WALTER HALLSTEIN-INSTITUT

FÜR EUROPÄISCHES VERFASSUNGSRECHT

HUMBOLDT-UNIVERSITÄT ZU BERLIN

WHI – Paper 14/02

THE CHARTER OF FUNDAMENTAL RIGHTS IN THE CONSTITUTION OF THE EUROPEAN UNION

PROF. DR. INGOLF PERNICE

THIS CONTRIBUTION HAS BEEN ELABORATED WITHIN THE FRAMEWORK OF A PROJECT OF THE
RESEARCH INSTITUTE FOR EUROPEAN AFFAIRS, VIENNA,
FOR THE AUSTRIAN MINISTRY FOR EDUCATION, SCIENCES AND CULTURE;
IT WILL BE PUBLISHED IN DEIRDRE CURTIN/STEFAN GRILLER/SACHA PRECHAL/BRUNO DE WITTE (EDS.).
THE EMERGING CONSTITUTION OF THE EUROPEAN UNION, 2003

THE CHARTER OF FUNDAMENTAL RIGHTS IN THE CONSTITUTION OF THE EUROPEAN UNION

by

Ingolf Pernice, Berlin*

* Prof. Dr. jur., managing Director of the Walter Hallstein-Institut for European Constitutional Law of the Humboldt-University of Berlin. This contribution has been elaborated within the framework of a project of the Research Institute for European Affairs, Vienna, for the Austrian Ministry for Education, Sciences and Culture; it will be published in Deirdre Curtin/Stefan Griller/Sacha Prechal/Bruno de Witte (eds.). *The Emerging Constitution of the European Union*, 2003.

The author is most grateful for the intensive collaboration of his assistant, Ralf Kanitz, in drafting this report.

A. Introduction

The solemn proclamation of the Charter of Fundamental Rights of the European Union (CFR) by the Council, the European Parliament and the Commission on 7 December 2000[1] has been welcomed and broadly considered as a major step in the constitutional process of the European Union. The Declaration of Laeken on the Future of the European Union now puts the question "whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights".[2] As the Final Report of Working Group II of the European Convention created by the Laeken Summit rightly concludes, the answer must be positive in both regards,[3] even though there are valid criticisms regarding the consistency, clarity end legal effectiveness of its provisions[4]. The Charter will be the basis and foundation of whatever may become the constitution of the European Union, and its integration into the future Constitutional Treaty of the European Union would help to ensure that the European Union will respect the European Convention on Human Rights which requires clear and effective safeguards for the protection of its guarantees (see B. below). The question is how to integrate the Charter into a Constitutional Treaty on the European Union and how, in practice, to accommodate its provisions with the other principles and provisions of the existing Treaties (see C. below).[5] Effective protection ultimately means effective access to justice, and it will be necessary, therefore, to find out how, in the "multilevel constitutional system" of the European Union, judicial protection of the fundamental rights of the individual can adequately be organised (see D. below). While there is no question of re-opening the discussion on the substance of the Charter, the conclusion is that to give it its place in the European Union Constitutional Treaty will be more than a formal step and imply some adaptation and reorganisation of the Charter as well as a substantial revision of the Treaties (see E. below).

---

[1] See OJ C 364 at 1 et seq., http://ue.eu.int/df/default.asp?lang=en.

[2] Laeken Declaration on the Future of the European Union, http://european-convention.eu.int/pdf/LKNEN.pdf.

[3] See CONV 354/02 of 22 October 2002, A.I.1-2 according to which the great majority of the group members supports the option of an integration of the Charter into the Constitutional Treaty, while others favour a reference to the Charter. See also Pernice, Ingolf, 'Eine Grundrechte-Charta für die Europäische Union', *Deutsche Verwaltungsblätter* (2000) 847 et seq., at 854 et seq. and 858 et seq.

[4] See the contributions to point II.2. of the questionnaire regarding "European Law and National Constitutions", F.I.D.E. XX Conference from 31 October to 2 November 2002 in London, www.fide2002.org, and in particular Dutheil de la Rochère, Jacqueline/Pernice, Ingolf, General Report, *ibid.*, point II.2.a. and Mayer, Franz C., 'Kitsch ou Constitution? La signification de la Charte européenne des droits fondamentaux', *Relations internationale* (édition spéciale Juin 2002) 125 et seq. at 129 et seq.

[5] See the mandate of the Working Group on the Charter of the European Convention: *If it is decided to include the Charter of Fundamental Rights in the Treaty, how should this be done, and what would be the consequences thereof? What would the consequences be of accession by the Community/Union to the European Convention on Human Rights?*, CONV 72/02. First important thoughts are included in Working Document 13 of 2 August 2002, drafted by Schoo, Johann/Piris, Jean-Claude/Petite, Michel.

B. The role and place of the Charter in an European Union Constitutional Treaty

In the light of a "post-national" concept of Constitution and being understood that the post-Nice debate on a future European Constitution is a new, important step in the dynamic process of "multilevel constitutionalism" in Europe,[6] fundamental rights are more than just legal guarantees for the individual protecting his freedoms against the intervention of public authority. Though they do define his *status negativus* – to use the terms developed by *G. Jellinek*[7] – they also have the function of providing the citizens rights of active participation in the political process, the *status activus*, and even positive claims against the government to develop policies which aim at ensuring that the individual can effectively benefit from the freedoms and rights granted to him in the Constitution: the *status positivus*. In more modern terms, they are both, subjective rights of the individuals and objective elements of the constitutional order[8] in that they express the "common values", as the Preamble of the Charter says, on which the European Union is based. Yet, the Charter can be seen as an attempt to summarise the values, rights and principles which, complementary to the objectives and the principles of the Treaties constitute the foundation of the "european social contract" due to be revised and extended to the peoples of the accession countries (infra, I.). The have, in addition, some specific functions in relation to the status of the citizen in the European Union as well as to the exercise of the powers given to it (infra II.). The Charter aims at making visible the rights which are already binding, under Article 6 (2) TEU, for the institutions, and in particular reaffirms the jurisprudence of the ECJ in this area. Anticipating legal effects of the Charter as a reference in practice is not more, therefore, than respecting the binding force of the rights recognised in the praetorian approach of the judiciary (infra III.). The respect of the rights granted in the Charter, therefore, and giving the Charter legally binding effects would not be a substitute for – or conflict with – the accession of the European Union to the European Convention on Human Rights, but make it easier if not possible (infra IV).

I. Foundation for a revised "social contract" of the citizens of the European Union

Since the conclusion of the Treaties of Paris and Rome, the constitution of the European Communities and, later, of the European Union, not less than the national constitutions have their origin, and base their legitimacy, on the will – or consensus – of the citizens concerned.[9] Though negotiated and concluded in the form of an international treaty, any further development

---

6 See most recently Pernice, Ingolf, 'Multilevel Constitutionalism in the European Union', *European Law Review* (2002) 511 et seq.

7 Jellinek, Georg, *System der subjektiven-öffentlichen Rechte* (Mohr: 2nd ed. Tübingen 1905), at 94; Hesse, Konrad, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Müller: 20th ed. Heidelberg 1999) at 128, rightly criticises the approach for its outdated consideration of the relationship between the citizen and the state-government, but it seems possible to translate it into a modern theory of fundamental rights, as developed by Häberle, Peter, *Die Wesensgehaltgarantie des Art. 19 Abs. 2 Grundgesetz,* (Müller: 3rd. ed. Heidelberg 1983, 1st ed. 1962); Häberle, Peter, 'Grundrechte im Leistungsstaat', *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (1972) 43 et seq.

8 For a comprehensive summary of the dimensions of the fundamental rights developed in German theory: Hesse, Konrad, *supra* note 7, at 127 et seq.; Dreier, Horst, in: H. Dreier (ed.), *Grundgesetz Kommentar Vol. 1* (Mohr: Tübingen 1996) Vorbemerkungen vor Art. 1, no. 27 to 69.

9 For the original concept see Pernice, Ingolf, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?', *Common Market Law Review.* (1999) at 703; more recently Pernice, Ingolf, *supra* note 6 at 514 et seq.

of the European Union's legal foundations is basically and primarily a matter of the citizens. They will and must be the ones who may or may not agree on the re-arrangement of the division of powers between the Member States and the European Union, on the revision of the institutional structure of the European Union as well as on the common values and fundamental rights to be made a binding foundation of the European Union and its Constitution. Whatever may be the outcome of the works of the Convention established by the Laeken Declaration of December 15, 2001, and finally of the IGC of 2004, it will be the expression of a new and, with the new Member States included, an enlarged "european social contract" which is consented by the peoples of the Member States so defining their status as the citizens of the European Union. [10]

Based on the common constitutional traditions of the Member States and the Conventions they have concluded in view of safeguarding, at a European or international level what is the undeniable standard of human rights, the Charter not only reflects the common values consented by the peoples of the European Union, but it is the substantive foundation of the unity of the law in the composite constitutional system of the European Union[11] as it has been established progressively by the ECJ in its jurisprudence on the protection of fundamental rights: A photography of the emerging *ius commune europaeum*,[12] based on human dignity and the respect of each member of the emerging European society for the specific identity of the other, the right of each individual to be different but to be treated equally. The Charter underlines that not homogeneity, but the diversity of cultures, languages, identities, heterogeneity are the assets of the European Union, their respect is the common ground the European society is formed and may be organised through common political institutions. *J. H. H. Weiler* talks in this context of the principle of "Constitutional Tolerance" as the basic achievement of European integration and foundation of the functioning of a democratic system in Europe,[13] and if there is anything above common interests like peace, well-being and ensuring the European peoples role and place at the global scene, it is the underlying consensus upon these basic values which preserve the individual's identity, freedoms and equal treatment as an active citizen of and in the European Union: It is what "constitutional patriotism" (*J. Habermas*) in Europe could refer to.

Inserting the Charter into a future Constitutional Treaty of the European Union, therefore, is not only an important step in the process of constitutionalisation of the European Union,[14] but

---

[10] See Pernice, Ingolf/Mayer, Franz C./Wernicke, Stephan, 'Renewing the European Social Contract: The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism', *King's College Law Journal* (2001) 61.

[11] "Europäischer Verfassungsverbund". For more details see Pernice, Ingolf, 'Europäisches und nationales Verfassungsrecht', *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (2001) 163 et seq.

[12] For first signs of a ius commune europaeum related to the constitutional law see Schwarze, Jürgen, 'Auf dem Wege zu einer europäischen Verfassung – Wechselwirkungen zwischen europäischem und nationalem Verfassungsrecht', *Europarecht Beiheft* (2000) 7 et seq. at 14. For the idea of a ius commune ("gemeineuropäisches Verfassungsrecht") see already Häberle, Peter, 'Gemeineuropäisches Verfassungsrecht', *Europäische Grundrechte Zeitschrift* (1991) 261 et seq.; *id.*, 'Gemeineuropäisches Verfassungsrecht', in: Bieber, Roland/Widmer, P. (eds.), *L'espace constitutionnel européen. Der europäische Verfassungsraum. The European constitutional area* (Schulthess: Zürich 1995) 361 et seq.; Heintzen, Markus, 'Gemeineuropäisches Verfassungsrecht in der Europäischen Union', *Europarecht* (1997) 1 et seq.

[13] Weiler, J. H. H., 'The European Union: Enlargement, Constitutionalisation and Democracy', www.whi-berlin.de/weiler.htm, paragraph 22 et seq.

[14] For this see Nettesheim, Martin, 'Die Charta der Grundrechte der Europäischen Union: Eine verfassungstheoretische Kritik' *Integration* (2002) 35 et seq. at 45 et seq.; Rossi, Lucia Serena,"'Constitutionnalisation" de l'Union européenne et des droits fondamentaux', *Revue Trimestrielle de Droit Européen* (2002) 27 et seq. at 38 et seq.,

affirming its very foundation. It will draw the citizen's attention to their fundamental role in this process, and make him more conscious of his rights and responsibilities in an integrated Europe. The debate on the Charter has initiated a European-wide dialogue on these common values, so the consensus reached by the Charter and its impending revision and/or incorporation in the Treaties will support European identity building.[15] This is why the fundamental rights listed in the Charter should be at the head of the European Union Constitutional Treaty, in its first part which should set out the common objectives of the European Union, the common principles and the common values on which it is based.[16]

II. Functions of fundamental rights in a European Union Constitutional Treaty

As the foundation of the European social contract and an integral part of the Constitution of the European Union, the fundamental rights of the Charter will have important functions which correspond to their various dimensions:

- By limiting the exercise of the powers given to the institutions of the European Union they will supplement the efforts of delimiting the competencies of the European Union and their exercise with regard to the individual, in conformity with the principles of subsidiarity and proportionality.[17]
- As an expression of fundamental common values they will give the policies of the European Union orientation and legitimacy, to strive for conditions under which every person can enjoy his freedoms, property and social rights in respect of and in a sound balance with the rights of the other.
- They will give guidance and orientation regarding the interpretation of the other provisions of European law, thus being an important reference for the Courts, but also for the citizens, administrative bodies and the "European lawyer"[18] to ensure the "effet utile" of these values generally in the society.
- In defining the relationship between the European Union and its citizens, they will provide the citizens assurance on what are their legal and political status, their individual rights and freedoms, their participation in the processes which design and control the policies and actions of the European Union.

Though it is clear that the role, dimensions and functions of fundamental rights are seen in the different Member States in quite different ways, and that a common, European theory of fundamental rights is yet to be developed, it seems to be important to be aware that at least from

---

at 46: "premier embryon d'une constitution européenne".

[15] See Pernice, Ingolf, *supra* note 3, at 849.

[16] A possible structure for this Treaty on these lines has been elaborated by Pernice, Ingolf, 'Elements and Structures of the European Constitution', www.whi-berlin.de/pernice-structures.htm; see also the draft of the Constitutional Treaty of the Presidium of the European Convention of 28 October 2002, CONV 369/02.

[17] For the construction of fundamental rights as "negative Kompetenznormen" see Hesse, Konrad, *supra* note 7; see also Mayer, Franz C., 'Die drei Dimensionen der Europäischen Kompetenzdebatte', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002) 577 et seq. at 583 et seq., with more references; Pernice, Ingolf, 'Europäische Grundrechte-Charta und Abgrenzung der Kompetenzen', *Europäische Zeitschrift für Wirtschaftsrecht* (2001) 673.

[18] For the expression see Häberle, Peter, *Der Europäische Jurist* (2002).

a German lawyers point of view fundamental rights have functions which exceed largely the defence of the individuals "room of liberty".[19]

III. Anticipating legal effects of the Charter

The legal status of the Charter is on the agenda of the Constitutional Convention. It has no legally binding force, so far, but has been drafted "as if" it did so. Since its solemn declaration, a number of Advocates-General at the ECJ have referred to specific provisions of the Charter, using it as a source for identifying Community fundamental rights.[20] They always make a note of the lack of any formally binding force of the Charter, though. More recently, the CFI on two occasions brought into play articles of the Charter as "confirmation" of the constitutional traditions common to the Member States.[21] The ECJ, in contrast, has so far desisted from mentioning the Charter. In certain acts adopted by the legislator recitals now refer to the Charter.[22]

If the ECJ, in its established jurisprudence and in accordance with its task under Article 220 TEC, to "ensure that in the interpretation and application of this Treaty the law is observed", develops and protects as a part of the general principles of law, the fundamental rights as the expression of the common constitutional traditions of the Member States, it will not be able to ignore, in future, the Charter whenever it is to state what are the contents and the limits of these rights. Though it is not formally bound and may even go beyond the standards set by it, but as an expression of the common values and due to the fact, that the institutions of the European Union have declared themselves bound by it, the Charter indeed does provide the citizens, the courts and institutions within the European Union, including the national administrative and judicial bodies, important indications on what the contents of the common fundamental rights shall be.

---

[19] See also Nettesheim, Martin, *supra* note 14., who talks about moderation and orientation of the public authority, functional interlacing of political actors and judicial authorities, confession of common values, integration, legitimisation and elements of constitutionalisation.

[20] See conclusions of Advocate-General Alber in C-340/99, *TNT Traco*, Advocate-General Tizzano in C-173/99, *BECTU*, Advocate-General Mischo in C-122 and 125/99 P, *D v. Council*, and in C-20/00 and 64/00, *Booker and Hydro v. the Scottish Ministers*, Advocate-General Stix-Hackl in C-49/00 *Commission v. Italy*, in C-131/00, *Nilsson*, and in C-459/99, *MRAX*; Advocate-General Jacobs in C-377/98, *Netherlands v. Parliament and Council*, in C-270/99 P, *Z v. Parliament* and in C-50/00 P, *Union de Pequeños Agricultores*, Advocate-General Geelhoed in C-413/99, *Baumbast and R*, and in C-313/99, *Mulligan et al*, Advocate-General Léger in C-353/99 P, *Council v. Hautala et al*, and in C-309/99, *Wouters* – all not yet published in the ECR. The wording of Advocate-General *Léger* in the abovementioned *Hautala* case should be noted: "As the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law."

[21] See judgments of 30 January 2002, T-54/99, *max-mobil*, and of 3 May 2002, T-177/01, *Jégo-Quéré*, neither of which has yet been published in the ECR. See also the judgement of 30. November 2000 of the Spanish Constitutional Court, 292/2000, www.tribunalconstitucional.es/STC2000/STC2000-292.htm. The Court ruling on a question of data protection referred to Article 8 CFR, at II.8.

[22] See recital No 2 of Regulation 1049/2002 on access to documents of the institutions, and recital No 18 of Council Decision 2002/187 setting up Eurojust. The Commission decided in March 2001 that any proposal for a legislative act and any regulatory act that it was preparing to adopt would be subject, at the time of drafting according to the usual procedures, of a prior compatibility check with the Charter; in addition, a new 'model recital', testifying to this compatibility check, is now inserted into its legislative proposals or regulatory acts which have a specific connection with fundamental rights.

So, does it make a difference whether or not the Charter becomes a binding document?

Since the ECJ has developed and is at present assuring fundamental rights on the European level, the Charter is not going to add very much in substance to the effective protection of fundamental rights in the European Union. It is therefore merely declaratory. It is nonetheless essential to insert the Charter as a binding part in the Constitutional Treaty as an expression of the common basis of values and inalienable rights of the citizens of the European Union, making it so a clear standard and orientation for its policies within all three pillars and, in future, of the European Union as a single entity.[23] To refuse its integration into a consolidated Treaty or constitutional Charter of the European Union would be the wrong signal that these fundamental rights are not taken seriously, and that a "common ground" of relevant values to base the European Union upon cannot be found or agreed by the citizens of the European Union. This signal would be disastrous for the citizens as well as for the candidate countries, and would jeopardise the credibility of the European Union internally and to the outside world.[24]

IV. Accession of the European Union to the European Convention on Human Rights

The question of whether the European Union should accede to the ECHR in order to provide for a coherent system of protection of human rights in the European Union has been discussed among European Union institutions for quite some time.[25] I do not support the argument that accession to the ECHR would put at risk the principle of the autonomy of Community law. The ECHR cannot be regarded as a "superior" court in relation to the supreme courts of the contracting parties, but simply as a more specialised body which exercises subsidiary external control.[26] Its decisions are binding for the Member States, but may not challenge the validity of any decision of national or European authorities. Thus, the ECHR is a complementary instrument to internal systems for the protection of fundamental rights of each contracting party (infra 1.), and the possible scrutiny of the European Union system exercised by the European Court in Strasbourg requires the approximation of the European Union-standards to those of the ECHR (infra 2.). There are various reasons, though, for the accession of the European Union to

[23] What is not intended, is a "restructuring of the European legal order" in the sense recently exposed, but largely rejected, by von Bogdandy, Armin, 'Grundrechtsgemeinschaft als Integrationsziel?', *Juristische Zeitung* (2001) 157 et seq. at 170. It is important to note, by the way, that the objectives of the Treaty already express in a proactive manner the common constitutional values of the Member States as they are founded in the various charters of fundamental rights, see for details Pernice, Ingolf, *Grundrechtsgehalte im Europäischen Gemeinschaftsrecht*, (1979), in particular at 20 et seq., 211, 221, and 224 et seq.

[24] In favour of a legally binding instrument to be integrated into the TEU Magiera, Siegfried, 'Die Grundrechtecharta der Europäischen Union', *Die öffentliche Verwaltung* (2000) 1017 et seq. at 1019 et seq., who has some criticism, however, regarding the contents of the Charter which in his opinion is not yet ripe for adoption (*ibid.*, at 1024 et seq.).

[25] See proposal of the Commission in supplement 2/79 to the Bulletin of the EC, it reiterated its proposal in 1990 and 1993, SEC (90) 2087 final and SEC (1993) 1679 final; the European Parliament endorsed this on several occasions, see for example the Resolution of 18 January 1994, OJ C 44 at 32 and also that of 16 March 2000 (A5-0064/2000).

[26] The ECJ has already admitted the possibility of subjecting the European Union to such external control, see Opinion 1/91 of 14 December 1991, ECR (1991) I-6079 et seq., paragraph 40: "The Community's competence in the field of international relations ….. necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions".

the ECHR (infra 3.), while given the praetorian functions of the Court in Luxembourg there is no reason to maintain Article 6 (2) TEU (infra 4.).

1. The Charter and the ECHR as complementary instruments

In the present situation the European Union is not a contracting party of the European Convention on Human Rights which is, therefore, not binding for the European Union. On the other hand, the Charter does not bind the Member States – except where they are implementing and bound by Community law which prevails contradicting national law including national fundamental rights.[27] In the light of the apparent readiness of the Strasbourg Court of Human Rights to scrutinise the responsibility of the Member States for any possible violation of human rights by the European Union[28] there are good grounds to take any possible measure excluding such violations. The Charter would complete and strengthen the European Union's own system of effective protection of fundamental rights so enabling the Member States to fulfil their obligations under the ECHR[29]

A legally binding Charter, therefore, would not preclude the accession of the European Union to the ECHR but make it easier. The Charter and the ECHR are complementary and not alternative instruments.[30] On the one hand the existence of the Charter does not in any way detract from the assumed benefits of making the external control mechanism established by the ECHR applicable to the European Union. On the other hand, accession to the ECHR would not reduce the benefits for the European Union of having its own catalogue of fundamental rights, all the more so since the ECHR allows the contracting parties to go beyond the rights which it ensures (Article 53 ECHR).

---

[27] So recognised as a principle by the *Bundesverfassungsgericht* (German Federal Constitutional Court) in the judgment of 12 October 1993 , 2 BvR 2134, 2159/92, *Maastricht-Vertrag*, Entscheidungen des Bundesverfassungsgerichts Vol. 89, 155 et seq. at 174 et seq. with the idea of a relationship of co-operation. For more details see the judgment of the Bundesverfassungsgericht of 7 June 2000, 2 BvL 1/97, *Bananen*, *Europäische Zeitschrift für Wirtschaftsrecht* (2000) 702 et seq. at 703 et seq.; crit. for the continuing acceptance of a national competence for reviewing European law Mayer, Franz C., 'Grundrechtsschutz gegen europäische Rechtsakte durch das BVerfG: Zur Verfassungsmäßigkeit der Bananenmarktordnung', *Europäische Zeitschrift für Wirtschaftsrecht* (2000) 685 et seq. The problem has been discussed also by the President of the German Federal Constitutional Court in a speech at the Walter Hallstein Institute for European Constitutional Law, see Limbach, Jutta, 'Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur – Ein Beitrag zur Bestimmung des Verhältnisses von Bundesverfassungsgericht, Europäischem Gerichtshof und Europäischem Gerichtshof für Menschenrechte', www.whi-berlin.de/limbach.htm at paragraph 17 et seq.

[28] See judgments of the ECHR of 18 February 1999 (Application No. 24833/94), *Matthews v. The United Kingdom,* Reports of Judgments and Decisions 1999-I 361 et seq. of 15 November 1996 (Application No. 17862/91), *Cantoni v. France,* Reports of Judgments and Decisions 1996-V 1614 et seq.

[29] In this sense also the conclusions of Working Group II of the European Convention, CONV 354/02 of 22 October 2002, B.I.

[30] See the Commission communication of 11 October 2000 – COM (2000) 644 final at paragraph 9: "question remains open", and the Commission for legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly, Report on the Charter of the Fundamental Rights of the European Union of 14 September 2000 – CHARTE 465/00 CONTRIB 319: "aim of the draft Charter ... can only be reached if institutions and bodies of the European Union are bound not only by the Charter, but also by the ECHR"; along the same lines Council of Europe observers in the Convention, CHARTE 4961/00 CONTRIB 356, 13 November 2000; see also Pernice, Ingolf, *supra* note 3 at 855; Alston, P./Weiler, J.H.H., 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights'*, Jean Monnet Working Paper 1/99* at 25 et seq.

2. *The approximation of the European protection to the ECHR-standards (Article 52 (3) CFR)*

What is the relationship between the Charter and the ECHR? Like for States members of the Convention, the ECHR must be seen as an additional safeguard, on the level of international law, for the effective protection of human rights in case of a failure of internal remedies. In order to avoid such failure with regard to the European Union a great number of the provisions of the ECHR have been the source for drafting the Charter. Article 52 (3) CFR aims at approximating the interpretation of these provisions to those of the ECHR: It holds up the Convention as a minimum standard for the Charter[31] and tries to ensure consistency and coherence between the Charter and the ECHR regardless of its fields of application,[32] while Article 53 CFR generally aims at ensuring that this new instrument of the European Union does not affect the protection of human rights by other instruments – national, European or international – in their respective field of application.[33]

Many observers express their satisfaction with the way the relation between the Charter and the Convention has been worked out[34], others however see procedural difficulties in securing legal coherence as long as the two Courts continue to have separate jurisdiction.[35] It is difficult to judge, in a given case, whether or not a right of the Convention corresponds to one of the Charter, and what would happen if a conflict arises between a right which is granted both, in the Convention and the Charter and another right which is recognised in the Charter only. Could the former be given higher value just because the latter has no equivalent in the ECHR?[36] There is no hierarchy, in any event, between the two instruments. They do not belong to one legal system, and even if the substantial provisions of the ECHR were to be considered as incorporated into the binding law of the European Union, Article 52 (3) CFR makes clear that the provisions of the Charter prevail and that their contents is the same as that of the corresponding provisions of the ECHR.

---

[31] Thym, Daniel, 'Charter of Fundamental Rights: Competition or Consistency of Human Rights Protection in Europe?', *Finnish Yearbook of International Law* (2002) forthcoming, supporting the argument put forward by Lemmens, Paul, 'The Relation between the Charter of Fundamental Rights of the European Union and the Convention on Human Rights – Substantive Aspects', *Maastricht Journal* (2001) 49 et seq. at 55, who suggests to omit the reference to the Convention in Article 53, arguing that 'Article 52 (3) of the Charter is drafted in such a way that it excludes the very coming into being of a conflict of that nature'. Lenaerts, Koen/de Smijter, Eddy, 'The Charter and the Role of the European Courts', *Maastricht Journal* (2001) 90 et seq. at 98 observe a possible conflict between Article 52 (2) and Article 52 (3) of the Charter if the application of the Charter leads to a lower level of protection of fundamental rights than that offered by the ECHR. According to them it is Article 53 of the Charter that "decides the conflict in favour of the norm guaranteeing the highest protection, in this case the ECHR."

[32] Thym, Daniel, *supra* note 31.

[33] See also infra C.II.

[34] See the comments of the Council of Europe observers on the draft Charter, 9 November 2000, contribution CONV 356 and Parliamentary Assembly of the Council of Europe, Resolution 1228 (2000) of 29 September 2000 on the Charter of Fundamental Rights of the European Union; see also Busse, Christian, 'Das Projekt der Europäischen Grundrechtecharta vor dem Hintergrund der EMRK', *Thüringer Verwaltungsblätter* (2001) 73 et seq. at 74; Jacqué, Jean-Paul, 'Vers une Charte des Droits Fondamentaux de l'Union, problèmes et progrès', *L'Europe des Libertés* (Juillet 2000) 4 et seq. at 5; Lord Goldsmith, Peter Henry, 'A Charter of Rights, Freedoms and Principles', *Common Market Law Review* (2001) 1201 et seq. at 1211; Dutheil de la Rochère, Jacqueline, 'The EU Charter of Fundamental Rights', Melissas, Dimitris/Pernice, Ingolf (eds.) *Perspectives of the Nice Treaty and the Intergovernmental Conference 2004* (Nomos-Verlag: Baden-Baden 2002) 41 et seq. at 44.

[35] Thym, Daniel, *supra* note 31; Lemmens, Paul, *supra* note 31, at 67.

[36] For these questions see Vranes, Erich, 'Der Status der Grundrechte der Europäischen Union', *Juristische Blätter* (2002) 630 et seq. at 637, with more references.

It is true that Article 52 (3) CFR does not refer to the case law of the ECHR. The ECJ might, therefore, feel free to diverge from it. Notwithstanding recital 5 of the Charter's preamble and the explanations of the Presidium referring to the case law of the ECHR, conflicts are not excluded: There may be cases which have to be decided by the ECJ prior to a ruling of the Strasbourg Court in a similar case. So what will happen if its point of view differs from the view Luxembourg took earlier in the same case?[37] The same question would arise, should a different wording chosen in the Charter for a corresponding provision of the ECHR lead the ECJ to distinguishing the rights by arguing that due to the divergent wording the two rights *do not* correspond. Even though the explanations of the Presidium list the corresponding rights of the ECHR, there may still be cases where the ECHR takes a different view on the meaning of a provision.

3. Accession of the European Union to the ECHR

It follows that the Charter does not absolutely exclude cases of divergent interpretation of corresponding provisions in the ECHR and the Charter, and with the European Union's accession to the ECHR cases of alleged violations of human rights by the European Union could be submitted, at last resort, to the Strasbourg Court. The role of the Strasbourg Court would be exactly the same for the European Union as for any other contracting parties of the ECHR, and there is no reason why the authority of the European Union should not be subject to the same control mechanisms to which the Member States of the European Union have accepted to be subject.

And there is another reason which strikes for accession of the European Union to the Convention. As already mentioned, the ECHR has shown its willingness to go on to control Community and European Union Law by means of the control exercised over the Member States, which, unlike the European Community and the European Union, are contracting parties to the Convention and subject to its jurisdiction.[38] It may in fact happen that Member States are held indirectly responsible before the Strasbourg Court for alleged violations of the ECHR which result in reality from acts by the institutions of the European Union[39]. This responsibility is already recognised for acts of primary legislation not subject to the control of the ECJ and for applications contesting a national act which only transposes a Community Directive word by word.[40] It is not clear, however, whether Strasbourg will exercise its control over measures which

---

[37] So far it has been the ECJ that tried to avoid possible conflicts with the ECHR. There are only two cases where the interpretation of the ECJ differs from that of the ECHR, and in theses two cases the ECJ ruled prior to the ECHR decisions. Since there was no jurisdiction of the ECHR, the ECJ could not foresee the arising conflict. See on Article 8 ECHR the judgment of the ECJ of 21 September 1989, Joined Cases 46/87 and 247/88, *Hoechst AG, Dow Benelux NV a.o. v. Commission,* ECR (1989) I 2859 et seq. and judgement of the ECHR *Niemitz*, Reports of Judgments and Decisions 1992, Series A, Vol. 251-B. On Article 6 ECHR the judgment of the ECJ of Case 374/87, Orkem v. Commission, ECR (1989) 3283 et seq. and judgment of the ECHR of 25 February 1993 (Application No. 00010828/84), *Funke v. France,* Reports of Judgments and Decisions 1993-XV 297 et seq.

[38] Admonished in *Cantoni v. France* , *supra* note 28, actually exercised in *Matthews v. United Kingdom*, *supra* note 28; for comments see Christian Busse, 'Die Geltung der EMRK für Rechtsakte der EU', *Neue Juristische Wochenschrift* (2000) 1074 et seq. at 1078 et seq.; see also the decision of the European Commission for Human Rights of 9 February 1990, *Melchers*, Decisions and Reports 64, 138 et seq.

[39] See Ress, Georg, 'Die Europäische Grundrechtscharta und das Verhältnis zwischen EGMR, EuGH und den nationalen Verfassungsgerichten', in: Duschanek, Alfred/Griller, Stefan (eds.), *Grundrechte für Europa. Die Europäische Union nach Nizza* (Springer: Wien 2002) 183 et seq., at 196 et seq.; Vranes, Erich, *supra* note 36, at 637 et seq.

[40] See Ress, Georg 'Das Europarecht vor dem Gerichtshof für Menschenrechte in Straßburg', www.whi-

are open to judicial control of the ECJ, neither is it clear in case such a control were to be exercised, to what extent the deference granted by Strasbourg to Luxembourg on the basis of 'equivalent protection' to that of the ECHR would be liable to revision.[41] It is difficult to assess the risks of this for the functioning of the European legal system in the future. More and more often the Strasbourg Court may rule indirectly on acts of the European Community or the European Union, while the latter is not even able to defend itself directly and its legal system is not represented by a judge within the Strasbourg Court. The Member States indirectly responsible in a given case for the defence of the European Union might argue with the European Union and with each other about the conformity of Community acts in relation to the ECHR.

Possibly a strict interpretation of the 'equivalent' protection test by the European Court of Human rights is needed to make the European Union Member State governments understand that only accession of the European Union to the ECHR will really shield them from liability for possible violations of this Convention committed by institutions of the European Union[42]. It is a logical consequence of the establishment of the European Union as a supranational public authority.

Instead of the accession of the European Union to the ECHR it has been proposed to install a preliminary ruling following the model set down in Article 234 TEC (35 TEU and 68 TEC).[43] Such a procedure would exclude divergent interpretations of the ECHR by the Strasbourg and Luxembourg Courts. However, it would – in most of the cases – be added to the community procedure under Article 234 TEC and would thus lead to important prolongations. Furthermore the citizen would not be able to force the ECJ to refer the case to the ECHR in that case. [44]

In accordance with Opinion 2/94 of the ECJ[45], accession of the European Union to the ECHR would require a modification of the Treaty, as well as an amendment to the ECHR and to the Charter of the Council of Europe.[46]

---

berlin.de/ress.htm.

[41] An application against the 15 Member States is currently pending before the Strasbourg Court alleging that a Commission Decision on competition, confirmed by the ECJ, violates the ECHR, *DSR Senator Lines v. the 15 Member States* (Application No. 56672/00). The Court has not yet ruled on the admissibility of the application, which is contested by the 15 Member States who refer to the case-law of the former Commission of Human Rights (see *supra* note 38); see also García, Ricardo Alonso, 'The General Provisions of the Charter of Fundamental Rights of the European Union', *Jean Monnet Working Paper 4/02*, www.jeanmonnetprogram.org, at 11.

[42] See Lenaerts, Koen/de Smijter, Eddy, *supra* note 31, at 101.

[43] See Rengeling, Hans-Werner, 'Eine Europäische Charta der Grundrechte, Ausarbeitung, Inhalte, Bindung', in Ipsen, Jörn/Schmidt-Jortzig, Edzard (eds.), *Recht – Staat – Gemeinwohl, Festschrift für Dietrich Rauschning* (Carl Heymanns Verlag KG: Köln 2001) 225 et seq. at 236.

[44] See Grabenwarter, Christoph, 'Die Menschenrechtskonvention und Grundrechte-Charta in der europäischen Verfassungsentwicklung', in: Cremer, Hans-Joachim a.o. (eds.), *Tradition und Weltoffenheit des Rechts, Festschrift für Helmut Steinberger* (Springer: Berlin 2002) 1129 et seq. at 1148.

[45] See Opinion 2/94 of 28 March 1996, ECR (1996) I-1759 et seq..

[46] See the report of 2 April 2002 (GT-DH-EU (2002) 012) of the ad hoc working group within the Steering Committee for Human Rights of the Council of Europe; see also Working Document 8 of the Working Group on the Charter of the Convention – Report circulated by Mr. António Vitorino, Chairman of the Working Group and member of the Presidium, "Study carried out within the Council of Europe of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights".

4. The future of Article 6 (2) TEU

A final thought has to be given to the present Article 6 (2) TEU. If the Charter is incorporated into a Constitutional Treaty of the European Union the question arises whether or not a reference should be kept, as currently in Article 6 (2) TEU, to the two outside sources of legal inspiration – the constitutional traditions common to the Member States and the ECHR. There are well-founded arguments on both sides here. For example, preserving such a clause – even if it were worded differently[47] – could be justified on the grounds that it makes it clear that the Charter will not prevent the ECJ from continuing to draw on these additional sources. To retain a reference to the ECHR in the Treaty could also be a desirable addition, from the point of view of legal certainty, to the reference to the ECHR in Article 52 (3) CFR. On the other hand, deleting Article 6 (2) TEU could be defended on the grounds that the Charter now constitutes the most authentic expression of European fundamental rights. According to that view, a "concurrent" reference to the other two sources would barely be comprehensible, since the Charter has already incorporated the rights of the ECHR and crystallises most fully the traditions common to the Member States.[48] This would all the more apply in case the new section 4 of Article 52 CFR as proposed by the Working Group II of the Convention is incorporated in the Treaty: It underlines the link between the interpretation of the Charter rights to that of the national constitutional provisions which they reflect. To retain Article 6 (2) TEU would, finally, not seem to be necessary since, as in other constitutional legal systems, a written catalogue of fundamental rights would not be understood, anyway, as "exhaustive" and preventing the development, through case-law, of new rights on the basis of the evolving constitutional traditions of the Member States.[49] Although a reference such as Article 6 (2) TEU would not be necessary, keeping it would not make a big difference.

C. Merging the Charter and the Treaties: practical issues

There seems to be an increasing consensus that the Charter should be incorporated into the Treaty as such. But there are also many options as regards the techniques for such an incorporation.[50] There are strong arguments for a full insertion of the Charter into the first title or chapter of a future Constitutional Treaty of the European Union. First of all, it is only by

[47] It would not be out of the question, for example, to add such a provision to the new heading, just after the last article of the Charter, or to insert a reference of the type "notwithstanding ...." in the latter's horizontal provisions.

[48] For this view see the judgement of the CFI *max. mobil*, *supra* note 21, paragraph 57

[49] See also Lenaerts, Koen/de Smijter, Eddy, 'Bill of Rights' for the European Union', *Common Market Law Review* (2001) 273 at 289; McCrudden, Christopher, 'The Future of the EU Charter of Fundamental Rights', *Jean Monnet Working Paper 10/01,* http://www.jeanmonnetprogram.org/papers/01/013001.rtf , 9 et seq.; Vranes, Erich, *supra*, note 36, at 636.

[50] In a discussion paper drafted by the Secretariat of the European Convention forwarded to the Working group on the Charter, CONV 116/02, the following options are presented: (a) The Charter could be "attached" to the Treaties in the form of a "solemn Declaration" (b) The TEU or a new Basic Treaty could indirectly refer to the Charter according to the model of Article 6 (2) of the existing TEU(c) The TEU or a new basic treaty could make a direct reference to the Charter (d) A direct or indirect reference to Charter could be made in the preamble to a new basic treaty (e) The Charter could become a new Protocol annexed to the Treaties or a new Basic Treaty (f) The full body of the 54 articles of the Charter could be inserted into a title or chapter of the TEU, or into a new Basic Treaty, of which it would form for example the first title or chapter; and one might also think of combining these options.

insertion that the Charter would acquire visibly the status of a fully binding constitutional text. Only this prominent place in the Constitutional Treaty would correspond to the important functions of the fundamental rights. Reopening the discussion on one or the other specific provision would put at risk the complete work of the Constitutional Convention.

It is clear, however, that a limited revision of its drafting is necessary for adapting the Charter to the fact that its fundamental rights are integrated in the Constitutional Treaty: References to "this Charter", for instance, must be replaced by references to "this Chapter" or to "this Title", as well as references to the TEC or the TEU like in Articles 21 (2) and 52 (2) CFR or those to "Community law" like in Articles 27 (2), 28, 30, 34 CFR and to "Union law" in Articles 51 (1) and 53 CFR would have to be replaced by appropriate terms. Above such drafting changes there is a need for more substantial consideration: What about the preamble of the Charter in case it becomes part of a consolidated Constitutional Treaty in which also the TEC and the TEU and, if considered appropriate, even some provisions of the – rather outdated – Euratom-Treaty are merged (infra I.). It will also be necessary to review the final clauses of the Charter with a view to bringing it in line with the *acquis* of the existing treaties (infra II.). There is a repetition in the Charter, of the citizen's rights already provided for in the TEC, and the question must be dealt with where to place these specific provisions (infra III.). Other provisions of the Charter more or less literally take up principles or objectives which are laid down in the TEC, and it is important to know whether they should not be dropped from the list of "fundamental rights" and listed among the principles of the Treaty (infra IV.). There will, finally be a need for clarifying certain questions regarding the relation of fundamental rights to various other provisions of the existing Treaties (infra V.)

I. The question of the preamble for a Constitutional Treaty of the European Union

Basic legal documents often contain preambles: There is an old tradition of preambles in constitutions, in international treaties, in human rights texts and also in all founding and modifying treaties regarding European Integration. Preambles either enumerate the contracting parties or give reasons and announce the intentions of the document. In a few cases, such as the that of the German Basic Law, preambles also refer to higher values, objectives, principles, affirm the identity of the community and summarise in a certain way the essentials of the Constitution.[51] It is a common principle of both national and international law that preambles may be used when construing the provisions of the document they introduce.[52]

1. Three models: criteria for the choice

The Articles of the Charter are preceded by a preamble, certain aspects of which played an important role in finding the middle ground in the Convention on Fundamental Rights.[53] If the

[51] See for an exhausting comparative analysis Häberle, Peter, 'Präambeln im Text und Kontet von Verfassungen', in: Listl, J./Schambeck, H. (eds.), *Demokratie in Anfechtung und Bewährung*, Festschrift für J. Broermann, (1982) 211 et seq., reprinted in Häberle, Peter, *Rechtsvergleichung im Kraftfeld des Verfassungsstaats*, (Duncker & Humblot: Berlin1992) 176 et seq. at 193 et seq.

[52] Article 31 (2) WVK

[53] See Busse, Christian, 'Eine kritische Würdigung der Präambel der Europäischen Grundrechtecharta', *Europäische Grundrechte Zeitschrift* (2001) 559 et seq.; with regard to the controversial attitudes towards religious or laical,

Charter is inserted into a new Constitutional Treaty, would it be conceivable to use the preamble to the Charter as the basis for drafting the preamble to a new Basic Treaty or, alternatively, to incorporate its different aspects into a reformulated preamble to the TEU? A comparison of the texts shows a number of parallels, but also divergences which may result from the different scope and origin of each text. Given the constitutive function of fundamental rights for a democratic establishment of supranational public authority as well as the specific origin of the Charter, it seems to be appropriate to take it as the basis for drafting a preamble of the European Union Constitutional Treaty. There is a need, of course, to include important paragraphs of the preambles of the TEU and the TEC-, as well as to adapt the text to the more general scope of a Constitution. It would, finally, be appropriate to emphasise more expressly the origin of legitimacy of this Constitution and the exercise of the authority entrusted to the European institutions: The citizens of the European Union. They are the actors and responsible, ultimately, for what the Constitutional Treaty is setting up, and the Heads of State, mentioned as the authors of the Treaties in the TEU and the TEC in their respective preambles are not more than the representatives of the peoples who, give themselves in the Treaties the rights and status of citizens of the European Union.

2. Synopsis: The preambles of TEU, TEC and the Charter

TEU (Amsterdam)	TEC	Charter
RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,	DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,	The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.
RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe,	RESOLVED to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,	Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.
CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,	AFFIRMING as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,	
CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989	RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,	The Union contributes to the preservation and to the

integrationalist or nationalist, liberal or communitarist of the members of the previous Convention which resulted in the final compromise of the Charter see also Leinen, Jo/Schönlau, Justus, 'Die Erarbeitung der EU-Grundrechtecharta im Konvent: nützliche Erfahrungen für die Zukunft Europas', *integration* (2001) 26 et seq. at 29.

Community Charter of the Fundamental Social Rights of Workers,

DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions,

DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them,

RESOLVED to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including, in accordance with the provisions of this Treaty, a single and stable currency,

DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,

RESOLVED to establish a citizenship common to nationals of their countries,

RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence in accordance with the provisions of Article 17, thereby reinforcing the European identity and its

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

DETERMINED to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating,

HAVE DECIDED to create a EUROPEAN COMMUNITY and to this end have designated as their Plenipotentiaries:

development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

Enjoyment of these

independence in order to promote peace, security and progress in Europe and in the world,

RESOLVED to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty,

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,

IN VIEW of further steps to be taken in order to advance European integration,

HAVE DECIDED to establish a European Union and to this end have designated as their Plenipotentiaries:

rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

Nothing needs to be added from the Treaty of Nice, except the idea that the Constitutional Treaty builds on the ending of the division of the European continent and seeks to establish a new foundation of continued understanding and co-operation of the citizens in an enlarged, ever closer European Union.

3. Drafting proposal for a merged Preamble

Having regard to the various forms in which the preambles of the treaties and the Charter state the essential conditions, objectives and confessions of the peoples of the Member States acting together through their respective representatives, it is clear that final drafting the preamble must be the last step in the drafting process of the entire Constitution. But a provisional draft should also be the starting point of the process, as it is an instrument to agree on some principles – like a master plan – which would give the constitution-making process guidance in values and structure. Taking from the existing texts, such a provisional Preamble could read as follows:

> *"WE, THE CITIZENS OF THE MEMBER STATES OF THE EUROPEAN UNION, recalling the historic importance of the ending of the division of the European continent and the need to establish firm bases for the construction of the future Europe,*
>
> *having given us the status of citizens of the Union, confirming the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations, pooling our resources to preserve and*

strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

are resolved to share a peaceful future based on common values, in creating an ever closer union among us,

HAVE DECIDED to establish a European Union which

- conscious of its spiritual and moral heritage, is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

- contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment.

- strives to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments, while enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations,

and to this end have designated as their Plenipotentiaries ...

II. Interpreting and accommodating the final clauses of the Charter

The questions that arise from the final clauses of the Charter of the European Union have been widely discussed since the Charta was solemnly proclaimed on 7 December 2000. Problems which might occur when the Charter is becoming legally binding may in fact be even more evident should the Charter be incorporated in a future Constitutional Treaty of the European Union. The main concerns are the scope of application of the fundamental rights (infra 1.), the safeguard of the principle of attributed competencies (infra 2.), the possible limitations of the fundamental rights (infra 3.), and challenges to the supremacy of European law (infra 4.).

1. Scope of application of the fundamental rights: Article 51 (1) CFR

The wording of Article 51 (1) CFR confirms that the Charter and national constitutions have separate and complementary fields of application.[54] However, the wording of Article 51 (1) CFR seems to be more restrictive than the ECJ's present doctrine that Member States must respect Community-based fundamental rights not only when they implement European Community law,[55] but also when they take autonomous measures restricting one of the common market freedoms, either attempting to derogate from[56] or claiming to fall outside the remit[57] of the latter.

[54] From a point of view of European constitutional law, the non-applicability of the Charter to purely internal situations underlines that 'the constitutional process the European Union is embark upon post-Nice is not about to create a unitary federal state', see Thym, Daniel, 'European Constitutional Theory and the Post-Nice Process', in Andenas, Mats/Usher, John (eds.), *The Treaty of Nice, Enlargement and Constitutional Reform* (Hart Publishing: Oxford, forthcoming).

[55] See the judgment of the ECJ of 13 July 1989, C-5/88, *Wachauf*, ECR (1989) 2633 et seq. at paragraph 19

[56] See the judgement of the ECJ of 18 June 1991, C-260/89, *ERT*, ECR (1991) I-2925 et seq. at paragraph 42.

This branch of the ECJ's case law is not covered by the language of the Charter and the ECJ may therefore 'feel under pressure'[58] to desist from pursuing this line of judicial review. [59]

It is questionable, however, whether Article 51 (1) CFR intends to restrict the scope of Fundamental Rights to implementing measures only. Indeed, the explanations of the Presidium refer to the case law of the ECJ.[60] It could thus be argued that Article 51 (1) CFR should be extensively construed. A restrictive reading of Article 51 (1) CFR may even be described as 'artificial and not appropriate'[61]. Yet, the Presidium itself emphasises that the explanations have no legal value.[62] The final version of Article 51 (1) CFR is no coincidence and was intensively discussed by the Convention.[63] Thus, the notion 'implementation' may by *argumentum e contrario* be regarded as a decision to exclude from the scope of the Charter national measures which are only 'within the scope of Community law' but no direct 'implementation of European law'.[64] This is without relevance for the ECJ as long as the Charter remains a pure proclamation. In case it is given legally binding effect, the Court would still be competent to decide whether national measures are covered by the exception-clauses of the Treaty, but it could not scrutinise such measures under the legal standards of the Charter.[65] Would the ECJ be entitled to continue applying its jurisprudence independently of the Charter, referring to the ECHR or to general principles of law, as it did in the past?

One the one hand, it seems to be difficult to accept that national measures are considered justified under an exception-clause to market freedoms or discrimination in case they are, under European standards, a clear violation of fundamental rights. Given their restrictive or discriminatory effects, such measures are under the scrutiny of the ECJ in any event, and the ECJ would not respect its duties under Article 220 TEC if it did not take into account the fundamental rights in judging on their legality. Of course, this occurs only in cases which are in the scope of the market freedoms and can be regarded as an application of an exception clause such as Article 30 TEC.

---

[57] See the judgement of the ECJ of 26 June 1997, C-368/95, *Familiapress*, ECR (1997) I-3709 et seq. at paragraph 24.

[58] See de Witte, Bruno, 'The Legal Status of the Charter: Vital Question or Non-Issue', *Maastricht Journal* (2001) 81 et seq. at 86.

[59] Along the same lines Lenaerts, Koen, 'Respect for Fundamental Rights as a Constitutional Principle of the European Union', *Columbia Journal of European Law* (2000), 18 et seq.

[60] Explanation of the Praesidium relating to Article 51 CFR: "... *As regards the Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the context of Community law (judgment of 13 July 1989, Case 5/88 Wachauf (1989) ECR 2609; judgment of 18 June 1991, ERT (1991) ECR I-2925). The Court of Justice recently confirmed this case law in the following terms: "In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member Stats when they implement Community rules..." (judgement of 13 April 2000, Case C-292/97, paragraph 37 of the grounds). ...".*

[61] Griller, Stefan, 'Der Anwendungsbereich der Grundrechtecharta und das Verhältnis zu sonstigen Gemeinschaftsrechten, Rechten aus der EMRK und zu verfassungsgesetzlich gewährleisteten Rechten', in Duschanek, Alfred/Griller, Stefan (eds.) *Grundrechte für Europa. Die EU nach Nizza* (Springer: Wien/New York 2002) 131 et seq. at 144.

[62] See CHARTE 4473/00.

[63] See de Búrca, Gráinne, 'The Drafting of the EU Charter of Fundamental Rights' European Law Review (2001) 126 et seq. at 137 and 138; Grabenwarter, Christoph, 'Die Charta der Grundrechte für die Europäische Union, *Deutsches Verwaltungsblatt* (2001) 1 et seq. at 2.

[64] See Besselink, Leonard, 'The Member States, the National Constitutions and the Scope of the Charter', *Maastricht Journal* (2001) 68 et seq. at 80.

[65] Thym, Daniel, *supra* note 31.

This view, on the other hand, may lead to a very broad, if not general application of European fundamental rights to national legislation and therefore recommend a more restrictive reading of the jurisprudence of the ECJ according to the *Cinethèque* judgement, to avoid scrutiny by the ECJ on national measures which have no basis in the European Union's law.[66]

With regard to the wording of Article 51 (1) CFR there is no persuading argument for either way. "Implementation" can be read as including measures using exception clauses of the market freedoms. Part of the legal regime for the internal market would then be the application to restrictions to the freedoms, of the European fundamental rights in addition to national fundamental rights. The basic rules on the internal market would so equally apply in all Member States, including to national legislation on exceptions which might restrict the market freedoms.

To clearly exclude or include the application of fundamental rights to such measures, it would be better to clarify Article 51 (1) CFR by a slight amendment of the wording to include or exclude national measures affecting the market freedoms.. This is not what the amendment proposed by Working Group II of the Convention provides for, when it further emphasises the respect of the existing competencies of the European Union;[67] it does not remedy the lack of clarity of Article 51 (1) CFR regarding the area of application of the Charter.

Another grey area of the Charter's scope of application is the transposition of directives. National measures on implementation or transposition of directives have not yet been scrutinised by the ECJ with regard to fundamental rights.[68] The German Federal Constitutional Court, however, has pointed out that the national legislator was fully bound by the German constitution when secondary law left the specification of certain rules to the Member States.[69] The Charter should not be applied when national legislators make use of their discretionary power. Thus, national provisions of implementation which are not determined by European Community law are a matter for national fundamental rights.[70] On the other hand, it is in the *Bananas*-case where the Federal Constitutional Court expressly confirms that the ECJ is competent for the protection of fundamental rights against acts of the national authorities which implement Community law.[71] Given this case-law and on this basis, no specific provision is needed in the Constitutional Treaty for this question.

---

[66] See Griller, Stefan, *supra* note 61, at 143

[67] See CONV 354/02, annex.

[68] But see the judgment of the ECJ of 12 December 1996, joined cases C-74/95 and C-129/95, *Criminal Proceedings against X,* ECR (1996) I-6609 et seq. at paragraph 21 et seq. In the case of a directive obliging the Member States to establish criminal liability for certain offences, the ECJ held that the Member States were obliged to respect the forseeability criterion of Article 7 ECHR. it is not clear though whether this was an autonomous obligation under Community law or a reference to the obligations of the Member States under the European Convention.

[69] See the decision of the Bundesverfassungsgericht of 9 January 2001, 1 BvR 1036/99, *Teilzeitarbeit*, published at www.bverfg.de, at paragraph 16.

[70] See Engel, Christoph, 'The European Charter of Fundamental Rights, A Changed Political Opportunity Structure and its Normative Consequences', *European Law Journal* (2001) 151 et seq. at 167/168; Rengeling, Hans-Werner, *supra* note 43, at 238; Weber, Albrecht, 'Die Europäische Grundrechtscharta – auf dem Weg zu einer europäischen Verfassung', *Neue Juristische Wochenschrift* (2000) 537 et seq. at 542.

[71] See the *Bananen* judgement, *supra* note 27, at 147, referring to the *Maastricht-Vertrag* judgement of of the Bundesverfassungsgericht, *supra* note 27 For the procedural consequences see infra, D.

2. Fundamental rights and the principle of attributed competencies : Article 51 (2) CFR

Article 51 (2) CFR makes clear that the division of competencies between the European Union and the Member States is not changed by the Charter. Thus, it confirms the principle of limited attributed competencies of the European Union as it is contained in Article 5 (1) TEC and Article 5 TEU, but it is merely declaratory in its effect. Even the adaptations proposed by Working Group II of the Convention to Article 52 (2) CFR are not more than declaratory.[72] Explicitly excluding new competencies for the European Union, the Charter could have the effect of not living up to the citizen's expectations, though. The Charter would promise more than it could deliver.[73] Ambitious social rights give raise to the citizen's hope while at the same time there is no corresponding competence of the European Union to promote such rights.[74]

It is arguable, therefore, that fundamental rights in the Charter should correspond to the competencies attributed to the European Union.[75] The Convention decided to follow a broader approach. A list of common values, on which the European construction is to be based, could not leave aside important fundamental rights and issues which are common to the European peoples but still outside the scope of European competencies. In this light, the general obligation to respect the fundamental rights, indeed, is independent of the actual existence of specific competencies for acts which may violate them. Thus, the provisions of the Charter have to be considered as the expression of common values against which the European Union institutions and Member states 'could not make a stand even if they don't have to implement them'.[76] The provisions on social rights, in addition, have the particular effect of "negative clauses on competence" regarding the respective social acquis on these rights in the Member States[77]. The new provision of Article 52 (6) CFR as it is proposed by the Working Group II of the

---

[72] See CONV 354/02, annex.

[73] See de Witte, Bruno, *supra* note 58, at 88.

[74] See Knöll, Ralf, 'Die Charta der Grundrechte der Europäischen Union. Inhalte, Bewertung und Ausblick', *Neue Zeischrift für Verwaltungsrecht* (2001) 392 et seq. at 394; Lindner, Josef Franz, 'EG-Grundrechtscharta und gemeinschaftsrechtlicher Kompetenzvorbehalt: Probleme und Thesen', *Die Öffentliche Verwaltung* (2000) 543 et seq. at 549; Pernice, Ingolf, *supra* note 3 at 853. Some authors assume that this could lead to a Union step by step seeking more legislative powers; see in that regard Hirsch, Günter, 'EG: Kein Staat, aber eine Verfassung?', *Neue Juristische Wochenschrift* (2000) 46 et seq. at 47, who speaks of the osmotic effect of a catalogue of fundamental rights.

[75] See Pernice, Ingolf, *supra* note 3 at 852 about the missing "Parallelität von Kompetenzen und Grundrechtsschutz"; along the same lines Calliess, Christian, 'Die Charta der Grundrechte der Europäischen Union – Fragen der Konzeption, Kompetenz und Verbindlichkeit', *Europäische Zeitschrift für Wirtschaftsrecht* (2001) 261 et seq. at 264; Ritgen, Klaus, 'Grundrechtsschutz in der Europäischen Union', *Zeitschrift für Rechtspolitik* (2000) 271 et seq. at 273.

[76] Dutheil de la Rochère, Jacqueline, *supra* note 34, at 44; see also Dutheil de la Rochère, Jaqueline, 'La Charte des drots fondamentaux de l'Union européenne: quelle valeur ajoutée, quel avenir?', *Revue du Marché commun et de l'Union européene* (2000) 674 et seq. at 678. See also Altmaier, Peter, 'Die Charta der Grundrechte der Europäischen Union', *Zeitschrift für Gesetzgebeung* (2001) 195 et seq. at 202/203 speaking of fundamental rights in stock or reserve fundamental rights ("Vorratsgrundrechte"); Borowsky, Martin, 'Wertegemeinschaft Europa: die Charta der Grundrechte der Europäischen Union zwischen politischer Proklamation und rechtlicher Verbindlichkeit – Ziele, Inhalte, Konfliktlinien', *Deutsche Richterzeitung* (2001) 275 et seq. at 281; Jacqué, Jean-Paul, *supra* note 34, at 7: *"Ce n'est pas parce que la Communauté n'est pas compétente en matière de grève qu'elle ne pourrait adopter des mesures qui directement ou indirectement restreignent le drot de grève dans les services publics. Ainsi donc, la question des droits garantis n'est pas liée a celle des compétences."*; Lindner, Josef Franz, *supra* note 74, at 549; Lord Goldsmith, Peter Henry, *supra* note 34, at 1207; Rengeling, Hans-Werner, *supra* note 43, at 245/246; Zuleeg, Manfred, 'Zum Verhältnis nationaler und Europäischer Grundrechte. Funktionen einer EU-Charta der Grundrechte', *Europäische Grundrechte Zeitschrift* (2000) 511 et seq. at 517.

[77] See Pernice, Ingolf, *supra* note 17 at 673; for this effect see also: Meyer, Jürgen/Engels, Markus, 'Aufnahme von sozialen Grundrechten in die Europäische Grundrechtecharta?', *Zeitschrift für Rechtspolitik* (2000) 368 et seq.

Convention, seems to confirm this interpretation in saying that "full account shall be taken of the national laws and practices as specified in this Charter".

Given its declaratory character, Article 51 (2) CFR could be dropped and should, in any event not range among the provisions in the Chapter on fundamental rights in the Constitutional Treaty. If it is felt necessary to include it at all, it could be added to the text of Article 5 (1) TEC.

3. Limitations of fundamental rights: Article 52 (1) CFR

Article 52 (1) CFR is of high importance. Instead of supplementing every single fundamental right with a specific provision on the possible extent and conditions of limitations, the Convention has chosen to deal with the limitations in a general clause. Though this has been strongly criticised,[78] the principle of proportionality, ultimately, is the basic practical criterion in any event.[79]

Accordingly, for some 30 years the case law of the ECJ has acknowledged that fundamental rights are part of Community law as general principles of this law, and that limitations can be accepted as far as the principle of proportionality is respected.[80] Disapproval has been articulated not with regard to the ECJ's recognition of fundamental rights but as to a non in-depth and somewhat superficial reasoning in his decisions involving fundamental rights. Hopes regarding the drafting of a Charter of fundamental rights have been dashed.[81] Yet, Article 52 (1) CFR is not the right means to help at this point. It will rest with the ECJ to weigh up individual fundamental rights on the one hand and the European public welfare on the other,[82] and to bring the protection of one fundamental right into balance with another fundamental right[83]. It, is on the contrary, absolutely not the ECJ's responsibility to adopt, for example, German constitutional tradition but to observe a European standard of protection which is inspired by the common constitutional traditions of the Member States.[84] Thus objections with regard to the limitation clause in Article 52 (1) CFR are not justifiable. It must be included to the set of general provisions in the Chapter on fundamental rights of the Constitutional Treaty.

---

[78] See Nettesheim, Martin, *supra* note 14, at 40.

[79] For a comparative analysis of the jurisprudence of the ECJ and the German Federal Constitutional Court on the extent and limitations of fundamental rights and, in particular the professional freedom, see Vögler, Michael, *Defizite beim Schutz der Berufsfreiheit durch BverfG und EuGH* (Nomos: Baden-Baden 2001).

[80] The first references can be found the judgments of 12 November 1969, 29/69, *Stauder*, ECR (1969) 419 et seq., and of 17 December 1970, 11/70, *Internationale Handelsgesellschaft*, ECR (1970) 1125 et seq. For a more exhaustive analysis see Pernice, Ingolf, *supra* note 23.

[81] See Kenntner, Markus, 'Die Schrankenbestimmungen der EU-Grundrechtecharta: Grundrechte ohne Schutzwirkung?', *Zeitschrift für Rechtspolitik* (2000) 423 et seq. at 424; Mahlmann, Matthias, 'Die Grundrechtscharta der Europäischen Union', *Zeitschrift für europarechtliche Studien* (2000) 419 et seq. at 439; Pache, Eckhard, 'Die Europäische Grundrechtscharta – ein Rückschritt für den Grundrechtsschutz in Europa?', *Europarecht* (2001) 475 et seq. at 489; Ritgen, Klaus, *supra* note 75, at 272.

[82] Obviously limitations of fundamental rights on the European level have to meet objectives of general interest which correspond to the competencies attributed to the European Union, see Kingreen, Thorsten, 'Die Gemeinschaftsgrundrechte', *Juristische Schulung* (2000) 857 et seq. at 863.

[83] Very instructive on this subject the comparative analysis of Vespaziani, Interpretazioni del bilanciamento die diritti fondamentali, 2002.

[84] See Pernice, Ingolf, *supra* note 3 at 850; de Witte, Bruno, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in: Alston, P. (ed.), *The EU and Human Rights*, 1999, 859 et seq. at 881.

The Charter may, as *Triantafyllou* suggests, offer in addition a 'golden opportunity' for the struggle against the democratic deficit of the European Union by means of a 'democratic' definition of the notion 'law' in Article 52 (1) CFR: the European Parliament should insist that any limitations to the rights in the Charter are (co-) decided by Parliament.[85] While there are good reasons for such an interpretation from a democratic point of view, it is difficult to see how the principle of co-decision has a chance to be introduced through this "back-door". Mentioning the aspect of democracy in relation to the legitimacy of limitations on fundamental rights, however, is an important element for the discussion of the legislative procedures of the European Union.

4. Parallel guarantees: Article 52 (2) CFR

The Charter, in a number of its articles, simply restates rights already expressly contained in the TEC, though – probably in the interests of readability – with a shorter and simpler wording in comparison to the corresponding articles of the Treaty. According to Article 52 (2) CFR, rights which are based on the TEC or the TEU may be exercised "under the conditions and within the limits defined by those Treaties." That clause made it possible to avoid the repetition, in each Charter article in question, of provisions for that these rights be exercised under the conditions and within the limits provided for in the corresponding article of the Treaty and of secondary legislation.[86]

When the Charter is inserted into a future Constitutional Treaty, the question is whether or not the "replications" should be eliminated, by deleting either the Charter articles in question or the corresponding articles from the current Treaties. This question is particularly important for following articles of the Charter:

- Article 15 (2) (free movement of workers, freedom of establishment and freedom to provide services – see Article 39, 43 and 49 TEC);
- Articles 20, 21 and 23 (equality before the law and non-discrimination – see Articles 12, 13 and 141 TEC),
- Articles 39 and 40 (Right to vote and to stand as a candidate at municipal elections and elections to the European Parliament – see Articles 19 and 190 (1) TEC);
- Article 42 (access to documents – see Article 255 TEC);
- Articles 43 (Ombudsman – see Articles 21 and 195 TEC), 44 (petition – see Articles 21 and 194 TEC), 45 (1) (freedom of movement for citizens – see Article 18 TEC) and 46 (diplomatic protection – see Article 20 TEC).

The difficulties of "parallel" but not quite identical guarantees in one Treaty are shown by the academic discussion on Articles 21 (1) CFR and Article 13 TEC.[87] The question is whether or not, in accordance with Article 52 (2) CFR, Article 13 TEC excludes the application of Article 21

[85] See Triantafyllou, Dimitris, 'The European Charter of Fundamental Rights and the "Rule of Law": Restricting Fundamental Rights by Reference', *Common Market Law Review* (2002) 53 et seq. at 61

[86] On this point, see also the explanations of the Presidium relating to Article 52 CFR: *"Paragraph 2 specifies that where a right results from the Treaties it is subject to the conditions and limits laid down by them. The Charter does not alter the system of rights conferred by the Treaties";* the explanations list provisions which in the view of the Presidium of the Convention fall under Article 52 (2) CFR.

[87] See Lenaerts, Koen/de Smijter, Eddy, 'Bill of Rights' for the European Union', *Common Market Law Review* (2001) 273 et seq. at 282 et seq.; Griller, Stefan, *supra* note 61, at 147 et seq.

(1) CFR. In my view Article 52 (2) CFR is not applicable to the prohibition of discrimination on grounds listed in Article 21 (1) of the Charter which are not listed in Article 13 TEC. Since Article 13 TEC has no direct effect, this is also true for the prohibition of discriminations on grounds listed in both articles but for which the Council has not yet taken any measures. It has been argued that as soon as the Council exercises its power under Article 13 TEC the Community act in question[88] will serve as a basis for construing the scope of the corresponding right recognised by Article 21 (1) CFR. As a result, the latter right would need to be exercised under the conditions and within the limits defined by that Community act.[89] Yet Article 21 (1) CFR is an expression of the general principle of equality. It is directly applicable even when there exists secondary legislation on the basis of Article 13 TEC. Article 13 TEC allows for complementing measures but does not exclude the application of Article 21 (1) of the Charter.[90] The two provisions are not really "parallel" guarantees to which Article 52 (2) CFR could be applied.

In case the Charter does not remain an independent – though binding – document the charm of which would be its comprehensiveness, repetitions, replications or restatements of any specific rights or principles are unnecessary and lead to legal uncertainty. The provisions on market freedoms and specific citizen's rights like on European and municipal elections, diplomatic protection should be left to other chapters of the Constitutional Treaty, while non-discrimination rules, access to documents and petition rights should remain part of the chapter on fundamental rights. In consequence, the reference in Article 52 (2) CFR would be superfluous since these rights are not restated in the chapter on fundamental rights.[91]

As indicated, provisions in other parts of the Treaty may well give the European Union power to legislate with a view to ensure full implementation of these rights. This is the case of Article 141 (3) TEC which gives a specific legislative power to the Community, while section 4 of this Article reserves the right of positive action to the Member States with a view to achieve substantive gender equality - as does Article 23 (2) CFR more generally and in a more concise drafting. Treaty articles which go beyond of the rights the Charter guarantees should be kept,[92] but the basic part stating the guarantee of the fundamental right, contained in such provisions, should be integrated in the chapter on fundamental rights.

With no parallel provisions there would be no reason any more to maintain Article 52 (2) CFR. Where, in case of some remaining parallelism, the Charter rights are not matching with the guarantees provided for by secondary legislation based on other Treaty articles, these guarantees are not put into question. Any further reaching protection of rights provided by secondary law

---

[88] See Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22 and a rectification in OJ 2000 L 199/86, which is the first application of Article 13 TEC.

[89] Lenaerts, Koen/de Smijter, Eddy, *supra* note 87, at 285.

[90] In this sense also Griller, Stefan, *supra* note 61, at 150; see also Petite, Michel, *supra* note 5, at 45.

[91] This would exclude that secondary law adopted under the present Treaty provisions would entail limits to fundamental rights, a consequence rightly pointed out for Article 52 (2) CFR by Vranes, Erich, *supra* note 36, at 636.

[92] This clarification was added after the critics of McCrudden, Christopher, Response to Ingolf Pernice, at Panel 2 of the Vienna Conference of 21 and 22 November 2002, "The Future Constitution of Europe: European Convention, IGC 2004, and the Prospects for European Integration".

remains untouched, but it is clear that these rights would not have the quality of fundamental rights.

5. The level of protection: Challenge to the supremacy of European law? (Article 53 CFR)

Article 53 CFR underlines that the Charter shall not be interpreted as affecting the status quo of human rights protection at national, European or international level in the respective fields of application of the instruments concerned.[93] It is argued that this is a challenge to the supremacy of Community law since the European public authority would be subordinated to the Member States constitutions. Member State courts would be, under Article 53 CFR, entitled to scrutinise secondary Community law under national standards and national courts were invited to question the supremacy of European Union law.[94]

The reference to the "respective fields of application", however, allows another reading. Nothing indicates that fundamental rights and freedoms as recognised in Member State's constitutions may be applied against acts of the European Union. As the German Federal Constitutional Court has confirmed in its Banana decision, national fundamental rights will not be, in principle, applied with regard to European law.[95] Thus, Article 53 CFR could be read as 'a call for an armistice between the European Union/European Community and the national constitutional practices'[96].

Indeed, the Charter is not an instrument of competencies, only of rights. It does not address conflicts of norms outside the sphere of the Charter.[97] While it is true that Article 53 CFR refers to the ECHR, this does not speak against such a reading:[98] A safeguard for the respect of the ECHR-standards is included in Article 52 (3) CFR, and this is how the ECHR gets relevance for the Charter, while at the present stage European Union law is not a field to which the ECHR applies the way it does to its contracting parties.

Also in the light of the drafting history of Article 53 CFR there is no evidence that Article 53 of the Charter is intended to threaten the supremacy of community law.[99] The clause of the minimum standard has been drafted following similar provisions in international human rights treaties. Yet unlike these international treaties, which rather complement the national systems of protection and are supposed to apply – as a subsidiary but second protection mechanism – to the same cases, the Charter 'acquires the role of a protagonist'[100], is the primary instrument of protection and has its own, independent field of application. The Charter is part of the European Union context which is construed in conceptual terms as an autonomous legal order which tends

---

93 See also Thym, Daniel, *supra* note 31.

94 See Griller, Stefan, 'Primacy of Community Law: A Hidden Agenda of the Charter of Fundamental Rights', in Melissas, Dimitris/Pernice, Ingolf (eds.) *Perspectives of the Nice Treaty and the Intergovernmental Conference 2004* (Nomos-Verlag: Baden-Baden 2002) 47 et seq.; Griller, Stefan, *supra* note 61, at 165 et seq. ; Dutheil de la Rochère, Jaqueline, 'Droits de l'homme La Charte des droits fondamentaux et au delà', *part of the Jean Monnet Working Paper 10/01*, www.jeanmonnetprogram.org, at 18 et seq.; García, Ricardo Alonso, *supra* note 41, at 23 footnote 96; Vranes, Erich, *supra* note 36, at 638 et seq.

95 See Grabenwarter, Christoph, *supra* note 63, at 11 and Engel, Christoph, *supra* note 70, at 167/168.

96 See Besselink, Leonard, *supra* note 64, at 75.

97 See Bering Liisberg, Jonas, 'Does the EU Charter of Fundamental Rights Threaten the Supemacy of Community Law?, Article 53 of the Charter: a fountain of law or just an inkblot?', *Harvard Jean Monet Working Paper 04/01* (2001) also published in *Common Market Law Review* (2001) 1171 et seq. at 1191.

98 For this argument, however, see Griller, Stefan, *supra* note 61, at 173.

99 See Bering Liisberg, Jonas, *supra* note 97, at 1190.

100 See García, Ricardo Alonso, *supra* note 41, at 23.

to displace, by means of the principle of supremacy, the disparities between the Member States and establishes a common, equal standard of protection regarding the exercise of European public authority common to all citizens of the European Union. As a new basis for the internal system of protection in the European Union it does not adversely affect – this is what Article 53 CFR says – neither the protection provided by the ECHR and other international instruments, nor the protection provided for by the constitutions of the Member States. It recognises and confirms the status quo, insofar, but does not change it.

The question of primacy of European law, therefore, is not dealt with in this provision. It is a fundamental principle of the European legal system and condition for the equal application of European law throughout the European Union[101]. The Charter in Article 53 seeks to provide fundamental rights standards not lower as the ECHR or the standards set under national constitutions of the Member States, but it does not give a competence, neither to the Strasbourg Court nor to the national courts to question the validity of European law. Should there exist any risk that Article 53 CFR is read as limiting or questioning the principle of supremacy, it should be dropped or amended[102], or a special provision should be included among the principles of the Treaty – as suggested in Article 8 (2) of the Preliminary draft Constitutional Treaty submitted by the Presidency of the Convention[103] – to restate the primacy of European law.

More generally, the question may be put whether it is useful at all to compare the level of protection of fundamental rights under the Charter with other instruments. There are authors who argue that such comparison is de facto impossible.[104] It is the problem of weighing up conflicting rights and freedoms which makes it difficult, indeed, to compare the levels of protection. In addition, the public interest which may legitimise limitations of a fundamental right in a given case at the European level, is never the same as the reasons which are put forward for limitations in another system. Both, the German Constitution in Article 23 (1), and the German Federal Constitutional Court in the Bananas case[105] consider the need for an "comparable" level of protection, and it is clear that this is not more than a very general criterion.[106] Comparison may be suitable only when trying to understand the scope of a right as such and per se confronting intervention of public authority.[107]

It follows that Article 53 CFR is of a merely declaratory nature and the question may be put whether it is necessary to maintain it with regard to a catalogue of fundamental rights in a Constitutional Treaty. While it is clear that a binding catalogue agreed within the European Union could not, legally, affect the protection provided by any international treaty to which the Member States are parties, the case is different, in principle, for provisions of European Union law regarding national constitutions: This impact is a specific characteristic of the European multilevel constitutional system.[108] On the other hand, Article 51 (1) CFR expressly limits the scope of the Charter to the European Union and to national acts implementing its law – where

---

[101] For some thoughts on the justification see Pernice, Ingolf, *supra* note 6, at 520 et seq., with more references.

[102] See Vranes, Erich, *supra*, note 36, p. 639, proposes to delete it.

[103] CONV 369/02 of 28 October 2002.

[104] See Weiler, J. H. H., 'Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space', in Weiler, J. H. H., *The Constitution of Europe* (1999) 102 et seq.; see also the discussion at Besselink, Leonard, 'Entrapped by the Maximum Standard: On fundamental Rights, Pluralism and Subsidiary in the European Union', *Common Market Law Review* (1998) 629 et seq.

[105] See *supra* note 27.

[106] See Pernice, Ingolf, in: Dreier (ed.), *Grundgesetz Kommentar Vol. 2* (Mohr: Tübingen 1998), Article 23 no. 75 et seq.

[107] In this sense also García, Ricardo Alonso, *supra* note 41, at 23 footnote 96.

[108] See Pernice, Ingolf, *supra* note 6, at 516.

national institutions are acting as "European agents".[109] While, formally, this provision should suffice to protect the national systems from any adverse effects of the Charter on the national protection of fundamental rights regarding challenges originating at the national level, it is clear that the practical application of and experience with the European fundamental rights may indirectly have harmonising effects upon and influence the national standards. Thus, there are good reasons to add Article 53 CFR to the general provisions of a chapter on fundamental rights in a European Union Constitutional Treaty.

III. Citizens rights and the provisions on the citizenship of the European Union

Both the Charter and the TEC include and define citizens rights. Articles 39 to 46 CFR contain the right to vote and to stand as a candidate at elections to the European Parliament, at municipal elections, the right to good administration, the right to access to documents, the right to petition and eventually the right to diplomatic and consular protection. They restate rights already granted in the Treaties, and it has been suggested above, not to include the specific rights of the citizen into the chapter on fundamental rights in a Constitutional Treaty.[110] This does not apply, however, to Articles 41 (good administration), 42 (access to documents), 43 and 44 (Ombudsman, petition) CFR, which have a more general scope and can be qualified as procedural fundamental rights.

The definition of the citizenship of the European Union and the specific rights defining the political status of the citizens of the European Union should be listed in a specific chapter of the Constitutional Treaty. This chapter should be introduced by Article 17 TEC, which describes the status of equal rights of all the citizens of the European Union, including their political rights throughout the European Union. Moreover, Article 17 TEC should be redrafted so as to make clear that the citizens of the European Union are the origin of democratic legitimacy of the European Union and all its policies. It should be followed by provisions excluding any discrimination on the grounds of nationality or residence, the guarantee of the citizen's freedom of movement and residence throughout the European Union, the provisions on European and municipal elections, on diplomatic and consular protection etc.

IV. Principles and objectives of European policies

Some of the provisions in the Charter do not, in a strict sense, guarantee rights of the individual, but rather restate principles and objectives which are already part of the TEC. In particular, Article 36 CFR on services of general economic interest restates Article 16 TEC, Article 37 CFR on environmental protection repeats with a slightly simplified wording, Article 6 TEC and Article 38 CFR on consumer protection take up the thrust of Article 153 (2) TEC. Though these issues are important as a part of a Charter expressing the common values of the European Union, the specific character of these provisions would justify to include them rather in the chapter on principles and objectives of the Constitutional Treaty than in the chapter on fundamental "rights".

---

[109] For this approach see Pernice, Ingolf, *supra* note 9, at 724 et seq.

[110] See *supra* B.II.

Articles 36 to 38 CFR should, therefore, not be part of the chapter on fundamental rights in the Constitutional Treaty, while the corresponding provisions of the TEC should be included in a chapter on principles and objectives.

V. Fundamental rights and other provisions of the Treaties

What is the relationship of fundamental rights to the other provisions of the existing Treaties such as provisions on the objectives and powers of the European Union (infra 1.), rules on non-discrimination and the market freedoms (infra 2.), the standards for homogeneity under Articles 6 and 7 TEU (infra 3.), and the special provisions for intergovernmental co-operation in the framework of pillar two and three of the TEU (infra 4.)

1. Objectives and powers of the European Union

After the incorporation of the fundamental rights listed in the Charter in a Constitutional Treaty they will be part of the binding constitutional law like any other provision of the same Treaty, including the principles, objectives and the articles conferring powers to the diverse institutions of the European Union. There is no inherent hierarchy, indeed, between the fundamental rights and other provisions of the Treaty laying down the objectives or conferring powers to the institutions of the European Union. But there will be the need to find a "sound balance" between the different rights and values, principles and objectives in case of conflicting interests, according to the principle of proportionality aiming at "practical concordance":[111] The protection of fundamental rights, e.g. the professional freedom in the area of biotechnology, for one individual, could conflict with the human dignity of others or considerations of public health or environmental protection, and it would be the task for the legislator – under the ultimate control of the ECJ – to find the sound balance between the two legitimate interests. There is no difference, in principle, between the European system and the application of fundamental rights at the national level.

While, consequently, one of the functions of fundamental rights in the European Union is to limit and to give guidance to the exercise of the legislative power conferred to it,[112] a few provisions of the Charter guarantee rights only in the cases and under the conditions provided for by Community law and/or national law and practice (Articles 9: marriage, 10 (2): conscientious objection, 14 (3): educational establishments, Article 16: business, Articles 27 (2), 28 and 30: worker's rights, and Article 34: social security and assistance). Though these rights are guaranteed in the Charter they seem to leave it open for the European Union or/and the national legislatures and executives to freely define their scope.[113] What than could be the reason of including them into the Charter or a catalogue of fundamental rights in the Constitutional Treaty?

It is clear that the objective character of these rights as binding values prevail their function as subjective claims in individual cases. As far as references are made to national law and practices, they could also serve as a kind of "standstill"-clauses excluding any adverse effect of European legislation on the level of protection reached in a Member State:[114] They may be,

---

[111] For this principle developed for the construction in cases of conflict in German constitutional law see Hesse, Konrad, *supra* note 7 at 142.

[112] See *supra* B.II.

[113] See the critics of Nettesheim, Martin, *supra* note 14, at 38.

[114] See Meyer, Jürgen/Engels, Markus, 'Aufnahme von sozialen Grundrechten in die Europäische Grundrechtecharta?', Zeitschrift für Rechtspolitik (2000) 368 et seq. at 371.

therefore, considered as another barrier to the exercise of the competencies of the European Union.[115] Insofar as they refer to Community law, the legislator – within the limits of the competencies conferred to it – is hold to maintain and develop further the relevant procedures and safeguards with a view to give effect to the rights in question: They are, indeed, another expression of objectives guiding European policies.

2. Rules on non-discrimination and the market freedoms

Recent judgements of the ECJ can be understood as extending the scope of Article 12 TEC to all European Union citizens legally residing in a Member State.[116] As a consequence, fundamental rights guaranteed on the national level have to be applied equally to all citizens of the European Union. There is no room for provisions in Member State's constitutions which reserve a fundamental right to nationals only.[117] Furthermore, since restrictions of the principle of non-discrimination contained in Article 12 TEC have to comply with European fundamental rights[118] other than those covered specifically by Article 12 TEC, there is a rather broad – though not unlimited – field of application for the rights granted by the Charter.

The same is true for the provisions on free movement of goods (Articles 28 et seq. TEC) and of the citizens of the European Union (Articles 18, 39 et seq. TEC), on free establishment and the freedom to provide services (Articles 43 and 49 TEC) as well as on the free movement of capital (Article 56 TEC). These guaranties translate the ideas of freedom and non-discrimination into prohibitions for the Member States and corresponding individual rights of the citizen,[119] but – though the ECJ sometimes talks of fundamental rights[120] – they have a different function: To open the European market of goods and factors, and so to establish an area of undistorted and free competition (Articles 3 lit. g, 4 (1) and 2 TEC). Nevertheless, restrictions to these freedoms, both at the national level and by European legislation, need to be justified in accordance with the respective exception-rules of the TEC, have to be proportional and will not be acceptable if the provisions in question are not in conformity with the fundamental rights.[121]

---

115 Pernice, Ingolf, *supra* note 17, at 673.

116 In its judgment of 12 May 1998, C-86/96, *Martinez Sala*, ECR (1998) I-2691 et seq., the ECJ uses Article 12 and 18 TEC to extend the protection against discrimination based on nationality to every Union citizen. The ECJ followed the same approach in its judgment of 24 November 1998, C-274/96, *Bickel und Franz*, ECR (1998) I-7637 et seq. at paragraph 16. Two later judgments are, however, somewhat more restrictive as for the application of Articles 12 and 18 TEC, see judgments of 19 January 1999, C-348/96, *Calfa*, ECR (1999) I-11 et seq., and of 21 September 1999, C-378/97, *Wijsenbeek*, ECR (1999) I-6207 et seq.. In a recent judgment of 20 September 2001, C-184/99, *Rudy Grzelzyk*, the ECJ develops a right of its own of the Union citizen to be entitled to non discriminating treatment with regard to social security benefits, paragraph 31; see Reich, Norbert, 'Union Citizenship yesterday, today and tomorrow', *Riga Graduate School of Law Working Paper No. 3* (2001) at 10 et seq.

117 See for example Articles 8, 9, 11 and 12 of the German Constitution, as well as the provision that (only) national legal persons enjoy the protection of fundamental rights under the Constitution, for further details see Pernice, Ingolf, 'Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and "Multilevel Constitutionalism"', in Riedel, Eibe (ed.), *German Reports on Public Law. XV. International Congress on Comparative Law, Bristol, 26 July to 1 August 1998* (Nomos: Baden-Baden 1998) 40 et seq.

118 See *supra* C.II.

119 For this approach see Pernice, Ingolf, *supra* note 23.

120 See for example ECJ judgement of 15 December 1995, C-415/93, *Bosman*, ECR (1995) I-5040 et seq.; see also no. 3 of Regulation 1612/68 on the free movement of workers within the Community, OJ (1968) L 257/2.

121 See *supra* C.II.

3. Fundamental rights and homogeneity in the European Union (Articles 6 and 7 TEU)

Though the Charter and, consequently, fundamental rights incorporated in a European Union Constitutional Treaty are not binding for the Member States with regard to their internal policies, there will be a strong harmonising effect in two ways: The law in the European Union as a composed constitutional system, though having two different sources: national and European, forms a unity in substance in that the system produces for each individual case ultimately on binding legal solution. Would a "double-standard" in the area of fundamental rights find acceptance with the citizens on the long run? The other question relates to the guarantee of basic homogeneity of the two constitutional levels in the European Union under Articles 6 and 7 TEU. What are the criteria for the construction of the "principles of liberty, democracy, respect for human rights and fundamental freedoms... which are common to the Member States" referred to in these provisions?

The citizen will hardly accept that the same Member State action is subject to two distinct standards of fundamental rights, depending on whether or not the Member State implements European Union law. How to explain to a citizen that only because his case falls not within the scope of European Union law his freedom is not protected while, if the case were in the scope of European law, it would? While it is not the Charter that brings up the problem, it becomes nonetheless more evident with the Charter.[122] National courts will tend to construe national fundamental rights in accordance with the Charter and the standards developed by the ECJ. And the ECJ will continue to ensure that its case-law is in accordance with the standards developed at the national level so to find the necessary acceptance of its jurisprudence in the Member States.

There is no real alternative to referring to the Charter or the fundamental rights taken from it and incorporated into the Treaty, when the "principles" of fundamental rights common to the Member States have to be explained under Articles 7 and 6 (1) TEU[123]. In cases of evident and serious violations, political pressure will be put upon the Member State in question to comply with the common standards as they have found their expression in the Charter. Thus, European fundamental rights could go as minimum standard within the Member States.

4. Fundamental rights and the areas of foreign, security and home policies

The reference to the "Union" and "Union law" in Article 51 (1) CFR suggests that the Charter reaches also to the now second and third pillar actions of the European Union. This is in conformity to Article 6 TEU and the objectives of Article 11 (1) TEU ("respect for human rights and fundamental freedoms") as well as to Article 29 TEU stressing the "area of freedom, security and justice" as the objective of the actions under pillar three of the European Union. Accordingly, in a Constitutional Treaty which merges the three pillars of the European Union, the chapter on fundamental rights would cover all policy areas without exception, the only question being whether and, if so, to what extent the jurisdiction of the ECJ could be limited with regard to external and home policies. Today, Article 46 TEU explicitly excludes the second pillar from its jurisdiction and allows only limited judicial control in the area of the third pillar (Article 35 TEU).

[122] See Busse, Christian, *supra* note 53, at 575 is in favour of a Charter binding the European Union and the Member States, allowing a higher level of protection in the Member States.

[123] See also the national reports referred to by Dutheil de la Rochère, Jacqueline/Pernice, Ingolf, *supra* note 4.

The problem of judicial review deficit in the field of the second pillar has already been raised.[124] Is it the ECJ who should assume the judicial review regarding the protection of human rights, or could the ECHR argue that the jurisdictional gap in the second pillar sets off its subsidiary jurisdiction which it has already exercised in the *Matthews* case[125]? Or is it the role of the national courts to apply their national – or European Union – fundamental rights also in the second and third pillar in the absence of ECJ jurisdiction?

With regard to the third pillar one might argue that Article 35 TEU confers upon the ECJ the jurisdiction to review the validity of framework decisions and decisions, but not the validity of conventions. This is a strong argument that conventions – like co-ordinated action under the second pillar shall continue to be considered as international law and thus be open to judicial control only of the Member States whereas (framework) decisions of the European Union shall be under the control from the ECJ and European fundamental rights. Still, the exclusion of preliminary references for some countries[126] will be a key argument even against European fundamental rights protection by the ECJ in the second pillar.[127]

Fundamental rights without access to judicial review would have no teeth and be regarded as non-serious. As long as, on the other hand, external and home policies are considered as a matter of intergovernmental co-operation between the Member States and not a competence of the European Union as a legal personality, to confer the judicial review upon the ECJ would mean that the ECJ exercises control over the "sovereign" policies and actions of the Member States. While, in principle, this is not the approach of the Treaties, Article 35 (1), (4), (6) and (7) TEU is an opening towards another reading. The fact that Articles 11 and 12 stress that "the Union" shall develop and implement a common foreign and security policy, that it is the European Council or the Council where the action is decided (Articles 13 to 15 TEU), that the Council concludes treaties under Article 24 TEU which shall be binding, according to Article 24 (6) TEU as revised in Nice for the institutions of the European Union, and that, according to Article 18 (1) TEU, "the Union" is represented by the Presidency, all these provisions do not allow to maintain that the Member States are acting and their policy could not be subject to judicial control of the ECJ. All the more, the merger of the pillars will necessarily go along with the acceptance of a legal personality of the European Union the actions of which could not be exempt from the jurisdiction of the ECJ even in part and independently of whether or not they have direct effect.

D. Judicial review in the European multilevel judicial system

It is crucial for a uniform and effective protection of fundamental rights throughout the European Union not only to subject European Union institutions and the Member States implementing their legislation to fundamental rights but also to offer effective remedies. It is important, with regard to solidarity rights and principles, that the new Article 52 (5) CFR as

---

[124] See Calliess, Christian, *supra* note 75, at 266; Mahlmann, Matthias, *supra* note 81, at 441: Charter as *'Naturalobligation'*; European Commission, communication of 20 September 2000, CHARTE 4477/00 at paragraph 12: *'answer would be even more clear if judicial review would be possible'*; according to Altmaier, Peter, *supra* note 76, at 201, the application of the Charter to the second and third pillar on the one side and the jurisdiction of the ECJ on the other are two distinct questions.

[125] See *Matthews v. The United Kingdom, supra* note 28..

[126] See Article 35 (2) TEU: The declaration has not been given by Denmark, France, Ireland and the UK.

[127] See Thym, Daniel, *supra* note 31.

proposed by Working Group II of the Convention distinguishes between rights and principles, the latter being important only for interpretation and the scrutiny of legality of implementing measures. The question, of course is, how to make the distinction in practice and to avoid that rights guaranteed by the TEC would be reduced to principles as a result of the integration of the Charter into the Constitution of the European Union[128]. Rights and principles of the Charter, as it was already said (*supra,* B.II.), guide and give orientation to all European policies which, indeed have to be considered and designed as "human rights policies" all together. It would be too limited to introduce, as proposed by Weiler and McCrudden, a specific human rights policy with corresponding powers and institutions[129].

While for principles and "solidarity"-rights an important instrument of control could be a reporting system on the progress of implementation[130], the great question regarding individual (subjective) rights granted under the Charter is how to provide the adequate judicial remedies. The issue of effective judicial protection has been much discussed, but not necessarily with regard to fundamental rights, though [131]. The final report of Working Group II of the Convention recognises that the issue is broader than just regarding fundamental rights, and it recommends to discuss it in the adequate framework. Yet, the report makes clear that with the Charter as a (first) part of a future Constitutional Treaty the question will become more evident and central. What if fundamental rights are made 'more visible' and individuals still have no direct access to the European Courts? Again the European Union would not live up to the citizen's expectations.

The European system of judicial review is based on the tribunals and courts of the Member States which, in applying European law as an integral part of the body of provisions they are bound to, have the function and loyalty (Article 10 TEC) as European courts[132] and elements of the European multilevel judicial system. Thus, the function of judicial review is decentralised, while the ECJ – together with the CFI – has the final word in questions of interpretation of European legislation and the monopoly for declaring an act of the European Union invalid (Article 234 TEC).[133]

Given the multilevel structure of the European judicial system, the question is whether sufficient legal remedies exist for ensuring that the protection of fundamental rights in the European Union is not just theory but serious in practice. Since it is a condition of the equal application and the unity of European law that to invalidate measures of the European Union shall remain the monopoly of the ECJ and the CFI, direct access for the individual to these Courts in cases of violation of fundamental rights seems to be an appealing solution (infra I.).

---

128 For thorough thoughts on this question, with the example of Article 141 TEC as compared with Article 23 CFR see McCrudden, Cristopher, *supra* note 92: The "rights/principles" question; see also McCrudden, Christopher, *supra* note 49, at 15 et seq., asking, with regard to "solidarity rights", whether "such rights (sc.: are) more appropriately seen as fundamental principles that must be put into effect by specific policies relevant to a particular country against the backdrop of its economic and social development, rather than as rights".

129 McCrudden, Christopher, *supra* note 49, at 14 et seq., with the question whether a Human Rights Commission should be created; see also Weiler, J. H. H., 'Does the European Union Truly Need a Charter of Rights?', *European Law Journal* (2000) 95 et seq. at 97..

130 McCrudden, Christopher, *supra* note 49, at 16, following the example of the European Social Charter.

131 The deficiencies of legal review in the Community were dealt with by the ECJ itself, in the specific context of the fundamental rights, in its Report on certain aspects of the implementation of the TEU (Proceedings of the Court of Justice and the Court of First Instance of the European Communities, n. 15/95), in which it asked whether the requirement of direct and individual concern was enough to guarantee individuals effective judicial protection against the possible violation of their fundamental rights by the activity of the Community institutions.

132 See Pernice, Ingolf, *supra* note 9, at 724 et seq.; see also the national and the general reports to question II.4.c. at the F.I.D.E. Conference 2002 in London, *supra* note 4.

133 See in particular the judgement of the ECJ of22 October 1987, 314/85, *Foto-Frost*, ECR (1987) 4199 et seq..

However, this system would be contrary to the decentralised character of the European system of judicial protection which is based on the judicial dialogue under Article 234 TEC, and the question is whether preference should not be given to a further development of this system (infra II.). Though this solution has many advantages, there is no assurance that the case in fact reaches the ECJ, and the question is how to deal with cases where the national courts do not share the view of the applicants that there is a violation of a fundamental right (infra III.).

I. Direct access for individuals to the ECJ or CFI

The European Union is a "Community of law",[134] based on the rule of law, mentioned in Article 6 (1) TEU, and its institutions are subject to judicial review of their acts on the basis of the Treaties and the general principles of law which include fundamental rights. Effective judicial protection of the rights they derive from the Community legal order. The right to such protection is one of the general principles of law common to the constitutional traditions of the Member States. It is confirmed in Articles 6 and 13 ECHR and now mentioned in Article 47 CFR.

Though effective legal review procedures is a basic principle of the European Union, it is widely criticised[135] that Article 230 (4) TEC restricts actions for annulment to persons to whom a Community act is addressed and to persons to whom it is "of direct and individual" concern.[136] Since the *Plaumann* judgment[137] the ECJ case-law of the has interpreted this phrase as ruling out, in principle, action against acts that are general in scope, even if they directly affect individuals; persons bringing a case would not be individually concerned unless it is affected "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed".

While it could be argued that conditions for direct appeal by individuals to the Community jurisdiction, as defined in Article 230 (4) TEC and interpreted by the above mentioned case-law, are to narrow or inadequate for guaranteeing the fundamental right to effective judicial protection against acts of the institutions, the CFI in its Salamander judgment[138] still says that Community law possesses a comprehensive appeal system providing effective judicial protection, including fundamental rights: Individuals may, according to the circumstances, either challenge a Community act directly, in accordance with Article 230 (4) TEC, or bring an action before a national court against measures implementing the Community

---

134 Judgement of the ECJ of 23 April 1986, 294/83, *Les Verts*; ECR (1986) 1339 et seq. At paragraph 23; for the concept which was developed by Walter Hallstein, see also Pernice, Ingolf, 'Der Beitrag Walter Hallsteins zur Zukunft Europas – Begründung und Konsolidierung der Europäischen Gemeinschaft als Rechtsgemeinschaft', *WHI Paper 9/01*, www.whi-berlin.de/pernice-rechtsgemeinschaft.htm.

135 See instead of all Jacobs, Francis G., 'Access to justice as a fundamental right in European Law', in: RodríguezIglesias, Gil Carlos/Due, Ole/Schintgen, Romain/Elsen, Charles (eds.), *Mélanges en hommage à Fernand Schockweiler* (Nomos Verlagsgesellschaft: Baden-Baden 1999) 197 et seq. at 203.

136 Article 230 (4) TEC reads as follows: *Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.*

137 Judgment of the ECJ of 15 July 1963, 25/62, *Plaumann*, ECR (1963) 211 et seq. at paragraph 8.

138 Judgment of the CFI of 27 June 2000, joined cases T-172/98 and T-175/98 to 177/98, *Salamander et al v Parliament and Council*, published at http://curia.eu.int. The CFI rejected direct actions by private undertakings against the directive on tobacco advertisements under Article 230 (4) TEC. By this the CFI reaffirms respects the existing system of judicial review which accords different responsibilities to national and European courts, see Schwarze, Jürgen, 'Judicial Review in EC law – Some reflections on the origins and the actual legal situation', *ICLQ* (2002) 17 et seq. at 27.

act, the national court being in a position – or under an obligation – to make a preliminary referral to the ECJ (Article 234 TEC) in order to check the validity of the Community act. It then rests with the Member States, under Article 10 TEC, to provide for legal remedies at national level that leave no gaps in this indirect control of act of the institutions.

However, in a more recent decision, the CFI attempted to change this previous jurisdiction of the ECJ. In the Jégo-Quéré et Cie SA judgment[139] the CFI held that

> *"natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard."*[140]

The CFI finds that Articles 234, 235 and 288 (2) TEC can no longer be regarded, in the light of Articles 6 and 13 ECHR and of Article 47 CFR, as guaranteeing persons the right to an effective remedy enabling then to contest the legality of Community measures of general application which directly affect their legal situation.[141] It also rules, though, that the CFI could not change the system of remedies and procedures established by the Treaties. However, it believes the strict reading of the notion of a person individually concerned must be reconsidered.

A few weeks before Advocate General Jacobs proposed in his Opinion in the Union de Pequenos Agricultores v Council case[142] exactly the same change in the strict interpretation of Article 230 (4) TEC. He suggested that an individual concern in the terms of Article 230 (4) TEC should be accepted

> *"where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests."*[143]

The ECJ in its Union de Pequenos Agricultores judgment of 25 July 2002, however, rejects the proposal of Advocate Genaral Jacobs. It holds that

> *"it is for Member States to establish a system of legal remedies and procedures which ensure the respect for the right to effective judicial protection."*[144]

In accordance to its previous rulings it reaffirms the restrictive reading of the notion started in 1963 in the Plaumann Case. Persons are individually concerned

> *"where the measure in question affects specific natural or legal persons by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee"*[145]

---

139 Judgement of the CFI of 3 May 2002, case T-177/01, *Jégo-Quére et Cie SA v Commission of the European Communities*, published at http://curia.eu.int.

140 CFI, *supra* note 139 at paragraph 51.

141 See CFI, *supra* note 139 at paragraph 47. An interesting reasoning since the CFI cites the ECHR and the CFR in order to diverge from its previous jurisdiction.

142 Conclusions of Advocate General Francis Jacobs delivered on 21 March 2002 in Case C-50/00 P, *Union den Pequenios Agriclutores v Council*, http://curia.eu.int.

143 Conclusions of Advocate General Francis Jacobs, *supra* note 142 at paragraph 60.

144 ECJ, judgment of 25 July 2002, C-50/00 P, *Union de Pequenos Agricultores v Council of the European Union*, published at http://curia.eu.int, at paragraph 41.

Thus, the ECJ did not take the chance to diverge from previous rulings. On the contrary, it emphasises that the existing system of judicial review within the European Union cannot be changed by the courts, but only by the legislature, that is the Member States.[146]

Yet, it confirms that the Community was based on the rule of law in which its institutions were subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals were therefore entitled to effective judicial protection of the rights. But it finds, like the CFI in its Salamander-case[147] that the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions with Articles 288/235 and 234 TEC.[148] Confirming the earlier case law, the ECJ refers to Article 10 TEC and holds that it is a question of the national court system and not that of the ECJ or the Treaties to provide for effective judicial review in the Member States. In consequence the ECJ concludes that is for the Member States to ensure that individuals can plead the illegality of a Community act by enabling them to challenge the legality of any decision or other national measure relative to the Community act before national courts.[149]

As the ECJ is not willing to adopt a new interpretation of the notion of individual concern laid down in Article 230 TEC, the need for an effective remedy has been pointed out in several recent writings.[150] *De lege ferenda*, it has been suggested to provide for direct access to the ECJ in matters of fundamental rights through a new remedy, copied from the German and Spanish systems: a "constitutional complaint".[151] Individuals who's fundamental rights are violated by an act of the European Union, legislative, administrative or even judicial, and who have no judicial remedy – or exhausted the remedies provided under national law – may apply to the ECJ to declare that act null and void. This solution would, in a certain way, fill the gap which seems to exist since the restrictive Plaumann-jurisdiction. It would, however, increase the workload of the ECJ considerably and – like in the Member States mentioned – lead to an excessive duration of the procedures and the frustration of most of the applicants.

II. Remedies for the respect of fundamental rights under Article 234 TEC

The decentralised system indicated by the ECJ, therefore, which is based upon the judicial dialogue under Article 234 TEC, the scrutiny of any national court on the compatibility of an European Union's act with the fundamental rights, but the monopoly of the ECJ to declare it void in a given case, seem to be the more adequate solution. The problem here is that the final decision of allowing the intervention of the ECJ is in the hands of the national judge. His eventual infringement of the obligation to address Luxembourg may only be corrected de facto

145 ECJ, *Plaumann* judgement, *supra* note 137, at paragraph 8. .

146 ECJ, *supra* note 144, at paragraph 45.

147 See *supra* note 138.

148 ECJ, *supra* note 144, at paragraph 40.

149 ECJ, *supra* note 144, at paragraph 42.

150 See Altmaier, Peter, *supra* note 76, at 207; de Witte, Bruno, *supra* note 58, at 89; Müller-Graff, Peter-Christian, 'Europäische Verfassung und Grundrechtscharta: die Europäische Union als transnationales Gemeinwesen', *Integration* (2000) 34 et seq. at 43; Rengeling, Hans-Werner, *supra* note 43, at 237; Weber, Albrecht, *supra* note 70, at 544.

151 See Calliess, Christian, *supra* note 75, at 268; Pernice, Ingolf, *supra* note 3, at 858; Reich, Norbert, 'Zur Notwendigkeit einer Europäischen Grundrechtsbeschwerde', *Zeitschrift für Rechtspolitik* (2000) 375 et seq. at 378; A *Verfassungsbeschwerde* is suggested against the background that preliminary rulings can only be enforced if capriciously or arbitrary left aside by national courts by Mahlmann, Matthias, *supra* note 81, at 441.

by resorting to the remedies that may be offered to this end by the national legal orders. It is an essential feature of procedure under Article 234 TEC that the applicant has no right to decide whether or not the national court makes a reference, which measures are referred for review or what grounds of invalidity are raised. Under Article 234 TEC the individual has no right of access to the ECJ; on the other hand, the national court cannot declare the general measure in issue invalid.[152]

According to the established case law of the German Federal Constitutional Court, a refusal of a court to refer a case to the ECJ can be challenged before the Federal Constitutional Court for denial of the access to the right judge (Article 101 (1) of the German Constitution) only in case the decision was evidently arbitrary.[153] However, in a decision of 9 January 2001 it held that in cases of an alleged violation of fundamental rights there is an obligation to refer to the ECJ and a violation of the German Constitution in case of an undue refusal.[154] The case dealt with the equal treatment of men and women in professional life. A woman working part-time as a physician during of her medical education requested the acknowledgement of the title 'practical physician', while a European directive provides that this title can only be given if that part of the education was in full-time employment. The allegation was that this provision was an indirect sexual discrimination. The Federal Constitutional Court ruled that the Federal Administrative Court was wrong to omit to request a preliminary ruling from the ECJ whether the condition in this directive is compatible with fundamental rights granted by Community law. Given that national courts are not entitled to judge on the validity of a European act, it argued that reference to the ECJ is the only way to ensure effective judicial protection of the fundamental rights of the individual, and that the procedural rights under Article 101 (1) of the German Constitution require the national courts to give access to this control.

This solution shows the way which could be followed generally by the Member States when they, as proposed by some Members of Working Group II of the Convention, would be bound to provide for effective remedies for the protection of rights derived from European Union law. This decentralised solution would be in conformity with the general wish of the Working Group to maintain the present overall system of remedies, and the "division of work" between the Community and national courts it entails, but there would be no European remedy to enforce the national courts to proceed under Article 234 TEC in a given case.

III. Enforcement of the access to the ECJ under Article 234 TEC

Thus in Germany citizens have access to a proper multi-layered system for the protection of fundamental rights. But what are exactly the criteria, and what about other Member States? To leave the decision on these issues to the Member States may be in line with the principle of subsidiarity and ensure that only serious cases are submitted to the ECJ. In view of a uniform, European-wide system of fundamental rights protection and an equal standard in legal review, it

---

[152] See the conclusions of Advocate General Francis Jacobs, *supra* note 142, at paragraph 56 et seq. and 102, an argument also supported by Reich, Norbert, *supra* note 151, at 376.

[153] Article 100 (1) German Basic Law.

[154] See the *Teilzeit* judgement of the Bundesverfassungsgericht, *supra* note 69, at paragraph 24: *„Denn der Grundrechtsschutz der Beschwerdeführerin liefe ins Leere, wenn das Bundesverfassungsgerichtmangels Zuständigkeit keine materielle Prüfung anhand der Grundrechte vornehmen kann und der Europäische Gerichtshof mangels Vorabentscheidungsersuchens nicht die Möglichkeit erhält, sekundäres Gemeinschaftsrecht anhand der für die Gemeinschaften entwickelten Grundrechtsverbürgungen zu überprüfen. In Fällen dieser Art verletzt das letztinstanzlich zuständige Fachgericht Art. 101 Abs. 1 Satz 2 GG durch eine Nichtvorlage an den Europäischen Gerichtshof."*

is difficult, however, to accept that the access to effective remedy depends on the various national procedures and requirements. While in one Member State citizens could achieve the judgement of the European Courts on their cases and successfully defend their rights and freedoms, in the other Member State they might not. This is not what equal application of European law means.

As a remedy one could think of amending Article 234 TEC to make sure that if national courts do not refer a case of alleged violation of a fundamental right to the ECJ applicants should be able to appeal to the ECJ.[155] So the ECJ could rule on whether or not a national court has fulfilled its obligation under Article 234 TEC. The problem of this solution is that an appeal against the refusal of the national court would alter the philosophy of co-operation which currently determines the mechanism of preliminary ruling.[156] Yet, could a national supreme court like the German Federal Constitutional Court really be forced by the ECJ on the complaint of an individual to refer a case to the ECJ? The present system broadly is based on a clear division of responsibilities: Except for the infringement procedure (Article 226 TEC) the ECJ does not scrutinise national measures, and national courts have no competence to invalidate European measures. The right of appeal to the ECJ against a decision of a national (supreme) court would, in addition, create a hierarchy between courts which are not, so far, meant to be in a hierarchical order. The European composed constitutional system is, by nature, not hierarchical but co-operative.[157] Consequently, a right of appeal would not comply with this very basis of the system and would hardly be accepted by any of the "supreme courts" of the Member States.

There is, finally, no alternative to a direct access to the ECJ for the individual in case the national courts refuse the reference to the ECJ although an infringement of a fundamental right has been alleged. The applicant should have to show that national courts have refused to refer the case to the ECJ and why such violation exists. The ECJ would than have to judge on the compatibility of the European act in question, but not on the substance of the decisions of the national court. The national court should, nevertheless, be bound to wait for the judgement of the ECJ in the case, before giving its final judgement. The field of application of such "direct reference" would not be as broad as the "constitutional complaint" discussed above, but it would overcome the gap of judicial protection of European fundamental rights as it exists in the present system.

García makes an interesting remark: in his eyes accession to the ECHR would call for a guaranteed prior intervention by the ECJ prior to a complaint to the ECHR.[158] He therefore thinks the time has come to call for a substantial reform of the judicial system of the European Union as part of the constitutionalisation process.[159] The "direct reference" proposed would not be a substantial change, but sufficient to ensure the effective protection of fundamental rights by the ECJ.

---

155 See Magiera, Siegfried, *supra* note 24, at 1024.

156 See the judgement of the ECJ of 1 December 1965, 16/65, *Schwarze*, ECR (1965) 1151 et seq at 1165 et seq..

157 See Pernice, Ingolf, *supra* note 11, 147 and 185 et seq.; see also Peters, Anne, Elemente einer Theorie der Europäischen Verfassung (Duncker & Humblot: Berlin 2001) at 253 et seq. with more references.

158 See García, Ricardo Alonso, *supra* note 41, at 18.

159 See García, Ricardo Alonso, *supra* note 41, at 21.

E. Conclusions

The Charter cannot be incorporated as such in a European Union Constitutional Treaty. There is a need for accommodating its preamble with the preambles of the TEU/TEC. A number of the final clauses need to – or could – be deleted, the others should rather introduce the chapter on fundamental rights than stay as final clauses. Articles 36 to 38 CFR should be deleted as they restate with slightly different wording important principles already included in the TEC. To include the greatest part of the Articles of the Charter as such into a Constitutional Treaty, provided some drafting adaptations are inserted, would be possible and important to show the limits and to give guidance to the exercise of the powers conferred to the European Union. No restriction should be made – after the merger of the three pillars of the European Union – to the jurisdiction of the ECJ for the effective protection of these fundamental rights. Though there will be a strong harmonising effect through the interaction of the national and European systems for the protection of fundamental rights in the composed constitution of the European Union, responsibilities will remain divided. National courts are competent to scrutinise the compatibility of European and national implementing measures with the fundamental rights, but it is the task only of the EFI and the ECJ to invalidate European measures violating fundamental rights. To ensure that a definitive refusal of a national court to refer a case to the ECJ under Article 234 TEC and so, to give the applicant access to the ECJ, it is proposed for the sake of effective judicial protection of the fundamental rights, *de lege ferenda*, to install a "direct reference" for a judgement on the validity of the European measure in question.

F. Recommendations

1. The Charter must be the basis and foundation of whatever may become the Constitution of the European Union. Fundamental rights are – apart from the division of powers – one of the two basic elements of what, traditionally, is a Constitution. They are the expression in the European *social contract* on the common values applied by the citizens of the European Union, safeguard for their individual autonomy and political status in this Community, guideline and orientation for the European policies, and a signal to the outside world on the central place of the individual in our political system.
2. Notwithstanding valid criticisms regarding the drafting and the efficiency of the particular guarantees, the fundamental rights listed in the Charter should – without modification in substance – become legally binding as an integral part, and be placed on top of the European Union Constitution. The protection of fundamental rights as developed by the ECJ on the basis of the ECHR and the constitutional traditions of the Member States will, thus, get its place in the system and be more transparent. The fundamental rights laid down in the Charter should apply to the full range of activities of the European Union, including those of the current pillars two and three.
3. The accession of the European Union to the ECHR should be regarded as a complementary instrument for the effective protection of fundamental rights in the European Union as it is in each contracting party of the Council of Europe. Even after accession of the European Union to the ECHR there will be, however, no hierarchy between the two legal systems: Though the substantial provisions of the ECHR may be considered as part of the binding law of the European Union, Article 52 (3) CFR makes clear that the provisions of the Charter prevail, and ensures that their contents is the same as that of the corresponding provisions of the ECHR.

4. While Article 53 CFR aims at ensuring that the Charter as a new instrument of the European Union does not affect the protection of human rights by other instruments – national, European or international – in their respective field of application, divergent views of the Courts in Strasbourg and Luxembourg and divergent levels of protection are not excluded. Accession of the European Union to the ECHR would prevent the indirect liability of the Member States for violations of the ECHR by the European Union and allow the European Union to have a judge at, and defend its cases before the Strasbourg Court on its own.

5. The Preamble of the Charter should be the basis for a Preamble of the Constitution of the European Union. But it should be completed by some recitals of the existing Treaties pointing out the special missions and structure of this Constitution which is, in fact, a component of a composed constitutional system, and complementary to the national Constitutions. The Preamble should emphasise more expressly that the European citizens are at the origin of legitimacy of this Constitution and the exercise of any authority entrusted to the European institutions. It could read as follows:

> *"WE, THE CITIZENS OF THE MEMBER STATES OF THE EUROPEAN UNION, recalling the historic importance of the ending of the division of the European continent and the need to establish firm bases for the construction of the future Europe,*
>
> *having given us the status of citizens of the Union, confirming the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations, pooling our resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,*
>
> *are resolved to share a peaceful future based on common values, in creating an ever closer union among us,*
>
> *HAVE DECIDED to establish a European Union which*
>
> *- conscious of its spiritual and moral heritage, is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.*
>
> *- contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment.*
>
> *- strives to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments, while enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations,*
>
> *AND TO THIS END HAVE DESIGNATED AS THEIR PLENIPOTENTIARIES ...*

6. The restriction in Article 51 (1) CFR on the application of the Charter only to Member States' measures implementing European Union law should be clarified so as to include all measures "in the scope of Union law", but exclude national measures to the extent that a discretion is left to the Member States in implementing directives of the European Union. The addendum to Article 51 (1) proposed by WG II restates only what is already said by the phrase: "...in accordance with their respective powers". On the other hand, the extension of Article 51 (2) CFR as proposed by WG II would not change the declaratory nature of this

provision. If there is a need for such declaration, this provision may be added to the current Article 5 (1) TEC.

7. The integration of the Charter as such into the Constitution would lead to repetitions, replications or restatements of specific rights or principles and create legal uncertainty. Provisions on market freedoms and specific citizen's rights like on European and municipal elections or diplomatic protection should, therefore, be left to other chapters of the Constitution, while non-discrimination rules, access to documents and petition rights should remain part – and be part only - of the chapter on fundamental rights. Accordingly, Article 36 CFR on services of general economic interest, which restates Article 16 TEC, Article 37 CFR on environmental protection, which repeats with a slightly simplified wording the provisions of Article 6 TEC, and Article 38 CFR on consumer protection, which takes up the thrust of Article 153 (2) TEC, should rather be included in the chapter on principles and objectives than in the chapter on fundamental "rights". If no parallel provisions exist, Article 52 (2) CFR could be deleted.

8. Article 53 CFR is not intended to threaten the supremacy of community law. The Charter is an instrument of individual rights which are added to those guaranteed under national law and could not affect their application. Article 53 CFR does not address conflicts of norms outside the sphere of the Charter nor does it confer the competence to challenge the validity of European law to national courts. Should there exist any risk that it is read as limiting or questioning the principle of supremacy, Article 53 CFR should be dropped or amended, or a special provision should be included among the principles of the Treaty – as suggested in Article 8 (2) of the Preliminary draft Constitutional Treaty submitted by the Presidency of the Convention – to restate the primacy of European law.

9. While Articles 41 (good administration), 42 (access to documents), 43 and 44 (Ombudsman, petition) of the Charter have a general scope and can be qualified as procedural fundamental rights to be part of the Constitution's chapter on fundamental rights, the specific rights defining the political status of the citizens of the European Union - like those on citizenship of the European Union and their status of equality related to it - should be listed in a separate chapter. There should be no hierarchy of values in the Constitution, regardless of their appearance as individual rights in general, rights of the citizens, principles or objectives of the European Union.

10. Certain provisions of the Charter guarantee rights only in the cases and under the conditions provided for by Community law and/or national law and practice (Articles 9: marriage, 10 (2): conscientious objection, 14 (3): educational establishments, Article 16: business, Articles 27 (2), 28 and 30: worker's rights, and Article 34: social security and assistance). With regard to national law and practices, they function as an additional barrier to the exercise of the competencies of the European Union. Insofar as they refer to Community law, they compel the European legislator – within the limits of the competencies conferred to it – to maintain and develop further the relevant provisions of European law with a view to give effect to the respective fundamental rights. A new Article 52 (5) as proposed by WG II, limiting judicial cognisance of these rights to be criteria only regarding the interpretation and validity of acts implementing European Union law could be useful to exclude any doubts on their legal effect.

11. Fundamental rights without efficient judicial remedies would not be worth the paper they are written on. Remedies should be secured in cases of alleged violations of the individual rights granted in the Charter with regard to whatever activity of the European Union is questioned from pillar one to three. The revision of Article 230 (4) TEC to the effect that a

"constitutional complaint" to the ECJ is established for individuals who are directly affected by an – even legislative – act of the European Union, however, could result in an excessive workload of the ECJ, longer duration of procedures and frustration of the applicants.

12. The decentralised system of judicial protection established by the TEC and based on the judicial dialogue between the national judiciary and the ECJ should be used and developed further to provide efficient judicial remedies in all cases of alleged violations of European fundamental rights regarding individual as well as legislative measures of the European Union or implementing such measures. In case a national Court does not refer the alleged violation of a fundamental right to the ECJ, and no other remedy is available, there should be provisions for a "direct reference" by the applicant to the ECJ under a new paragraph of Article 234 TEC.