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THE FUTURE OF THE CHARTER AND INSTITUTIONAL ARRANGEMENTS FOR THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE MEMBER STATES

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EXECUTIVE SUMMARY

As part of the debate on the possible future incorporation of the Charter of Fundamental Rights of the European Union into the Treaty and the accession of the European Union to the European Convention on Human Rights (ECHR), this note – requested as a backup to the work of the Task Force on the Convention on the Future of Europe – is first and foremost intended to summarise the Charter's current legal status and the issues raised by the various options being considered with a view to making it legally binding.

The study draws the conclusion that the Charter, drafted as if it was to become binding, functions in fact "as if" it had the strength of a legal provision, but only indirectly. Its integration into the treaties is not yet acquired; if it were retained by the Convention and the next intergovernmental Conference, certain horizontal provisions should probably be re-examined. However, these paragraphs were important for the balance of the final text and made it possible for certain Member States to accept it.

In addition, full integration would probably require an amendment of the treaties to the requirements of the Charter, both as regards the contents and the procedural aspects. It would be necessary to examine duplication of certain provisions of the Treaty with those of the Charter, as well as possibilities to improve judicial protection of individual citizens in fields where it still is either non-existent, or imperfect.

Secondly, the document contains a comparative summary of the manner in which fundamental rights are currently defined – at institutional level – in each of the Member States and how respect for these rights is enforced at judicial level.

This second part focuses on the following aspects:

- the nature of the legal texts in which the fundamental rights are enshrined,
- the issue of checking the constitutionality of laws,
- the role of the European Convention on Human Rights and its application at domestic level.

I. The future of the Charter of Fundamental Rights

1. Recent developments

The conclusions of the Cologne European Council meeting of 3 and 4 June 1999 state that, once the Charter of Fundamental Rights has been drafted, it will *'have to be considered whether and, if so, how the Charter should be integrated into the Treaties'*. This is one of the points which, under the terms of Declaration 23 annexed to the Treaty of Nice, must be thoroughly examined within the current proceedings of the Convention on the Future of Europe.

The European Parliament has, on several occasions, voted in favour of integrating the Charter into the Treaties[1]. In its resolution of 16 March 2000 on the drafting of a European Union Charter of Fundamental Rights, Parliament calls for the Charter to have

> '... fully binding legal status by being incorporated into the Treaty on European Union' (paragraph 7(a)).

The declaration adopted by the European Council in Laeken in December 2001 takes up this idea and even adds a link with the Convention on Human Rights:

> 'Thought would also have to be given to 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.'

It is therefore clear that these proposals must be seen as complementing each other, rather than as two alternatives.

The issue of EU accession to the ECHR has been the subject of repeated lengthy debates not only among legal experts, but also of course within the Community institutions and the Council of Europe. In March 2001 the Council of Europe Committee of Ministers instructed a working group to draw up a study on legal and technical issues relating to the possible accession of the Union (and/or the Communities) to the ECHR. This study is due to be completed by the end of the year[2].

As for the European Convention, set up by the Laeken European Council and chaired by Mr Valéry Giscard d'Estaing[3], it recently set up six working groups, one of which, chaired by Commissioner Antonio Vitorino, will be responsible for addressing the issue of the incorporation

[1] See, in particular, its two resolutions of 16 March 2000 (OJ C 377, 29.12.2000, pp. 170 and 329) and 14 November 2000 (OJ C 364, 18.12.2000, p. 1) based on the reports of the Committee on Constitutional Affairs A5-0064/2000 and A5-0325/2000 (rapporteurs: Andrew Duff and Johannes Voggenhuber).

[2] Working Group on legal and technical issues of possible EC/EU accession to the European Convention on Human Rights (GT-DH-EU); see Council of Europe, *Human Rights Information Bulletin*, No 55, November 2001-February 2002, p. 21.

[3] The first meeting took place on 28 February 2002, and its work is due to be completed by March 2003.

of the Charter of Fundamental Rights as part of the next revision of the Treaties. The group has been asked to submit the results of its work by October or November[4].

The European Parliament's Committee on Constitutional Affairs, for its part, has been authorised to submit an own-initiative report dealing with the recent impact of the Charter on the Court's decisions and the Commission's legislative proposals (rapporteur: Mr Andrew Duff).

Before considering some of the options regarding the Charter's future status within EU law, we should briefly take a closer look at the raison d'être of the Charter of Fundamental Rights, what it actually consists of at present and how it is applied.

2. Why do we need a Charter of Fundamental Rights?

At the Nice European Council meeting, on 7 December 2000, the Union institutions (European Parliament, Council and Commission) proclaimed the Charter of Fundamental Rights of the European Union, drafted by a Convention composed of representatives of the governments and parliaments. Views on the significance of this event vary. Some still wonder whether this Charter is really necessary, especially as fundamental rights are extensively guaranteed in the Union and its Member States. Others believe that the Charter will strengthen the protection of fundamental rights because it formulates them in a language which is clear and comprehensible to all Union citizens, thus fostering confidence in the Union's common legal order.

Even without a Charter of Fundamental Rights, the validity of fundamental rights is undisputed at Union level. It is generally acknowledged that the European Court of Justice in Luxembourg has been providing adequate protection from abuse of the Union's sovereign power. The Court of Justice ensures that Union laws and decisions are compatible with fundamental rights, as they result from the constitutional traditions common to the Member States, as general principles of Union law (Article 6 of the Treaty on European Union). Even acts of Member States are subject to this examination, insofar as they apply or transpose Union law. Only national provisions on fundamental rights apply in purely national areas of legislation.

For instance, the German Federal Constitutional Court has, according to W. Dix, expressly recognised that:

> 'the Court of Justice guarantees protection of fundamental rights largely comparable to that provided by the German Basic Law. However, there is a fundamental difference: while the Basic Law, just like most state constitutions, contains detailed provisions on fundamental rights, the Treaty on European Union merely refers to the aforementioned legal sources (Article 6). This approach is not really transparent and in its impact scarcely predictable for citizens, especially as there are already 15, and ultimately there will be more than 25, different legal traditions which have to grow together. Judges from all Member States, on whom these traditions have had a formative influence, decide in the current 11 official languages on the substance of the Union's existing

[4] This working group's mandate was laid down in document CONV 72/02. In accordance with the Laeken Declaration, there are two aspects to the mandate:
- the procedures for and consequences of any incorporation of the Charter into the Treaties
- the consequences of any accession by the Community/Union to the European Convention on Human Rights.
Mr Vitorino proposes addressing these aspects 'separately and in turn'.

> fundamental rights. It therefore makes sense to present to citizens a list of all their fundamental rights, thus strengthening their confidence in the common legal order. The aim is not to rectify a lack of legal protection but, rather, to achieve greater legitimacy for an ever more comprehensive common legal order. For this reason, the European Parliament and individual national parliaments, particularly the German Bundestag, have long since been calling for a catalogue of fundamental rights for the European Union[5].

The very proclamation of the Charter will make the protection of fundamental rights at Union level more visible and comprehensible to everybody. In future, the European Court of Justice will also be able to cite the Charter when examining the compatibility of a Community act with fundamental rights. This has led some to ask why the Charter should be incorporated into the Treaty, as advocated by a majority of Member States. Others argue that it would be a retrograde step if the European Union, whose Member States aspire to help ensure that human rights are respected globally, were to make do with a legally non-binding proclamation of these rights. A text of such fundamental importance is, in their view, due a corresponding legal status. Unlike a proclamation, which merely provides courts with interpretation guidelines, a Treaty text is obviously legally binding and must be applied verbatim by the Courts.

3. The Charter at present

European citizens invoke the Charter more and more frequently in their various dealings with the Union institutions. The European Parliament and the Commission receive a huge number of complaints, petitions and letters referring pertinently to the Charter. Legal experts also increasingly invoke the Charter in their dealings with the Union's judicial bodies, and the Court of Justice Advocates-General regularly mention it in their conclusions, while pointing out that it is not legally binding. The Court of First Instance made an explicit reference to the Charter, for the first time since its proclamation, in a ruling of 30 January 2002.

At present, the Charter's significance can be summed up in three points:

- In terms of its form, the Charter has been inserted into an instrument described by some as an interinstitutional agreement, which is the result of what has become a customary practice in the Community: Parliament, the Council and the Commission may, in order to facilitate the implementation of provisions of the EC Treaty, conclude agreements by which they commit themselves mutually. The Charter resulted from this type of procedure even though the actual drafting process before it was proclaimed by the three institutions was very different from that which normally applies in the case of such agreements.
- A second feature of the Charter concerns the objectives assigned to the body responsible for its drafting, i.e. the Convention. Under the terms of the conclusions of the Cologne European Council, in June 1999, the Charter should

> 'contain the fundamental rights and freedoms as well as basic procedural rights guaranteed by the European Convention for the protection of human rights and fundamental freedoms and derived from the constitutional traditions common to the Member States, as general principles of Community law'.

[5] W. Dix, "Charte des droits fondamentaux et Convention", *Revue du Marche Commun et de l'UE*, No. 448, May 2001, p. 305.

From this point of view, the Charter may be considered, in so far as it makes fundamental rights more 'visible', essentially to formulate the general principles of Community law.

- Lastly, the proclamation of a Charter of Fundamental Rights, drawn up by a Convention composed not only of representatives of the Heads of State and Government but also of representatives of the European Parliament, the national parliaments and the Commission, is of considerable political and even constitutional significance, even if it has, as yet, no legally binding force. This proclamation is therefore a significant step towards the constitutionalisation of the Union, as a democratic political entity.

These aspects of the Charter are highlighted by the manner in which it is currently applied.

a) Application by the European institutions

As seen above, the Charter is considered by some as an interinstitutional agreement between Parliament, the Council and the Commission. This type of act is politically and morally binding on the institutions involved even though it does not create any rights or duties for third parties, Member States or other subjects of Community law. The Commission and the European Parliament have specified the significance they attach to their commitment in signing the Charter, especially with regard to their legislative activities.

The Commission

In two communications of 13 September 2000 and 11 October 2000[6], the Commission made it clear that the Charter should eventually be incorporated into the Treaties and that the text of the Charter would automatically have an impact, including legal implications, from the time of its proclamation. This viewpoint was confirmed by President Prodi in his speech on the occasion of the proclamation of the Charter: *'In the eyes of the European Commission, by proclaiming the Charter of Fundamental Rights, the European Union institutions have committed themselves to respecting the Charter in everything they do and in every policy they promote'*[7]. On 13 March 2001, the Commission decided that all future proposals for legislation and other statutory provisions would be made subject to prior verification of their compatibility with the Charter. All proposals for legislation and other statutory provisions having a specific link with fundamental rights will contain an additional recital specifying that the act complies with the rights and principles contained in the Charter. This verification is now applied, in particular in areas such as asylum, immigration policy and cooperation in criminal matters, which were established as priorities by the Tampere European Council (October 1999).

The Council and Parliament, as co-legislators, will be required to examine Commission proposals, including the recitals relating to the Charter. With respect to texts under the second pillar (foreign and security policy), responsibility for any references to the Charter will lie with the Council since the Commission has no power of initiative and Parliament is merely kept informed. Under the third pillar (justice and home affairs), on the other hand, the Commission does have certain powers of initiative.

[6] COM(2000)559 and COM(2000)644.
[7] Statement to the European Parliament of 12 December 2000.

The European Parliament

The European Parliament's attitude was spelt out by its president in the speech she gave at the proclamation ceremony: '*...from now on, even it this meant anticipating this full legal transcription in the Treaty, the Charter will be the law guiding the actions of the Assembly (...) elected by universal suffrage. From now on it will be the point of reference for all the Parliament acts which have a direct or indirect bearing on the lives of citizens throughout the Union. It represents a commitment on our part*'[8]. It may be concluded that, as regards references to the Charter in legislation, Parliament should in future be as vigilant as the Commission.

b) Prospects for application by the Court of Justice

The fact that the Charter has no legal force in no way prevents plaintiffs from referring to it in a national or Community court, nor, of course, of using it as a source of inspiration. The Court of Justice of the European Communities has on many occasions used texts of different origins for judgments seeking to protect fundamental rights, basing its decisions on what it considered to be general principles of Community law. Consequently, the Charter should be seen as the most complete expression of those general principles. The Advocates-General have already, on various occasions, shown the importance they attach to the Charter[9]. The Court of First Instance has also referred to the Charter in two of its rulings[10].

Positions of the Advocates-General

Significantly, a number of Advocates-General invoke the Charter as the expression of the fundamental principles of Community law. In his conclusions on a referral for a preliminary ruling by the *High Court of Justice* of England and Wales on a case relating to the interpretation of the directive on the organisation of working time and, more specifically, the rules governing the right to paid annual leave, Advocate-General Tizzano stated that

> 'in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved - Member States, institutions, natural and legal persons - in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right' (Article 31(2) of the Charter)[11].

This is a very firm statement in favour of the Charter as an expression of the fundamental rights applicable in the Community and applying to everyone, and as a basis for interpreting a directive, even though the Charter has not been incorporated into the Treaties.

The position adopted by Advocate-General Léger in a case relating to the right of access to documents of the institutions, which Article 42 of the Charter lays down as a fundamental right, is also extremely firm:

[8] Speech by the President, Mrs Nicole Fontaine, at the Nice European Council (7 December 2000).
[9] A list of cases is contained in European Convention document CONV 116/02 WG II 1, p. 4.
[10] Judgments of 30 January 2002, T-54/99, *Max-mobil*, and 3 May 2002, T-177/01, *Jégo-Quéré* (see below).
[11] Case C-173/99, *BECTU v. Secretary of State for Trade and Industry*; conclusions presented on 8 February 2001.

> 'Naturally, the clearly-expressed wish of the authors of the Charter not to endow it with binding legal force should not be overlooked. However, aside from any consideration regarding its legislative scope, the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without any moral consequences. It should be noted that those values have in common the fact of being unanimously shared by the Member States, which have chosen to make them more visible by placing them in a charter in order to increase their protection. The Charter has undeniably placed the rights which form its subject matter at the highest level of values common to the Member States. (…) 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[12].

It is also worth noting the conclusions delivered by Advocate-General Jacobs on 14 June 2001 in a case relating to the legal protection of biotechnological inventions (*Kingdom of the Netherlands v. European Parliament and Council of the European Union*)[13].

In these examples, the Charter is not used as an independent source of Community law, but as a useful expression of fundamental rights which it is the judge's responsibility to enforce. The most explicit conclusions highlight the Charter's clear purpose of serving as a point of reference for all those involved - Member States, institutions, natural and legal persons - 'in the Community context'. The Advocates-General have had no hesitation in considering the Charter to be the expression of fundamental rights of the European Union.

Judgments

To date, there is no explicit position of the Court of Justice on the Charter. On the other hand, as mentioned above, the Court of First Instance has already referred to the Charter in a number of cases. In the *Mannesmann Röhren-Werke AG v. Commission* case[14], relating to competition and the right to refuse to provide answers that imply admission of an infringement (issue of self-incrimination), the applicant asked the Court at a very late stage to have regard to the Charter proclaimed in Nice on 7 December 2000

> 'on the grounds that the Charter constituted a new point of law concerning the applicability of Article 6(1) of the ECHR'.

This was in fact an opportunity to test the impact of Article 52(3) of the Charter (*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention*'). The Court ruled that the Charter

> 'can therefore be of no consequence for the purposes of review of the contested measure, which was adopted prior to that date'.

Conversely, this statement could be interpreted as implicitly recognising the argument that respect for the Charter is binding on the Commission with regard to measures adopted after its proclamation. However, the Court of Justice, in the ruling it delivered on the aforementioned

[12] Case C-353/99, *Council v. Hautala et al.*; conclusions delivered on 10 July 2001.
[13] C-377/98; judgment of 9 October 2001.
[14] T-112/98 of 20 February 2001.

BECTU case, chose not to mention the Charter but instead based its arguments on the 1989 Community Charter of the Basic Social Rights of Workers[15], concluding that the right to annual paid leave constituted a '*particularly important principle of Community social law*'.

In each of these cases, the circumstances were probably not ideal for introducing a reference to the Charter for the first time. The wide variety of legal systems of protection of fundamental rights does not help to make the system coherent. Thus:

> '*The Charter of Fundamental Rights builds upon but does not intend to replace the many sources and systems of protection of fundamental rights which co-exist in Europe (…) This might seem as paradoxical. After all, the idea of law is related to that of providing one single normative orientation in each case, and this seems to be contradictory with pluralism in sources of law. That is especially so if one takes into account that the plurality of systems of fundamental rights protection which apply concurrently have developed their own institutions in charge of monitoring compliance and adjudicating about eventual doubts concerning the breadth and scope of the rights. In that sense, some argue that it is rather unavoidable to ask who will have the last word*'[16].

This last question clearly leads us to the question of the EU's accession to the ECHR, which we will look at more closely further on.

4. What future status for the Charter?

As we have mentioned, the Declaration on the Future of Europe, adopted at the Nice Intergovernmental Conference, and the Laeken Declaration provide for examination of the issue of the Charter's status as part of the revision process. The first option would be to do nothing. Legally, and in the light of what has been explained above, the Charter would continue to exert a persuasive influence on holders of legislative power in the Union. Its position would gradually evolve and political use could be made of the Charter as a point of reference with respect to democracy and respect for fundamental freedoms.

However, it is questionable whether the *status quo* is still actually possible as regards the Charter's status. According to certain academics, the adoption of the Charter of Fundamental Rights of the European Union has given rise to a paradox: on the one hand, its similarity to the ECHR is such that one cannot avoid the issue of how to ensure coherent supervision (with accession to the Convention as a logical solution) and, on the other, the likely constitutionalisation of the Charter, which will lead to an acceptance of its justiciability in the Community order, would be an argument in favour of giving the Union system a degree of autonomy.

At the time of the drafting of the Charter, the Heads of State and Government were politically opposed to incorporating the Charter into the Treaties. However, the institutional adjustment which is taking place through the proceedings of the Convention on the future of Europe should make the Charter's future clearer. If anything is to be done to incorporate the Charter into the Treaties, it is important that the possible options and their implications be analysed. Different

[15] Adopted in the form of a declaration by the Member States.
[16] A.J. Menéndez, "Chartering Europe: the Charter of Fundamental Rights of the EU", *Arena Working Papers 2002*.

combinations between the options set out below are of course possible (e.g. protocol annexed to the Treaties plus a direct reference to this protocol in an article of the TEU).

a) Simple declaration

The first option would be to insert the Charter in the form of a simple declaration annexed to the Treaty on European Union. The Charter would be presented as a text drawn up by a Convention and proclaimed in Nice by the three political institutions (Council, Commission and European Parliament). The full text would appear, including the preamble and general provisions. In legal terms, its status would be no different from its present one as a proclaimed charter. The Charter's position as a declaration annexed to the final act of an intergovernmental conference would be mainly of political significance. It would at least signify that the Member States wished to highlight the new value of fundamental rights and the work carried out by the previous Convention.

b) Protocol

Given the interpretation of the nature of a protocol contained in the decisions of the Court of Justice, this option would make the Charter's provisions legally binding. Its political status would depend on the reference made to the protocol in the Treaty itself. In any case, the question would be asked why the intergovernmental conference preferred annexing a protocol to fully incorporating the (non-horizontal?) articles of the Charter into the Treaties or a new basic treaty.

c) A reference to the Charter in Article 6 of the TEU

The reference to the Charter would in this case by made as an additional provision after the reference to the general principles of Community law, so that the current order was enriched but not disrupted by the integration of the Charter. The Charter itself would appear in full as an annex, e.g. in the form of a declaration. This option would have the advantage of making judges less reluctant to accept the Charter as a source of inspiration without altering the Charter's persuasive role vis-à-vis the European institutions. Their political authority would probably be strengthened. On the other hand, any direct reference (to the current Charter or another form of annex) would make the Charter's provisions legally binding (see next section).

d) Incorporation of the Charter into the Treaties

It should be pointed out that the incorporation of a catalogue of fundamental rights was already envisaged in the draft Treaty on European Union, adopted by the European Parliament in 1984 on the basis of the Spinelli report. Whatever form the European Union's constitutional status may take, the incorporation of the Charter into the Treaties, with equal legal status, raises a whole series of legal questions. There would be a number of questions relating to compatibility between the Charter and the Treaties. On the other hand, it seems difficult to envisage amending the substance of a text like the Charter, given that it was adopted in special circumstances on the

basis of a rather fragile consensus. Might there be a danger of undoing the work done on that occasion to achieve the right balance?

An even more delicate issue is that of the general (or horizontal) provisions of the Charter (Articles 51 to 54): the question is whether they should remain unchanged or be amended wholly or in part. Leaving these provisions unchanged would create major problems. If the Charter's general clauses were maintained, specific solutions would need to be found regarding the Charter's substantive provisions and their relationships with existing international conventions, such as the ECHR (see Articles 52(2) and 53 of the Charter) and the constitutions of the Member States (see Article 53 of the Charter).

Conversely, removal of the Charter's general provisions would also create a problem. The Charter was adopted as an entity and many Member States would oppose the idea of removing such a clause, which defines the scope of the rights guaranteed and the level of protection. This is why the Commission suggests that 'a wise initial position'[17] would be that the content of the Charter as negotiated by the earlier Convention constitutes a common 'acquis' which should be maintained. However, should the Convention advocate changing the current structure of designation of the Treaties, it might prove necessary to make certain adjustments to the Charter of a purely drafting nature or to hold a discussion on maintaining Article 52(2) of the Charter if the Convention wished to establish a hierarchical distinction between a new basic Treaty and the rest of existing primary law[18].

Taking a closer look at this subject, a few remarks need to be made about some of the issues we have raised, which the horizontal provisions of Articles 51 to 53 of the Charter seek to regulate.

Relationship between the Charter and the Treaties

Article 51(2) stipulates that the Charter does not establish *'any new power or task for the Community or the Union*'. This phrase may be understood to mean that the Charter may not amend the powers of the Community or the Union. Deletion of such a provision might raise doubts as to the extent of these powers. In addition, Article 52(2) of the Charter states that rights recognised by the Charter *'which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties*'.

This is clearly intended to ensure consistency. However, can we consider, for instance, that the rights of non-discrimination set out in Article 21 of the Charter 'are based on' the EC Treaty as regards colour, genetic features, language or membership of a national minority, even though these do not appear in Article 13 of the EC Treaty? Do the 'conditions and limits' defined by the Treaties apply in these cases? No definitive answer has yet been given to these and other questions.

[17] Doc CONV 72/02, p. 3.

[18] 'Primary' law means (1) all acts adopted by the Member States in their capacity as the constituent power of the EU's legal order, i.e. of the instruments which have been directly negotiated between the governments of the Member States (the Treaties, annexed protocols and treaties of accession), (2) equivalent acts, in particular the 1976 Act on the election of Members of the European Parliament, the Statute and Rules of Procedure of the Court of Justice and (3) general legal principles.

Relationship between the Charter and international law, as well as the national law of Member States

On the question of the level of protection, Article 53 states that nothing in the Charter 'shall be interpreted as restricting or adversely affecting human rights […] as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions'.

As regards international law, the statement that the Charter should not restrict or adversely affect international human rights standards would seem in line with the view that international law takes precedence over Community law. Similarly, with regard to Treaties to which the Community or the Union are party, Article 53 merely confirms the rule of international law whereby the adoption of the Charter can in no way release these two entities from previously contracted international obligations. Clearly, agreements to which all the Member States of the European Union are parties - in this instance, the ECHR - are not binding on the Community or the Union as such. The Union's affirmation in the Charter that its provisions must be interpreted in a manner that is compatible with these agreements is therefore based on the political will of the Member States.

The question of the relationship with the constitutions of the Member States raises practical difficulties. Article 53 reiterates that the Charter must not be interpreted as restricting or adversely affecting the rights recognised by the Member States' constitutions *'in their respective fields of application*'. It seems difficult to reconcile the precedence given here to the Member States' constitutions with the assertion contained in Community case law that Community law may not be challenged by any rule of national law whatsoever, including constitutional provisions.

This therefore raises two problems: first, the Charter provision seems to weaken the Community's claim to supremacy; secondly, it does not go far enough to defend the point of view of national constitutions as being universally applicable. It therefore seems particularly difficult to distinguish clearly between matters falling within the Charter's field of application and those coming under the constitution. There is liable to be an increase in cases where Union law and the national constitutions would clash in respect of fundamental rights. According to some commentators, the fact that Article 53 neither upholds the principle of the supremacy of EC law over all national law, nor endorses that of the universal applicability of the Member States' constitutional law, is bound to complicate this issue, which can hardly be avoided.

A few theories on possible consequences of Article 53 of the Charter

The Charter's horizontal clauses, and in particular Article 53, have raised particular interest in academic circles[19].

Some of the hypotheses concerning the relationship between Community law and Member States' constitutional law reflect the concerns expressed by a number of Member States (e.g. that

[19] 'For legal scholars, […] the Charter is red meat …' Liisberg, p. 7.

the Charter might be used as a means of constantly extending the rights which the Union will be obliged to protect) while others are of particular interest to the EU institutions.

- ***A weakening of the principle of the supremacy of Community law?***

We have already noted that Article 53 lays down respect for the constitutions of the Member States as a minimum standard, and this may be used in the future as an argument in the debate concerning the supremacy of Community law over national law. Some authors claim that Article 53 is contrary to the principle of the supremacy of Community law, given that it seems difficult to reconcile the precedence given to national constitutions in this article with the fundamental principle deriving from Community case law whereby Community law cannot, under any circumstances, be overridden by a provision of national law, even a constitutional provision.

There are two arguments against this interpretation of Article 53. The first is that the political message behind this article is making a completely different point, i.e. that the Charter does not seek to substitute national constitutions. The second argument refers to Article 53 of the ECHR, which is considered to have been the source of inspiration for Article 53 of the Charter[20]. From this point of view, the article is intended to prevent the Charter from being used as a pretext to lower the level of protection of fundamental rights afforded by other existing texts. According to both these interpretations, the reference to the national constitutions does not adversely affect the principle of the supremacy of Community law.

- ***Might Article 53 of the Charter prevent the current level of protection of fundamental rights from being enhanced?***

According to another interpretation, Article 53 might constitute an obstacle to the enhancement of the level of protection of fundamental rights, since, any further development of the system of protection will be based exclusively on Community law, as formulated by Community legislation and the Treaties, without taking account of other external sources of inspiration. Although this idea fails to take account ofthe evolving case law of the Court of Justice, it is, to a certain extent, backed up by some rulings of the Strasbourg Court in the 1950s and 60s with regard to Article 53 of the ECHR. The reasoning used here is mainly based on a particular interpretation of the phrase *'in their respective fields of application'*, which, according to some commentators, draws a clear distinction between the rights protected by the Charter, and hence the Community system, and the rights protected on the basis of other national or international texts.

This reading of Article 53 nevertheless clashes with the nature of the Charter for two reasons. First, if the Charter were part of Community law, it would be subject to the evolving rules of interpretation which the Court applies to all Community provisions. Secondly, the power which the Court of Justice has to derive its interpretation of fundamental rights from non-Community sources and to adapt its legal doctrine to current needs is both a political and a legal requirement, given the risk of certain conflicts with national constitutions. It is reasonable to believe, on the basis of the spirit of the system and with a view to avoiding any conflicts between Community law and national fundamental rights, that the Court of Justice will adopt a dynamic approach in

[20] Article 53 of the ECHR ('Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.') happens to contain the same clause as Article 53 of the Charter.

its interpretation of fundamental rights. Article 53 of the Charter does not provide for anything that might be contrary to this approach.

e) The right of individual appeal to the European Courts

Some commentators, including the chairman of the Working Group on the Charter set up by the Convention on the Future of Europe, have drawn attention to an aspect which they consider important in ensuring effective protection of individual rights at Community level, namely the right of individual appeal to the Court of Justice[21]. Legal theory regularly expresses the view that obstacles to individual access to the Court of Justice might eventually raise the issue, more generally, of equivalence between protection of human rights in the Community system and that guaranteed by the ECHR (see following section).

A recent decision of the Court of First Instance has provided new material on this subject[22]. The case concerns a French shipowner who contested European legislation on gill nets. The European Commission, basing itself on the standard rulings of the Court of Justice, asked for the shipowner's action to be declared inadmissible. However, in this case, the Court of First Instance no longer interpreted the term 'person individually concerned' as meaning that individuals may contest Community regulations only in exceptional circumstances.

The Court of First Instance provided a new definition: a 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. If it had based its decision on the criteria currently established in the decisions of the Court of Justice, the Court of First Instance would have considered the action to be inadmissible. According to the Court of First Instance, the case law of the Court of Justice would mean depriving many individuals of all means of applying for annulment of provisions of general application. The Court of Justice has not yet had an opportunity to give a ruling on a similar case.

It should be mentioned that, in this case, the Court of First Instance has taken over part of the conclusions of Advocate-General Francis Jacobs in a case currently before the European Court of Justice[23]. On 21 March 2002, Francis Jacobs had broken with the custom of presenting the Court as being 'close to the citizen', considering this to be no longer acceptable in the present circumstances. The pressure from judicial circles - lawyers, national courts and academics - is too strong to continue denying citizens the right to contest before the courts any acts adopted by the Commission and Council which they consider to be illegal. The Advocate-General therefore proposes amending the criteria currently used by the Court. The Court's judgment in this case is not expected before the autumn of 2002.

The Council of Europe Working Group mentioned at the beginning of this document has also considered whether it would be desirable to establish special provisions at the European Court of

[21] See Doc CONV 72/02, paragraph I(3). These rights are in fact guaranteed by the ECHR (Article 6 and/or 13).
[22] Judgment on Case T-177/01, *Jégo-Quéré* (3 May 2002); the French fishing company Jégo-Quéré had asked the Court to annul two Commission regulations on gill nets without ruling on the substance of the case. The Court declared its action to be admissible.
[23] Case C-50/00, *Union de Pequeños agricultores v. Council*.

Human Rights in Strasbourg for the European Union, enabling it to take part in proceedings on any cases involving questions of Community law. The working group believes that this would give the Union an opportunity to defend itself and would enable the Strasbourg Court to obtain the EU's cooperation in the implementation of its judgments. The working group wonders, more specifically, whether individual applicants should, in the event of EU accession, be given the possibility of participation of the Union (in the case of an action against a Member State) or a Member State (in the case of an action against the Union) in the proceedings as a co-defendant.

5. EU accession to the ECHR: what strategy should be adopted?

Accession to the ECHR is no longer considered as an alternative to incorporation of the Charter into the Treaties, but as a complementary approach. The Laeken Declaration gave this legal development official recognition by presenting the two options as closely related issues. In Parliament, opinions still differ, but the vast majority of Members are in favour of accession[24]. The Commission - in particular the Commissioner responsible, Mr Vitorino - has on several occasions spoken in favour of accession[25].

Opinion 2/94, which was adopted by the Court of Justice in 1996[26] and has often been instrumentalised by writers arguing against EU accession to the Convention, is not a negative opinion on the subject on the part of the Court. As the Court's President clearly explained, this opinion

> 'did not in any way constitute the expression of a negative attitude on the part of the Court of Justice towards the principle of such accession[27].

There was, for a long time, perfect agreement between the Luxembourg and Strasbourg Courts on the compliance of Community law with the ECHR. This harmony was possible thanks to the transposition of the 'equivalence' doctrine, as expressed inter alia in German constitutional case law, and because the scope and general rationale of fundamental rights had not yet taken on their present proportions. The risk of conflict was therefore limited. Given that fundamental rights seemed properly guaranteed within the Community system, the ECHR supervisory bodies preferred to avoid conflict, a position expressed in the ruling on*M and Co v. FRG* in 1990[28].

This division of work was disrupted in 1999 by the European Court of Human Rights decision on the *Matthews* case, in which the judge claimed jurisdiction over the conditions in which a Member State honoured an obligation contained in domestic law (European Parliament elections in Gibraltar) and which the CJEC could not control. While stressing that Community law did not fall within its jurisdiction, the Strasbourg Court nevertheless examined whether the Member

[24] See Recital S of the resolution of 16 March 2000: 'whereas the Union's accession to the European Convention on Human Rights following the necessary amendments to the Treaty on European Union would represent an important step towards the strengthening of the protection of fundamental rights in the Union'.
[25] See, for instance, Mr Vitorino's speech of 17 April 2002 to Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs.
[26] ECR I-1759.
[27] Speech given on 31 January 2002 at the formal sitting of the European Court of Human Rights on the occasion of the opening of the judicial year.
[28] Decision 13258/87 of 9 February 1990.

States' attitude adversely affected a right guaranteed by the Convention[29]. In a very recent judgment, the European Court of Human Rights took responsibility for the implementation of Community law by a Member State by condemning French administrative court decisions relating to Community directives[30].

The Convention responsible for drafting the Charter held lengthy discussions on how to avoid conflicts between the two systems of protection. Article 52(3) finally established that, in so far as the Charter contained rights *'which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms'*, the meaning and scope of those rights would be the same, subject, however, to a reservation in favour of Union law wherever it provides for extensive protection. The interpretation of this article raises a variety of problems. First of all, it is difficult to find exact correspondences between the rights guaranteed by the Charter and those guaranteed by the ECHR. For instance, Article 5 of the Charter, which bans slavery, adds the prohibition of trafficking in human beings to the text as contained in the ECHR; Article 9 on the right to marry introduces the possibility of same-sex marriages, which is not mentioned in the ECHR.

Given these problems which interpretation of Article 52 entails, it is questionable whether the article should be maintained if the Charter were to be incorporated into the Treaties, despite its purpose of encouraging convergence between interpretations of the case laws of the Luxembourg and Strasbourg Courts. It should also be added that only part of the Charter's provisions covers areas contained in the ECHR. EU accession to the ECHR is seen by some as a means of removing the risk of discrepancies in areas common to the ECHR and the Charter. The presence of a Charter of Fundamental Rights in the Treaty establishing the European Union would not in fact appear to be an obstacle to this accession. Many states with constitutions which include declarations of rights are party to the ECHR.

Nevertheless, Mr Vitorino, chairman of the aforementioned working group, has said that the group will consider, if it wishes, the advantages and disadvantages of options proposed by some as alternatives to accession in order to ensure consistency between EU law and the ECHR, such as a referral or consultation procedure from the Court of Justice to the European Court of Human Rights.

6. Conclusions

The Convention responsible for drafting the Charter succeeded in obtaining the agreement of the 15 Member States and the EU institutions on a common text. Some consider the Charter, and more specifically the new drafting procedure within a convention, as a model to be used for future amendments of the Treaties. The establishment of the European Convention on the future of Europe may thus be seen, in procedural terms, as a result of the adoption of the Charter of

[29] The right in question is the right to take part in free elections by secret ballot on the choice of legislature, as guaranteed by Article 3 of Protocol No 1 to the ECHR. The Court declared the British Government liable on the grounds that, by virtue of Article 1 of the ECHR, all high contracting parties have an obligation to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.
[30] Judgment of 16 April 2002, *Dangeville S.A. v. France* (36677/97).

Fundamental Rights. Others even consider the Charter as a first step towards an EU federal constitution.

The European Community and, a fortiori, the European Union which still lacks legal personality, are not bound by the ECHR and its specific judicial control mechanisms. Primary and secondary Community law and EU law do not therefore come under the legal supervision of the Strasbourg Court. Moreover, international commitments entered into by the Member States, in particular the European Convention on Human Rights, are not formally applied by the Court of Justice of the European Communities as international norms but are taken into account in identifying the general principles of law common to the legal systems of the Member States.

Consequently, while an analysis of the decisions of the Court of Justice shows that the Court actually applies the Convention as if its provisions formed an integral part of Community law, there is no overall normative system governing the relationship between the European Convention on Human Rights and the Community legal order.

On the other hand, the EC Member States are all bound by the ECHR (see Part II of this document) and come under the supervision of the European Court of Human Rights as regards provisions of their domestic law. National provisions implementing Community law and national provisions implementing European Union law also come under the control of the Strasbourg Court since they are the responsibility of the states which, individually, are parties to the ECHR. At present, the bulk of judicial control in the field of justice and home affairs, for instance, would take place in Strasbourg through supervision of national implementing acts and not in Luxembourg, given the restrictions on control by the CJEC. This clearly indicates the problem which arises when national implementing measures are subject to control whereas the initial norm which they are intended to implement is not.

It is therefore possible to note that the Charter, written as if it were to become legally binding, actually operates 'as if' it had legal force, but only indirectly. There is no certainty as yet that the most ambitious solution, namely incorporation into the Treaties, will be adopted. If it were, it would probably be necessary to review certain horizontal provisions despite the fact that these were extremely important in achieving a balanced text and helped to ensure that the Member States could approve the Charter's substance.

This solution would also probably require an adjustment of the basic texts to the needs of the Charter, both in terms of content and procedure. Due consideration will need to be given to possible overlapping between the provisions of the Treaty and those of the Charter, and possible improvements in the Union's judicial protection and protection of individuals in areas where such protection is still non-existent or inadequate. This applies, in particular, to Titles V and VI of the Treaty on European Union and the limits on the right of individual appeal in Community law.

Finally, we should take a brief look at the situation in the Member States for two reasons:

- We have seen that making the Charter legally binding in the Community context raises, first of all, problems with regard to coordinating national and European systems. Experience within the national legal systems, especially with regard to how they guarantee effective protection of individual rights, should help to establish a few guidelines for the Convention's work, while making due allowance for differences between national and European systems.

- Secondly, if the Union chose to accede to the Convention, it would be necessary to give due consideration to the possible effects of this accession on national protection systems, e.g. possible clashes between obligations contained in the Treaties and those under the Convention.

II. Protection of fundamental rights in the Member States[31]

GERMANY

Constitution and fundamental freedoms

Fundamental rights are defined in the constitution – the 1949 Basic Law – establishing the Federal Republic of Germany. They are very similar to the rights defined in the European Convention on Human Rights.

The constitution stipulates, in particular, that any person whose rights are violated by a public authority has a right to institute court proceedings. In cases where no specific court has jurisdiction, this right is to be exercised before the ordinary courts.

The European Convention on Human Rights was ratified and entered into force in 1953 and the right of individual appeal was recognised in 1955. Under German law, the Convention has a legal status below that of the constitution and equal to the country's laws. Despite a number of legal disputes, this is the position of the Federal Constitutional Court. However, the European Convention on Human Rights is considered to have higher legal status than laws adopted by the federal states (Länder). The convention could therefore be overridden by a federal law adopted subsequently. In practice, this is avoided by a very liberal interpretation in favour of the Convention wherever there is a risk of conflict with a subsequent federal law.

The Federal Constitutional Court and fundamental rights

The constitution provides for a Federal Constitutional Court responsible for matters relating to the constitution and a number of other areas of public law. The Court may not act on its own initiative. A case must be brought before it.

As regards ascertaining the constitutionality of laws, cases may be referred to the Court by the federal government, the government of a federal state (Land) or a third of the members of the Bundestag.

As regards fundamental rights, the main type of action is a constitutional appeal lodged by an individual. Such action may be taken by anyone who considers that his rights have been violated by a public authority. This type of constitutional appeal must be lodged within given time limits and specify the constitutional right which has been violated.

This is a legal instrument allowing any citizen to claim his rights under the constitution.

In practice, access to the Federal Constitutional Court is restricted to a large extent by an admission procedure: a committee of three judges of the Court is responsible for carrying out a preliminary examination and determining whether the appeal is admissible. Around 97% of

[31] The book by Blackburn and Polakiewicz (see bibliography) is an authoritative source on the technical details of application of the ECHR in all the states' parties, including coordination with their national protection systems.

complaints are declared inadmissible at this stage. There is no means of appeal against decisions taken by such committees.

Influence of the European Convention and Court of Human Rights

It is widely recognised that the European Convention on Human Rights has little influence on German law because of the high level of protection afforded by the constitution.

However, Germany has had to amend its legislation in a number of cases in response to condemnations by the European Court or even cases which have not ended in condemnation.

AUSTRIA

Constitution and fundamental rights

The 1929 version of the 1920 constitution is accompanied by various other constitutional texts, such as the 1867 basic law on the general rights of citizens. This text contains the provisions on fundamental freedoms and rights.

It is also worth mentioning, among the other texts with constitutional status, the 1988 federal constitutional law on individual protection and the 1978 law on the protection of personal data.

The constitution stipulates that Austria is a federal state. It sets out the respective powers of the federation and the nine Länder. Fundamental freedoms and rights defined in the constitutional texts apply to everyone.

The organisation and competence of the courts is laid down by federal law.

The constitution provides for a Constitutional Court, responsible for determining the constitutionality of federal laws and the laws of the Länder. A matter may be referred to it by the Administrative Court, the Supreme Court, an Appeal Court, an administrative chamber or on its own initiative in cases where it is required to apply a law to a case pending before it.

Matters relating to the constitutionality of the laws of the Länder may be referred to the Court by the federal government. Matters relating to federal laws are referred to it by a state (Land) government, a third of the members of the National Council or of the Federal Council.

A Land's constitutional law may stipulate that a third of the members of the Landtag may appeal to the Court to dispute the constitutionality of a law of the Land.

Any person whose rights have been infringed by a law may appeal to the Constitutional Court. The Court may annul the provision in question.

The European Convention on Human Rights

The European Convention was ratified in 1958. In 1964 the provisions of the European Convention were expressly given to constitutional status.

BELGIUM

Constitution and fundamental rights

The constitution, as it results from the 1993 constitutional revision, stipulates that Belgium is a federal state made up of Communities and Regions. It contains around 20 articles setting out a number of fundamental freedoms and rights.

The Communities and Regions have no competence in the matter of fundamental rights. Justice, the organisation of judicial power and respect for fundamental freedoms come under federal jurisdiction.

The Court of Arbitration, which was set up in 1983 as part of the gradual introduction of federalism, has limited jurisdiction in respect of fundamental rights. It is responsible for ensuring that legislation – whether adopted at federal level or by the Communities or Regions – is constitutional, but only with respect to articles of the constitution relating to equal treatment, non-discrimination and freedom of education.

Matters may be referred to the Court of Arbitration by any of the country's governments (federal and others), the president of a parliament or council, or any citizen. The action must be lodged within six months of publication of the act of legislation.

The Court of Arbitration may annul the act in question.

If faced with a problem concerning the unconstitutional nature of an act of legislation in relation to the specific three fundamental rights mentioned above, the ordinary courts are required to refer the matter to the Court of Arbitration for a preliminary ruling and to abide by its decision. If the law is considered contrary to the fundamental right invoked, the judge may not apply that law. However, it is not annulled.

The European Convention on Human Rights

The European Convention, which was ratified in 1959, constitutes an essential instrument since, according to Belgian legal doctrine and case law, its provisions are set out with sufficient clarity and in sufficient detail for them to have direct effect. Any individual may bring an action before the Belgian courts for violation of the Convention. Magistrates are required to apply the Convention's provisions and to give them priority over domestic law.

The Convention provides for a number of rights which are not explicitly mentioned in the Belgian constitution. A proposal to revise the constitution is currently being discussed in the parliament with the aim of inserting a new article to refer explicitly to the rights and freedoms recognised in the European Convention.

This amendment will enable the Court of Arbitration, subject to a subsequent extension of its jurisdiction, to check that laws and other similar texts comply with the provisions of the European Convention.

DENMARK

Constitution and fundamental rights

The constitution, in its most recent version of 1953, sets out a number of fundamental freedoms and rights.

The Danish judicial system – of which the Supreme Court is the highest authority – guarantees respect for those rights and, in particular, control over the constitutionality of laws. There is no specific constitutional court.

The Parliamentary Ombudsman helps to ensure that the administrative authorities take due account of human rights in their management activities and decisions.

The European Convention on Human Rights

The European Convention, which was ratified in 1953, was incorporated into Danish law in 1992. Any citizen may therefore directly invoke the provisions of the European Convention before the courts.

SPAIN

Constitution and fundamental rights

The 1978 constitution sets out a number of basic rights and civil liberties.

It establishes a system of Autonomous Communities, which are given jurisdiction 'rational material' while central government continues to hold exclusive competence over a number of areas listed in the constitution. The first of these is the regulation of the basic conditions which guarantee the equality of all Spaniards in the exercise of their rights and fulfilment of their constitutional duties. It is therefore the state's responsibility to define and guarantee fundamental rights.

The powers of the Autonomous Communities vary, are liable to evolve and include the power to adopt legislation.

The constitution establishes a Constitutional Court, which has jurisdiction over the whole of Spanish territory. It is competent to hear appeals on the grounds of unconstitutionality against provisions of the Autonomous Communities having force of law.

The Constitutional Court is also competent to hear individual appeals on grounds of violation of fundamental rights and freedoms.

Appeals on grounds of unconstitutionality may be lodged by the Prime Minister, the Ombudsman, 50 deputies, 50 senators, the executive authorities and, where applicable, the assemblies of the Autonomous Communities.

Individual appeals may be lodged by any natural or legal person, the Ombudsman or the Public Prosecutor's Office.

Any law – or part of law – declared unconstitutional becomes null and void.

The Ombudsman, whose office was established by the constitution, is responsible, in particular, for upholding fundamental freedoms and rights. Complaints to the Ombudsman may be submitted free of charge and are not subject to any formal requirements. The Ombudsman may also act on his own initiative: as mentioned above, he may refer a matter to the Constitutional Court on grounds of unconstitutionality of laws of the State or of Autonomous Communities, or bring an action for the protection of fundamental human rights.

The European Convention on Human Rights

Spain ratified the European Convention in 1979. The Constitution stipulates that validly concluded international treaties, once officially published, constitute part of the internal legal order.

FINLAND

Constitution and fundamental rights

The new constitution, which entered into force in March 2000, contains the same provisions on fundamental rights as those adopted at the time of the partial revision of the constitutional texts in 1995.

These provisions contain a series of fundamental political, economic and social freedoms and rights.

In accordance with tradition in this area, the new constitution does not provide for judicial control of the constitutionality of laws.

Control is still carried out on a preventive basis by a parliamentary body, namely the Committee on Constitutional Provisions. The courts do not have the power to examine the constitutionality of laws. However, a new provision of the constitution recognises the supremacy of constitutional provisions over laws.

The Parliamentary Ombudsman and the Chancellor of Justice may give opinions on the legality of certain acts, but do not have the power to annul them.

The Parliamentary Ombudsman and the Chancellor of Justice are responsible for monitoring the implementation of fundamental freedoms and rights.

The Ombudsman is elected by the Parliament. The Chancellor of Justice is appointed by the President of the Republic.

The European Convention on Human Rights

The European Convention, which was ratified in 1990, has been incorporated into Finnish law and is therefore applicable by the courts.

Although its provisions, which have been incorporated by means of a law, could in theory be overridden by a subsequent law, any provisions relating to international treaties are in practice interpreted favourably by the courts.

The rule preventing courts from checking the constitutionality of domestic laws is not applied as strictly to provisions deriving from international treaties, and case law has tended to consider such provisions – in this context, the provisions of the European Convention – as having a higher status than other laws.

FRANCE

Constitution and constitutional protection of civil liberties

Fundamental rights are defined in the current constitution of 1958, including its preamble which refers to the 1789 Declaration of Human Rights and the preamble to the 1946 constitution.

The constitution stipulates that duly ratified international treaties have an authority superior to that of laws. This applies, in particular, to the European Convention on Human Rights, which was ratified in 1974 and whose provision on the right of individual appeal was approved in 1981.

The Constitutional Council is the only body which is competent to examine the constitutionality of laws and hence, in particular, to ensure that the laws adopted by the Parliament respect fundamental rights. Individuals may not appeal to the Constitutional Council. Only the President of the Republic, the Prime Minister and the Presidents of the two parliamentary assemblies – the National Assembly and the Senate – may refer a matter to the Council. In 1974 it also became possible for 60 members of either of the parliamentary assemblies to refer a matter to it.

The European Convention on Human Rights

Civil and criminal law courts, of which the Court of Cassation is the supreme body at national level, and the administrative courts, of which the Council of State is the supreme body, are responsible for applying the European Convention on Human Rights, which has been incorporated into national law with a higher status than laws. The only restriction on the application of the rights recognised in the Convention results from the generally restrictive interpretation given of the Convention by the French courts.

Since the right of individual appeal was recognised in 1981, the European Court of Human Rights has increasingly had occasion to rule on the compliance of French legislation with the Convention.

Although the European Court’s judgments are not binding on French courts, they have nevertheless been taken into account in a number of cases. Moreover, France has in certain cases

adapted its legislation in response to condemnation by the European Court, sometimes without even awaiting the Court's decision.

GREECE

Constitution and fundamental rights

The 1975 constitution sets out a number of civil, political and social rights.

The courts may not apply a law whose content is contrary to the constitution. Each court is therefore competent to check the constitutionality of laws.

The Special Highest Court may also be called on to decide on the unconstitutionality of a law in the event that the decisions of ordinary courts prove incompatible.

The European Convention on Human Rights

The European Convention, which was ratified in 1953 and then denounced by the military dictatorship, was reintroduced in 1974.

The provisions of the European Convention form an integral part of national law and have supremacy over any other contrary legal provision by virtue of the constitution.

IRELAND

Constitution and fundamental rights

The 1937 constitution defines a number of fundamental rights, placing more emphasis on civil and political rights than on economic and social rights.

According to the theory of natural rights, upheld by case law, reference to the personal rights of citizens, as formulated in the constitution, implies that a whole series of rights which are not expressly mentioned in the constitution are to be recognised as having constitutional status.

Irish case law has played an original and important role in recognising and protecting rights which are not enshrined in the constitution.

The High Court and, on appeal, the Supreme Court, are responsible for deciding on the constitutionality of laws.

The President may also – after consultation with the Council of State – refer any Bill to the Supreme Court in order to examine its constitutionality. In the event of a negative ruling, the law may no longer be called into question for unconstitutionality once it has been adopted.

The European Convention on Human Rights

The European Convention was ratified in 1953 and the right of individual appeal was recognised at the same time.

According to established legal theory in Ireland, international treaties have no effect on the internal legal order and cannot therefore have any legal effects liable to be invoked before the courts unless they are incorporated in domestic law. The provisions of the European Convention have not so far been transposed, although there have been a number of debates on the advisability of such a measure.

Irish case law therefore considers that provisions of the Convention, as well as the judgments of the European Court of Human Rights, have no legal value in domestic law and may not be invoked before the courts.

However, the European Convention does have a significant political impact. The executive authorities have on several occasions referred to the Convention's provisions and the judgments of the European Court in order to justify introducing new legislation.

ITALY

Constitution and fundamental rights

Fundamental rights are defined in the 1947 constitution. These rights may not be called into question by Parliament or by any revision of the constitution.

The constitution establishes a Constitutional Court, which ensures respect for the constitution and has exclusive power to decide on the constitutionality of laws.

Control of constitutionality is not restricted to the future implementation of a bill. It also applies to existing laws which cease to be applicable as soon as they are declared unconstitutional by the Court.

As regards fundamental rights, individuals have no means of appealing directly to the Court. Only the national government and the regional governments have direct access to the Court. Individuals may only appeal to the Court indirectly: in any court proceedings which bring to light a suspected violation of fundamental rights, the court in question may refer the matter to the Constitutional Court for a preliminary ruling.

The European Convention on Human Rights

The European Convention on Human Rights was incorporated into Italian law in 1955. The Convention does not have any particular legal status: it has no constitutional value and is considered, in principle, to have the same status as an ordinary law. The Convention's provisions may therefore be overridden by subsequent legal provisions.

In practice, the Constitutional Court's decisions state that the Convention's provisions, without having equal value to the Constitution, must be interpreted in such a way as to give them priority and special legal status in relation to subsequent national laws.

However, it is not possible for a law to be declared unconstitutional on the sole grounds that it is contrary to the provisions of the European Convention.

The case law of the European Court of Human Rights has helped to draw attention to a number of problem areas and contributed to legislative reforms founded on provisions of the Convention.

LUXEMBOURG

Constitution and fundamental rights

The constitution, which was adopted in 1868 and has been amended several times, most recently in 2000, contains the main traditionally recognised civil liberties and a number of economic and social rights.

The supremacy of the constitution over ordinary law is recognised. As a result of its 1996 revision, the constitution provides for a procedure to monitor the constitutionality of laws with the establishment of a Constitutional Court, to which matters may be referred for preliminary rulings.

The Council of State is also authorised to deliver an opinion on the constitutionality of a bill. Its opinion is only consultative in nature and is not binding on the legislative authorities.

The European Convention on Human Rights

Luxembourg ratified the European Convention in 1953 and recognised the right of individual appeal.

The provisions of the Convention form an integral part of the country's legal system and supplement the guarantees contained in the constitution.

NETHERLANDS

Constitution and fundamental rights

The 1983 revision of the constitution introduced a section on fundamental rights, which includes traditional rights and social rights.

The constitution expressly prohibits the courts from checking the constitutionality of laws. The advisability of introducing this type of appeal is currently being discussed. The question is also whether this type of control should be the preserve of the supreme court or open to all courts.

As regards the country's judicial organisation, the Supreme Court acts as a court of cassation in civil and criminal law matters. On administrative matters, the highest authority is held by the administrative division of the Council of State.

The constitution recognises that all duly ratified international treaties form part of the internal legal order. This includes the European Convention on Human Rights. It should also be noted that the European Convention recognises a number of rights which are not enshrined in the Constitution of the Netherlands.

Implementation of the European Convention on Human Rights

The European Convention was ratified in 1954 and the right of individual appeal was recognised in 1960.

Although the constitution prohibits judges from reviewing the constitutionality of laws, i.e. ensuring, in particular, that no law is contrary to fundamental rights as defined in the constitution, the same constitution authorises – and in fact requires – the judicial authorities to ensure that laws comply with the provisions of treaties. In this case, the constitution specifies that the provisions of treaties take precedence over laws and constitutional provisions.

Dutch case law includes many examples of non-application of laws owing to incompatibility with provisions of the European Convention.

An analysis of the case law of the European Court of Human Rights also shows that decisions condemning the Netherlands have had practical effects.

UNITED KINGDOM

Constitutional set-up and fundamental rights

There is no single text setting out the legal framework of institutions and citizens' freedoms in the United Kingdom. The country's institutional set-up is not based on a constitution but on a whole range of texts and practices established over the centuries. Some of the reference texts are the major charters of 1215 and 1225, the 1679 Habeas Corpus Act, the 1689 Bill of Rights and the 1911 and 1949 Parliament Acts.

There are also a number of established constitutional practices.

Mention should also be made of the contribution of the judicial authorities in interpreting the law.

In this context, there are no legal texts establishing lists of citizens' rights and freedoms.

According to established legal doctrine, the protection of fundamental rights results from the supremacy conferred on the rule of law, as applied by an independent judiciary.

This traditional approach has been challenged since the 1970s and there have been a number of attempts to introduce a text setting out fundamental rights and freedoms, i.e. a bill of rights.

It should be pointed out that any legal text, however important it may be to the operation of the institutions, may be amended by Parliament by virtue of the principle of parliamentary sovereignty without any special constitutional revision procedure. Moreover, the supremacy of Parliament and the separation of legislative and judicial powers means that courts have no power to declare a law adopted by Parliament as invalid or unconstitutional.

Three laws passed in 1998 grant new powers to Scotland, Wales and Northern Ireland. The Scotland Act established a Scottish Parliament, the Government of Wales Act set up a National Assembly for Wales and the Northern Ireland Act defined the legislative powers of the Northern Ireland Assembly. It should be pointed out that the laws establishing these new institutions and powers are devolution acts, i.e. theoretically reversible acts transferring part of the power of central government to subnational bodies.

The sovereignty of the British Parliament is not affected by these devolution agreements. It maintains all its prerogatives even in devolved areas, where it simply refrains from exercising them. From this point of view, the United Kingdom cannot be considered as equivalent to a federal state.

No specific competence has been allocated in respect of fundamental rights. It is also specified that these assemblies must respect international obligations incumbent upon the United Kingdom and, in particular, the rights contained in the 1998 Human Rights Act.

However, it should be noted that Scotland is traditionally governed by legislation of its own in a number of areas of civil and criminal law – and this is confirmed by the devolution act as well as its own specific judicial system. The case law of Scottish courts has not always been the same as that of English courts with regard to the effects of the European Convention on domestic law.

In May 2001 the Scottish Parliament adopted a Convention Rights (Compliance) Act intended to bring certain aspects of Scottish law into line with the provisions of the European Convention.

The European Convention on Human Rights

The European Convention was ratified in 1953 and the right of individual appeal was recognised at the same time.

However, the provisions of the European Convention have no direct effect on domestic law and cannot therefore be invoked before the courts so long as the Convention has not been incorporated into domestic law by an act of parliament.

In 1998 the European Convention was partly incorporated by the Human Rights Act, which entered into force in October 2000.

It should be mentioned that the courts did actually draw their inspiration from the provisions of the Convention even before it was partly incorporated.

SWEDEN

Constitutional provisions and fundamental rights

Four documents have constitutional status, including the following three which contain important provisions on fundamental rights: the law on freedom of the press and the law on freedom of expression, which set out the rights relating to the media and freedom of expression, and the text relating to government procedures, which defines the other rights.

It should be pointed out, first of all, that freedom of expression is given particular importance and special protection.

The text on government procedures, which was adopted in 1974, only provided for minimum protection in the area of human rights. Subsequent amendments have served to gradually strengthen these provisions.

Certain powers have also been conferred on the courts and administrations in respect of monitoring the constitutionality of laws and derived provisions. However, these powers may only be exercised where the law adopted by the parliament or the decree issued by the government is 'manifestly' contrary to the constitution. In such cases, the court or administration concerned may refuse to apply the law or regulation.

Any bill concerning human rights must as a rule first be submitted to the Legislative Council, a body made up of a number of judges from the Supreme Court and the Supreme Administrative Court.

In 1994 a special status was conferred on the European Convention on Human Rights.

The role of the Parliamentary Ombudsman

Under the 1986 law establishing the Ombudsman, one of his tasks is to ensure that the courts and administrations comply with constitutional texts, in particular with regard to respect for human rights.

Though not directly enforceable, the Ombudsman's decisions have considerable influence and help maintain high standards of administration and good governance.

The European Convention on Human Rights

The European Convention was ratified in 1952. It was incorporated into Swedish law by a law which entered into force in 1995. The provisions of the European Convention are therefore legally binding. To avoid all possible conflict with any other legislative text, an amendment to the constitution, which entered into force at the same time, specifies that no law or legal provision may be adopted which clashes with the provisions of the Convention.

The enforcement of this provision is subject to the same limitations as described above with regard to the procedures for monitoring the constitutionality of laws. It can only be implemented

where there is 'manifest' conflict between a provision and the law incorporating the European Convention into Swedish law.

PORTUGAL

Constitution and fundamental rights

The 1976 constitution, as it results from the fourth revision in 1997, sets out a series of fundamental rights: personal, economic, social and cultural rights.

The constitution also specifies that duly ratified international conventions are to be applied in national law.

The administrative and political autonomy status granted to the Azores and Madeira as autonomous regions does not comprise any prerogatives in respect of fundamental rights.

The constitution stipulates that the courts have the power to monitor the constitutionality of laws: the courts are required not to apply any law which they deem unconstitutional.

The Constitutional Court is responsible for checking the constitutionality of all legislation. Matters may be referred to it by the President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the Ombudsman, the Public Prosecutor or a tenth of the Members of Parliament. Its decisions are legally binding.

The President of the Republic and the ministers may refer to the Constitutional Court for a preventive check on the constitutionality of any draft treaty, law or decree.

The European Convention on Human Rights

The European Convention was ratified in 1978 and incorporated into domestic law.

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