it has been argued in the U.S. context that "the very act of summoning "community" through a language of rights may expose the divisions within the community ... rights then can be understood as a kind of language that reconfirms the difficult commitment to live together even as it enables the expression of conflicts and struggles" (Minow, 1990:309). However, despite the undoubted force of the economic interdependence of the European Community's Member States, the degree of political commitment to a European society - as compared with that within the United States, for example - remains rather weak. It may be that if too great a gulf opens up between the values expressed in Community law and policy and those which underpin the different cultural, legal and political systems of the different Member States, a crisis point may be reached and the "commitment" to a European society undermined.

(b) The social impact of rights.

Connected with this question of whether the Community's uses of the language of rights is more divisive than integrating is the question of the social impact of these uses. It has been suggested already that the themes of integration and legitimation are connected, in that rights discourse may lose some of its appeal if it is not seen to be of some benefit to those it purports to protect.

What is immediately apparent from considering some of the cases categorised above, is that rights in Community law are very often invoked not by individuals, but by corporate applicants and other powerful entities. This is certainly clear in the case of the rights classified in the first and second groups - economic and property rights and rights of the defence. These cases do not provide examples of the invocation of rights to protect the human interests of the disempowered. On the other hand, even though the language of rights was adopted in such cases by the Court of Justice, this did not often deliver the desired outcome, since the economic and property rights were said not to be absolute or unconditional (see *Nold*, *Handelsgesellschaft* and *Hauer*, above). This observation might reinforce one of the central claims of rights critics, which is that the invocation of rights tends to be of rhetorical value rather than of practical benefit. By contrast, however, in several of the cases involving rights of the defence, although these were generally pleaded on behalf of large companies suspected of engaging in anti-competitive practices, some of the Court's rulings did involve curtailment of excessive or oppressive investigatory powers of the Commission.

In the context in which they have been used not against the Community, but against Member States which have acted to restrict the exercise of a Community rule or policy, the "rights of the defence" in

the second category do sometimes appear to have afforded a measure of concrete benefit and protection for individuals rather than for corporate interests, in the face of inadequate processes for challenging restrictive state action - e.g. *Pecastaing*,⁵⁴ *Johnston v. CC of the RUC*⁵⁵, *Heylens*⁵⁶ and more recently possibly *Adams*⁵⁷ and *Gallagher*.⁵⁸ However, even in the context of the rights in the third category (traditional civil and political liberties such as in the E.C.H.R.) which are generally considered to be "human rights", it is apparent that those invoking the language of rights are often not the oppressed minorities or individuals which might be expected. This can be seen from the various cases which have involved freedom of expression for advertising or commercial television companies, or pleas invoking the "privacy of the dwelling" for businesses resisting investigation into anti-competitive practices. On the other hand, the vocabulary of rights has proved advantageous to the relatively disempowered in contexts such as the German housing case⁵⁹ or *Stauder*.⁶⁰ There has also been a measure of success where individual administrative acts (rather than general legislative measures) of the Community have been challenged for infringing such rights, for example in the staff cases involving the right to privacy in the context of HIV testing,⁶¹ or freedom of expression in the context of journalists posts.⁶²

Similarly mixed conclusions can be drawn from observing the results of claims to Treaty-given rights such as freedom of movement, set out in the fourth category. Although it is obvious that these are essentially aimed at market integration, and thus the language - in particular that relating to the free movement of goods and services - is most often invoked to the advantage of commercial organisations, this is also a context in which the language has been of benefit to the less advantaged. In particular in the context of workers in Article 48 of the EC Treaty, the self-employed in Articles 52 and 59, and prospective students under Article 127, the translation of Community economic freedoms into the language of individual human rights has yielded certain benefits. And, as has been suggested above, the language of citizenship in Article 8a may prove to be of more than symbolic effect in the future.

Finally, with regard to the social rights categorised in group 5, this has perhaps been the area in which the language of rights has yielded most substantive benefit for the relatively disadvantaged, and where its rhetorical force has been accompanied by certain practical gains. Paradoxically, of course, these rights are said to be less "fundamental" (apart from the equal treatment principle in employment matters between men and women, which has been accorded symbolic status as a fundamental right) and since they are created by legislation or are expressed in instruments such as the 1989 Social Charter, they are not accorded constitutional status at Community level, and are vulnerable to easy alteration.

5. Conclusion

It seems even from this brief glance at the range of contexts in which rights appear in Community law that very mixed conclusions emerge. The language of rights affords a means of introducing a range of different values - other than predominantly market values - into the Community's legal and policy-making processes. It offers the potential for developing a moral and ethical foundation for the Community, and for contributing to the development of a sense of European identity and a commitment to a European society, in a way which may further the process of political integration. Equally, however, it is possible for the language of rights in Community law to paper over deep national divisions and cultural differences, to suggest a moral content to Community policies which in reality are furthering what are essentially market goals, and to hold out the promise of protection for human rights whilst actually delivering little of practical benefit to human persons as opposed to corporations and legal persons.

A more fundamental criticism of the language of rights, however, which cannot be answered merely by pointing to the positive or beneficial effects which the invocation of rights has had in specific contexts, has been that the language and the nature of rights is adversarial and uncompromising, forcing interests to be pitted against each other in a competitive way in which the winning right will "trump" the loser. On the other hand, it may be said in partial response to this criticism, that whilst the language of rights

is clearly oppositional and generates counterclaims which force a comparison of competing claims, the approach taken in Community law tends to be less extreme than that associated with classical liberal rights discourse in which one right will trump another. The development of a concept of proportionality within Community law has generated a balancing approach to rights claims, which may facilitate compromise to a greater extent than the form of rights-absolutism associated with American jurisprudence.⁶³

Finally, one of the most fundamental criticisms which has been levelled at the use of a vocabulary of rights is that the very concept of rights, with its individualising language and practices, is incompatible with a genuinely participatory democracy. Perhaps this is a criticism which, at its present stage of legal and political development, is least apposite in the context of the Community. The criticism presupposes a fully developed and functioning democratic system in which different interests can be heard and mediated through the political processes, and in which the legalisation of interests through the language of rights would undermine and obstruct those processes. However, the European Community's political system remains elitist, largely undemocratic and beyond the influence of large sections of the population which it comprises. In this context, rather than undermining the democratic process, it is possible that the language of rights has an empowering effect in giving voice to interests which are largely excluded from the political processes and which might not otherwise be heard.

Sweeping generalisations to the effect that "human rights are fully protected in Community law" on the one hand, or that "the fundamental rights protected in Community law are purely market rights" on the other hand, do not present an accurate picture. There is a certain amount of confusion over exactly what is meant by fundamental rights in Community law, given the many quite distinct contexts in which such language is used. The influence and impact of that language on the nature of Community law, on those whose interests it claims to protect, and on the process of integration, is complex. As is evident from the various categories suggested above, much depends on the nature of the "right" in issue, and on the exact context in which a right is invoked or discussed. What is necessary in any given context is to evaluate these different features, and to consider the impact of the use of rights in that particular situation.

The language of rights could introduce a richer set of values into Community law and has the potential to contribute to the development of a better Community. However, a strong scepticism should be retained in respect of its rhetoric, of its tendency to conceal differences in power and status, and to benefit mainly the powerful. There should be an awareness of the danger of declaring consensus where there is none, and of promising change where none is delivered. A consciousness of the many different ways and the different contexts in which the language of rights is used in Community law should enable an ongoing critical evaluation of its significance and its role in the process of European integration.

Bibliography

Bamforth, N., "Sexuality and Law in the New Europe" (1995) 58 *Modern Law Review* 109.

Barrington, D., "The Emergence of a Constitutional Court" in *Human Rights and Constitutional Law* (J. O'Reilly, ed. 1992, Round Hall Press) 251.

Cairns, A., *Charter versus Federalism: The Dilemmas of Constitutional Reform* (McGill-Queens University Press, 1992)

Cappelletti, M., *The Judicial Process in Comparative Perspective* (Oxford, 1989) 395

Clapham, A., "A Human Rights Policy for the European Community" (1990) 10 *Y.B.E.L.* 309.

Coppel, J., and O' Neill, A., "The European Court of Justice: Taking Rights Seriously?" (1992) 12 *Legal Studies* 227.

- Dausies, M., "The Protection of Fundamental Rights in the Community Legal Order" (1985) 10 E.L.Rev. 398
- Durkheim, E., *The Division of Labour in Society*, 1893 (Macmillan, 1984).
- Faraday, F., "Dealing with Sexual Harassment in the Workplace: The Promise and Limitations of Human Rights Discourse" (1994) 32 Osgoode Hall L.J. 33.
- Frowein, J., "Fundamental Human Rights as a Vehicle of Integration in Europe", in *Integration Through Law* (Cappelletti, Secombe and Weiler, eds. 1986) Volume 1 Book 3, 231.
- Frowein, J., "The ECHR as the Public Order of Europe", in *Collected Courses of the Academy of European Law*, Volumes 1-2 (Clapham and Emmert, eds. 1990) 358.
- Gaete, R., *Human Rights and the Limits of Critical Reason* (Dartmouth, 1993).
- Herman, D., "Beyond the Rights Debate" (1993) 2 Social and Legal Studies 25.
- Hutchinson, A., and Monahan, P., "The "Rights" Stuff: Roberto Unger and Beyond", (1984) 62 Texas Law Review 1477.
- Keeling, D., and Mancini, G.F., "Democracy and the European Court of Justice" (1994) 57 M.L.R. 175.
- Kennedy, D., "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo Law Review 205.
- Kingdom, E., *What's Wrong with Rights?: Problems for Feminist Politics of Law* (Edinburgh, 1991).
- Lenaerts, K., "Fundamental Rights to be Included in a Community Catalogue" (1991) 16 E.L.Rev. 367.
- Minow, M., *Making All the Difference: Inclusion, Exclusion and American Law* (New York, Cornell, 1990).
- Olsen, F., "Statutory Rape: A Feminist Critique of Rights Analysis" (1984) 62 Texas Law Review 387.
- Pahl, R.E., "The Search for Social Cohesion: From Durkheim to the European Commission" Arch. europ. sociol., XXXII (1991) 345
- Perry, M., "Taking Neither Rights Talk nor the "Critique of Rights" too Seriously", (1984) 62 Texas Law Review 1405.
- Phelan, R., "Right to Life of the Unborn v Promotion of Trade in Services: the European Court of Justice and the normative shaping of the European Union" (1992) 55 M.L.R. 670.
- Schermers, H., "The European Communities bound by Fundamental Human Rights" (1990) 27 C.M.L.Rev. 249.
- Smart, C., *Feminism and the Power of Law* (Routledge, 1989) chap. 7.
- Snyder, F., *New Directions in European Community Law* (Weidenfeld & Nicholson, 1990).
- Tatchell, P. *Europe in the Pink* (London: GMP, 1992).
- Tushnet, M., "An Essay on Rights" (1984) 62 Texas Law Review 1363.

- Tweedy, J., and Hunt, A., "The Future of the Welfare State and Social Rights: Reflections on Habermas" (1994) 21 J.L.S. 288.
- Twomey, P., "The European Union: Three Pillars without a Human Rights Foundation" in Legal Issues of the Maastricht Treaty (O Keefe and Twomey Eds 1994), 129.
- Waaldijk, K. and Clapham, A. eds., Homosexuality: A European Community Issue (Martinus Nijhoff, 1993).
- Ward, I., "In Search of a European Identity" (1994) 57 M.L.R. 315.
- Weiler, J., "Eurocracy And Distrust" (1986) 61 Washington Law Review 1103
- Weiler, J., "The European Court at a Crossroads:Community Human Rights and Member State Action" in Du Droit International au Droit de l'Integration (Nomos: Baden-Baden, 1987) 821.
- Weiler, J., "The Transformation of Europe" (1991) 100 Yale Law Journal 2405.
- Weiler, J., "Journey to an Unknown Destination: A retrospective and prospective of the European Court of Justice in the Arena of Political Integration" (1993) 31 J.C.M.S. 417