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# Fundamental Rights and Multilevel Constitutionalism in Europe

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# FUNDAMENTAL RIGHTS AND MULTILEVEL CONSTITUTIONALISM IN EUROPE

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## A. Introduction

The Charter of Fundamental Rights of the European Union (CFR) was solemnly proclaimed by the Council, the European Parliament and the Commission on 7 December 2000.<sup>1</sup> Now – having undergone only a few technical changes – it has been incorporated as Part II in the Draft Treaty Establishing a Constitution for

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<sup>1</sup> See OJ C 364 at 1., <http://ue.eu.int/df/default.asp?lang=en>.

Europe (CT) submitted to the President of the European Council in Rome on 18 July 2003.<sup>2</sup> The questions originally put by the Declaration of Laeken on the Future of the European Union - whether the Charter of Fundamental Rights should be included in the basic treaty and whether the European Community should accede to the European Convention on Human Rights<sup>3</sup> -, have been answered affirmatively in both regards.<sup>4</sup> Although on 12 December 2003, the Brussels European Council had to note that it was impossible for the Intergovernmental Conference to reach an overall agreement on the draft constitutional treaty "at this stage",<sup>5</sup> the incorporation of the Charter into the Draft Treaty was not controversial.

The question is to what extent Part II of the Constitution for Europe can be regarded as the basis and foundation of the Constitution of the European Union (see B below). With regard to Article 7 (2) CT which provides for the accession of the Union to the ECHR, the relation between the two instruments for the protection of fundamental rights requires some clarification (see C below). Although the general approach of the Charter - that national and European fundamental rights have separate scopes of application - has been maintained (see D below), the ECHR, the national and the European standards of protection taken together nevertheless seem to form an efficient and consistent system for the protection of fundamental rights within the European "multilevel constitutional system" (see E below).

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<sup>2</sup> See CONV 850/03. The draft treaty was adopted by consensus by the European Convention on 13 June and 10 July 2003. Articles in this paper refer to the 2003 IGC Draft treaty establishing a Constitution for Europe of 25 November 2003, following editorial and legal adjustments by the Working Party of IGC Legal Experts, see CIG 50/03.

<sup>3</sup> See Presidency Conclusions of 14 and 15 December 2001, SN 300/01, Annex III, para. 27 (The Laeken Declaration on the Future of the European Union).

<sup>4</sup> See in this sense already the Convention Working Group on "Incorporation of the Charter/Accession to the ECHR", Final Report of 22 October 2002, CONV 354/02, 1, 2, according to which the great majority of the group members supports the option of integrating 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., at 854 and 858. For criticisms regarding the consistency, clarity and legal effectiveness of its provisions, see the National Reports regarding point II.2. of the questionnaire on "European Law and National Constitutions", F.I.D.E. XX Conference from 31 October to 2 November 2002 in London, available at [www.fide2002.org](http://www.fide2002.org), and in particular Duteil de la Rochère, Jacqueline/Pernice, Ingolf, General Report, *ibid.*, point II.2.a.; Mayer, Franz C., 'Kitsch ou Constitution? La signification de la Charte européenne des droits fondamentaux', *Relations internationale* (édition spéciale Juin 2002) 125 at 129.

<sup>5</sup> The Irish Presidency was requested to assess the prospect of progress and to report to the European Council in March 2004.

## B. Functions and dimensions of fundamental rights in the European multilevel constitution

The Charter of Fundamental Rights was welcomed and broadly considered to be a major step in the constitutional process of the European Union. Making it a legally binding part of the draft constitutional treaty will be another – and not less important – step in this process. As Part II of the Constitution for Europe, the Charter will constitute a privileged instrument for identifying fundamental rights – and it has already been used accordingly, despite the lack of any formally binding legal force, prior to the adoption of the draft constitutional treaty.<sup>6</sup> However, since the ECJ has developed and is at present ensuring fundamental rights at the European level, the Charter is not going to add significantly to the effective protection of fundamental rights in the European Union. Part II of the Constitution for Europe is nonetheless essential to make European fundamental rights visible and as an expression of the common basis of values of the European Union. It provides a clear standard and orientation for its policies.<sup>7</sup>

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<sup>6</sup> 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, 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 yet to be 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." The Advocates-General always note the lack of any formally binding force of the Charter, however. The CFI on two occasions brought into play articles of the Charter as "confirmation" of the constitutional traditions common to the Member States, 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. For national courts see the judgement of 30. November 2000 of the Spanish Constitutional Court, 292/2000, available at [www.tribunalconstitucional.es/STC2000/STC2000-292.htm](http://www.tribunalconstitucional.es/STC2000/STC2000-292.htm), the Court ruling on a question of data protection referred to Article 8 CFR, at II.8; the German Constitutional Court in its decision of 22 November 2001, *NPD-Verbot*, 2 BvB 1/01, *Europarecht* (2002) 236 at 238 refers to Article 51 CFR. The ECJ, in contrast, has so far desisted from mentioning the Charter. Still, in certain acts adopted by the legislator recitals now refer to the Charter. 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.

<sup>7</sup> 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?',

Fundamental rights are – along with provisions ensuring the separation of powers – one of the two basic elements that, traditionally, form a Constitution. But today, the function of a catalogue of fundamental rights goes beyond the mere protection of individual rights and freedoms. In the light of a "post-national" concept of the Constitution, the debate on the European Constitution is an important step in the dynamic process of "multilevel constitutionalism" in Europe.<sup>8</sup> It is not accidental that this debate started with fundamental rights. They are more than just legal guarantees for the individual, protecting his freedoms against the intervention of public authority; they indeed define the legal status of the citizen in the polity. To use the terms developed by G. Jellinek,<sup>9</sup> this has different dimensions: it is, first, the *status negativus* providing protection for the personal freedoms, private property and equal treatment of the citizen. Yet, fundamental rights also have the function of ensuring for the citizen the rights of active participation in the political process, the *status activus*, and even positive claims against the government to develop policies which ensure 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 individual and objective elements of the constitutional order.<sup>10</sup> In the case of the Constitution for Europe their objective dimension is the expression of the "common values", as the Preamble of the Charter affirms, on which the European Union is based. Thus, expressing a search for a consensus of the citizens brought together in the Union, the Charter can be seen as summarizing the values, rights and principles which complement the objectives and the principles of the Treaty and which constitute the foundation of the "European social contract" now being revised and extended to the peoples of the accession countries (see I below). It seems important to clarify such different functions with a view, in particular, to the specific provisions in the Charter, their relation to each other and to other provisions of the Constitution (see II below).

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*Juristische Zeitung* (2001) 157 at 170. It is important to note, incidentally, 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., 211, 221, and 224.

<sup>8</sup> See most recently Pernice, Ingolf, 'Multilevel Constitutionalism in the European Union', *European Law Review* (2002) 511.

<sup>9</sup> Jellinek, Georg, *System der subjektiven-öffentlichen Rechte* (Mohr: 2<sup>nd</sup> ed. Tübingen 1905), at 94; Hesse, Konrad, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Müller: 20<sup>th</sup> 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: 3<sup>rd</sup> ed. Heidelberg 1983, 1<sup>st</sup> ed. 1962); Häberle, Peter, 'Grundrechte im Leistungsstaat', *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (1972) 43.

<sup>10</sup> For a comprehensive summary of the dimensions of the fundamental rights developed in German theory see Hesse, Konrad, *supra* note 9, at 127; Dreier, Horst, in H. Dreier (ed.), *Grundgesetz Kommentar Vol. 1* (Mohr: Tübingen 1996) Vorbemerkungen vor Art. 1, no. 27 to 69.

## 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, has its origin, and bases its legitimacy, on the will – or consensus – of the citizens concerned.<sup>11</sup> Although negotiated and concluded in the form of an international treaty, any further development of the European Union's legal foundations is basically and primarily a matter for the citizens. They will and must be the ones who agree or not 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 into a binding foundation for the European Union and its Constitution. In this light, the Constitution for Europe can be regarded as the expression of a new and, with the new Member States included, an enlarged "European social contract" which has the consent of the peoples of the Member States so defining their status as citizens of the European Union.<sup>12</sup>

Based on the common constitutional traditions of the Member States and the Conventions they have concluded in view of safeguarding, at the European or international level, the undeniable standard of human rights, the Charter not only reflects the common values consented to by the peoples of the European Union, but is the substantive foundation of the unity of the law in the composite constitutional system of the European Union<sup>13</sup> as it has been established progressively by the ECJ in its jurisprudence on the protection of fundamental rights. It represents a photograph of the emerging *ius commune europaeum*,<sup>14</sup> based on human dignity and the respect of each member of the emerging European society for the specific identity of

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<sup>11</sup> 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 8 at 514.

<sup>12</sup> 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.

<sup>13</sup> "Europäischer Verfassungsverbund". For more details see Pernice, Ingolf, 'Europäisches und nationales Verfassungsrecht', *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (2001) 163.

<sup>14</sup> For the 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 at 14. For the idea of a *ius commune* ("gemeineuropäisches Verfassungsrecht") see already Häberle, Peter, 'Gemeineuropäisches Verfassungsrecht', *Europäische Grundrechte Zeitschrift* (1991) 261; *id.*, 'Gemeineuropäisches Verfassungsrecht', in Bieber, Roland/Widmer, P. (eds.), *L'espace constitutionnel européen. Der europäische Verfassungsraum. The European constitutional area* (Schulthess: Zürich 1995) 361; Heintzen, Markus, 'Gemeineuropäisches Verfassungsrecht in der Europäischen Union', *Europarecht* (1997) 1.

the other, the right of each individual to be different but to be treated equally. The Charter underlines that, instead of homogeneity, the diversity of cultures, languages, identities, and thus heterogeneity, are the assets of the European Union; their respect is the common ground on which European society is formed and might 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 as the foundation of the functioning of a democratic system in Europe.<sup>15</sup> If there is anything besides common interests such as peace, well-being and ensuring the role and place of European peoples at the global level, it is the underlying consensus on these basic values which preserves the individual's identity, freedom and equal treatment as an active citizen of and in the European Union: it is to this that "constitutional patriotism" (J. Habermas) in Europe could refer.

Inserting the Charter into the draft constitutional treaty of the European Union, therefore, not only is an important step in the process of the constitutionalisation of the European Union,<sup>16</sup> but affirms its very foundation. It will draw the citizen's attention to his 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 incorporation into the Constitution for Europe support a process of European identity- building.<sup>17</sup> They are also a signal to the outside world of the central place that the individual takes in our political system.

## II. *Functions of fundamental rights in the (Draft) Treaty Establishing the Constitution for Europe*

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, in particular, 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 competences of the

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<sup>15</sup> Weiler, J. H. H., 'The European Union: Enlargement, Constitutionalisation and Democracy', [www.whi-berlin.de/weiler.htm](http://www.whi-berlin.de/weiler.htm), paragraph 22.

<sup>16</sup> For this see Nettesheim, Martin, 'Die Charta der Grundrechte der Europäischen Union: Eine verfassungstheoretische Kritik' *Integration* (2002) 35 at 45; Rossi, Lucia Serena, 'Constitutionnalisation" de l'Union européenne et des droits fondamentaux', *Revue Trimestrielle de Droit Européen* (2002) 27 at 38., at 46: "premier embryon d'une constitution européenne"; de Búrca, Gráinne/Aschenbrenner, Jo Beatrix, 'European Constitutionalism and the EU Charter of Fundamental Rights', *Columbia Journal of European Law* 9 (2003) 355., at 380.

<sup>17</sup> See Pernice, Ingolf, *supra* note 4, at 849.

European Union and their exercise with regard to the individual, in conformity with the principles of subsidiarity and proportionality.<sup>18</sup>

- 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 others.
- 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"<sup>19</sup> to ensure the "effet utile" of these values generally in society.
- In defining the relationship between the European Union and its citizens, they will provide assurance for the citizens regarding their legal and political status, their individual rights and freedoms and 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, the wording of the Charter seems to confirm that fundamental rights in Europe have functions which largely exceed the defence of the individuals "space of liberty".<sup>20</sup> The right to education (Article II-14 CT) and the rights regarding solidarity (Title IV of the Charter) show that fundamental rights also compel public authorities to act positively for the benefit of the individual.

Nevertheless, a few provisions of Part II of the Constitution for Europe guarantee rights only in the cases and under the conditions provided for by Community law and/or national law and practice (Articles II-9: marriage, II-10 (2): conscientious objection, II-14 (3): educational establishments, Article II-16: business, Articles II-27 (2), II-28 and II-30: worker's rights, and Article 34: social security and assistance). These provisions seem to leave it open for the European Union and/or the national legislatures and executives freely to define their scope.<sup>21</sup> The question is what the real normative value of such "rights" then may be.

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<sup>18</sup> For the construction of fundamental rights as "negative Kompetenznormen" see Hesse, Konrad, *supra* note 9; see also Mayer, Franz C., 'Die drei Dimensionen der Europäischen Kompetenzdebatte', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002) 577 at 583., with more references; Pernice, Ingolf, 'Europäische Grundrechte-Charta und Abgrenzung der Kompetenzen', *Europäische Zeitschrift für Wirtschaftsrecht* (2001) 673.

<sup>19</sup> For the expression see Häberle, Peter, *Der Europäische Jurist* (2002).

<sup>20</sup> See also Nettesheim, Martin, *supra* note 16., who talks about moderation and orientation of public authority, functional interlacing of political actors and judicial authorities, confession of common values, integration, legitimisation and elements of constitutionalisation.

<sup>21</sup> See the critics of Nettesheim, Martin, *supra* note 16, at 38.



It is clear that the objective character of these rights as values prevails over their function as subjective claims in individual cases. As far as references are made to national law and practice, they could also serve as a kind of "standstill"-clause, excluding any adverse effects of European legislation on the level of protection already reached in a Member State:<sup>22</sup> they may, therefore, be considered as another barrier to the exercise of the competences of the European Union.<sup>23</sup> Insofar as they refer to Community law, the legislator – within the limits of the competences conferred on it – is held 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 the objectives guiding European policies.

Given their objective character it is difficult to determine the rapport between Charter rights and other principles and objectives in the Constitution. There is no basis for assuming an inherent hierarchy between fundamental rights and other provisions of the Constitution laying down the objectives for or conferring powers on the institutions of the European Union. However, there will be a need to find a "sound balance" between the different rights and values, principles and objectives in case of conflicting interests. The exercise of balancing values *in concreto* will have to be led by the principle of proportionality and aim at "practical concordance":<sup>24</sup> indeed, the protection of a fundamental right (e.g. the professional freedom in the area of biotechnology) for one individual, could conflict with the human dignity of others or with considerations of public health or environmental protection. It is the task of 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.

### C. European Union and ECHR fundamental rights protection

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.<sup>25</sup> Article I-7 CT now provides for the accession of the European Union

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<sup>22</sup> See Meyer, Jürgen/Engels, Markus, 'Aufnahme von sozialen Grundrechten in die Europäische Grundrechtecharta?', *Zeitschrift für Rechtspolitik* (2000) 368 at 371.

<sup>23</sup> Pernice, Ingolf, *supra* note 18, at 673.

<sup>24</sup> For this principle developed for the construction in cases of conflict in German constitutional law see Hesse, Konrad, *supra* note 9 at 142.

<sup>25</sup> 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). 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

to the ECHR, such a new power being – according to Opinion 2/94 of the ECJ – a precondition for accession.<sup>26</sup> In the present situation, however, the European Union is not a contracting party to the ECHR, and the Convention is therefore not binding on the European Union. European Union law may therefore only be subject to ECHR control by means of the control exercised over the Member States, which, unlike the European Union, are contracting parties to the Convention and subject to its jurisdiction.<sup>27</sup>

The Strasbourg Court may indeed hold Member States indirectly responsible for alleged violations of the ECHR actually resulting from acts taken by the institutions of the European Union.<sup>28</sup> This responsibility is already assumed for acts of primary legislation not subject to the control of the ECJ and for national acts which only transcribe a Community Directive word for word.<sup>29</sup> It is not clear, however, whether Strasbourg will exercise its control over measures which are open to judicial control by 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 the ECHR, would be liable to revision.<sup>30</sup> Although Part II

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234 TEC (35 TEU and 68 TEC), 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 Rauschnig* (Carl Heymanns Verlag KG: Köln 2001) 225 at 236. 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, 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 at 1148.

<sup>26</sup> See Opinion 2/94 of 28 March 1996, ECR (1996) I-1759. Also needed is an amendment to the ECHR and to the Charter of the Council of Europe, 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’.

<sup>27</sup> Admonished in the judgement of 15 November 1996 (Application No. 17862/91), *Cantoni v. France*, Reports of Judgments and Decisions 1996-V 1614, actually exercised in the judgement of 18 February 1999 (Application No. 24833/94), *Matthews v. The United Kingdom*, Reports of Judgments and Decisions 1999-I 361; for comments see Christian Busse, ‘Die Geltung der EMRK für Rechtsakte der EU’, *Neue Juristische Wochenschrift* (2000) 1074 at 1078; see also the decision of the European Commission for Human Rights of 9 February 1990, *Melchers*, Decisions and Reports 64, 138.

<sup>28</sup> See Ress, Georg, ‘Die Europäische Grundrechtscharta und das Verhältnis zwischen EGMR, EuGH und den nationalen Verfassungsgerichten’, in Duschaneck, Alfred/Griller, Stefan (eds.), *Grundrechte für Europa. Die Europäische Union nach Nižsza* (Springer: Wien 2002) 183., at 196; Vranes, Erich, *supra* note 37, at 637.

<sup>29</sup> See Ress, Georg ‘Das Europarecht vor dem Gerichtshof für Menschenrechte in Straßburg’, [www.whi-berlin.de/ress.htm](http://www.whi-berlin.de/ress.htm).

<sup>30</sup> An application against the 15 Member States is currently pending before the Strasbourg Court

of the Constitution itself will already complete and strengthen the European Union's own system of effective protection of fundamental rights, enabling the Member States to fulfil their obligations under the ECHR,<sup>31</sup> only accession will really shield the Member States from indirect liability for possible violations committed by institutions of the European Union.<sup>32</sup>

Accession to the ECHR would not challenge 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.<sup>33</sup> Its decisions are binding for the Member States and the European Union, but do not challenge the validity of any decision of the national or European authorities. The possible scrutiny of European Union law by the European Court in Strasbourg may still require the approximation of the European Union's standards to those of the ECHR (see I below). The ECHR, however, is a complementary, not an alternative, instrument to internal systems for the protection of fundamental rights of each contracting – State or European Union – party (see II below).

### I. *The ECHR and the Charter – diverging international and supranational fundamental rights standards?*

Many observers express their satisfaction with the way the relationship between the Charter and the Convention has been worked out.<sup>34</sup> First, the provisions of the

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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 27); 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](http://www.jeanmonnetprogram.org), at 11.

<sup>31</sup> In this regard see also the conclusions of Working Group II of the European Convention, CONV 354/02 of 22 October 2002, B.I.

<sup>32</sup> See Lenaerts, Koen/de Smijter, Eddy, *supra* note 35, at 101.

<sup>33</sup> 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., 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".

<sup>34</sup> 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 at 74; Jacqué, Jean-Paul, 'Vers une Charte des Droits Fondamentaux de l'Union, problèmes et progrès', *L'Europe des Libertés* (Juillet 2000) 4 at 5; Lord Goldsmith, Peter Henry, 'A Charter of Rights, Freedoms and Principles', *Common Market Law Review*

ECHR have been a source for the drafting of the Charter. Second, Article II-52 (3) CT 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<sup>35</sup> and tries to ensure consistency and coherence between the Charter and the ECHR regardless of its fields of application.<sup>36</sup> The reference to the constitutional traditions common to the Member States and the ECHR in Article 6 (2) TEU, which has been kept in Article I-7 (3) CT, however, makes clear that the ECHR is referred to only as an outside source of legal inspiration.<sup>37</sup> Third, Article II-53 CT 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 fields of application. This intention also arises from recital 5 of the Preamble of the Charter.

It is nonetheless hard to judge, in a given case, whether or not a right of the Convention corresponds to one of the Charter. Indeed, Article II-52 (3) CT does not refer to the case-law of the ECHR. With the European Union's accession to the ECHR, however, cases of alleged violations of human rights by the European Union could be submitted, at last resort, to the Strasbourg Court. Thus, even though accession does not exclude cases of divergent interpretation of corresponding provisions in the ECHR and the Charter – the ECJ might still distinguish between rights with the argument that, due to the divergent wording, the two rights do not

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(2001) 1201 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 at 44; others however see procedural difficulties in securing legal coherence as long as the two Courts continue to have separate jurisdiction, see Thym, Daniel, 'Charter of Fundamental Rights: Competition or Consistency of Human Rights Protection in Europe?', *Finnish Yearbook of International Law* (2002) 11; 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 at 67.

<sup>35</sup> Thym, Daniel, *supra* note 34, supporting the argument put forward by Lemmens, Paul, *supra* note 34, 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 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."

<sup>36</sup> Thym, Daniel, *supra* note 35.

<sup>37</sup> The written catalogue of fundamental rights in Part II of the Constitutional Treaty therefore neither is "exhaustive" nor does it prevent the development, through case-law, of new rights on the basis of the evolving constitutional traditions of the Member States, see 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*, available at <http://www.jeanmonnetprogram.org/papers/01/013001.rtf>, 9; Vranes, Erich, 'Der Status der Grundrechte der Europäischen Union', *Juristische Blätter* (2002) 630., at 636.

correspond<sup>38</sup> –, accession will be of great help in establishing a common minimum standard of human rights protection throughout Europe. Much as for state parties to the Convention, the ECHR must be seen as an additional safeguard, at the level of international law, for the effective protection of human rights in case internal remedies fail.

## II. *The Charter and the ECHR as complementary instruments*

The incorporation of the Charter into the draft constitutional treaty does not by any means preclude the accession of the European Union to the ECHR. On the one hand the existence of a binding fundamental rights catalogue 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 60 ECHR specifies that nothing in the Convention shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised in the laws of the High Contracting Parties or in another agreement to which they are a Party. Article II-52 (3) CT, in turn, gives room for European Union law to provide for more extensive protection.

Accession of the European Union to the ECHR should thus be regarded as a complementary measure – and not as a substitute – for the effective protection of fundamental rights in the European Union, as it is for each contracting party of the Council of Europe.<sup>39</sup> The role of the Strasbourg Court would be exactly the same for

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<sup>38</sup> So far it has been the ECJ that has 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 these 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 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 and judgment of the ECHR of 25 February 1993 (Application No. 00010828/84), *Funko v. France*, Reports of Judgments and Decisions 1993-XV 297.

<sup>39</sup> 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 see the Council of Europe observers in the Convention, CHARTE 4961/00 CONTRIB 356, 13 November 2000; see also Pernice, Ingolf, *supra* note 4 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.

the European Union as for any other contracting party 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.<sup>40</sup>

## D. European Union and national fundamental rights

In contrast to what has just been said about the ECHR and the European Union systems of fundamental rights protection, European Union and national fundamental rights are – in a strictly legal sense – not complementary, but rather parallel instruments of protection with a different scope of application (see I below). It is then the problem of conflicting jurisdictions and competences (see II below) which leads to the question whether the case-law of the ECJ and the national Constitutional Courts constitutes a challenge to the European multilevel constitution (see III below).

### I. *Scope of application*

The wording of Article 51 (1) CFR confirms that the Charter and national constitutions have separate fields of application.<sup>41</sup> However, the wording of Article II-51 (1) CT seems to be more restrictive than the ECJ's present doctrine. According to the ECJ's doctrine, Member States must respect Community-based fundamental rights not only when they implement European Community law,<sup>42</sup> but also when

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<sup>40</sup> Article II-52 (3) CT only is a provision unknown to most Member State constitutions.

<sup>41</sup> From the 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 embarking 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, 2003) 179. For national fundamental rights recognised 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 at 174 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 at 703; crit. for the continuing acceptance of a national competence for reviewing European law see Mayer, Franz C., 'Grundrechtsschutz gegen europäische Rechtsakte durch das BVerfG: Zur Verfassungsmäßigkeit der Bananenmarktordnung', *Europäische Zeitschrift für Wirtschaftsrecht* (2000) 685. 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 Nationalem Gerichtshof für Menschenrechte', [www.whi-berlin.de/limbach.htm](http://www.whi-berlin.de/limbach.htm) at paragraph 17.

<sup>42</sup> See the judgment of the ECJ of 13 July 1989, C-5/88, *Wachauf*, ECR (1989) 2633 at paragraph 19.

they take autonomous measures restricting one of the common market freedoms, either attempting to derogate from,<sup>43</sup> or claiming to fall outside the remit of,<sup>44</sup> the latter. 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'<sup>45</sup> to desist from pursuing this line of judicial review.<sup>46</sup> It is questionable, however, whether Article II-51 (1) CT 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. It could thus be argued that Article II-51 (1) CT should be extensively construed. A restrictive reading of Article II-51 (1) CT may even be described as 'artificial and not appropriate.'<sup>47</sup>

Yet, the Presidium itself emphasises that the explanations have no legal value.<sup>48</sup> The final version of Article II-51 (1) CT is no coincidence and was intensively discussed by the Convention on Fundamental Rights.<sup>49</sup> The notion of '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 involve no direct 'implementation of European law'.<sup>50</sup> 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.<sup>51</sup>

<sup>43</sup> See the judgement of the ECJ of 18 June 1991, C-260/89, *ERT*, ECR (1991) I-2925 at paragraph 42.

<sup>44</sup> See the judgement of the ECJ of 26 June 1997, C-368/95, *Familiapress*, ECR (1997) I-3709 at paragraph 24.

<sup>45</sup> See de Witte, Bruno, 'The Legal Status of the Charter: Vital Question or Non-Issue', *Maastricht Journal* (2001) 81 at 86.

<sup>46</sup> Along the same lines see Lenaerts, Koen, 'Respect for Fundamental Rights as a Constitutional Principle of the European Union', *Columbia Journal of European Law* 6 (2000), 1.

<sup>47</sup> Griller, Stefan, 'Der Anwendungsbereich der Grundrechtecharta und das Verhältnis zu sonstigen Gemeinschaftsrechten, Rechten aus der EMRK und zu verfassungsgesetzlich gewährleisteten Rechten', in Duschaneck, Alfred/Griller, Stefan (eds.) *Grundrechte für Europa. Die EU nach Nizza* (Springer: Wien/New York 2002) 131 at 144.

<sup>48</sup> See CHARTE 4473/00 and for the Presidium of the Convention CONV 828/1/03 REV 1.

<sup>49</sup> See Borowsky, Martin, in: Meyer, Jürgen (ed.), *Kommentar zur Charter der Grundrechte der Europäischen Union* (Nomos: Baden-Baden 2003) Artikel 51 no. 2, 24 and 29; de Búrca, Gráinne, 'The Drafting of the EU Charter of Fundamental Rights' *European Law Review* (2001) 126 at 137 and 138; Grabenwarter, Christoph, 'Die Charta der Grundrechte für die Europäische Union', *Deutsches Verwaltungsblatt* (2001) 1 at 2.

<sup>50</sup> See Besselink, Leonard, 'The Member States, the National Constitutions and the Scope of the Charter', *Maastricht Journal* (2001) 68 at 80.

<sup>51</sup> Thym, Daniel, *supra* note 35. Restrictions to fundamental freedoms would still have to be uniformly construed and may therefore be based only on European fundamental rights, see ECJ judgement of 12 June 2003, C-491/01, *Schmidberger*, not yet published in the ECR; Kanitz, Ralf/Steinberg, Philipp, 'Grenzenloses Gemeinschaftsrecht? Die Rechtsprechung des Gerichtshofs zu Grundfreiheiten, Unionsbürgerschaft und Grundrechten als Kompetenzproblem', *Europarecht* (2003) 1013.

Furthermore, recent judgements of the ECJ can be understood as extending the scope of Article 12 TEC (Articles I-4 (2) and III-7 CT) to all European Union citizens legally residing in a Member State.<sup>52</sup> As a first consequence, fundamental rights guaranteed at 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.<sup>53</sup> Second, the ECJ's case law may lead to a very broad, if not general, application of European fundamental rights to national legislation. Indeed, situations involving the freedom to move and to reside within the territory of the Member States, as conferred by Article 18 (1) TEC, fall within the scope of Community law.<sup>54</sup> Restrictions of the principle of non-discrimination contained in Article 12 TEC then have to comply with European fundamental rights other than those covered specifically by Article 12 TEC.<sup>55</sup>

<sup>52</sup> In its judgment of 12 May 1998, C-86/96, *Martinez Sala*, ECR (1998) I-2691., the ECJ applies 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 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., and of 21 September 1999, C-378/97, *Wijsenbeek*, ECR (1999) I-6207. In the judgment of 20 September 2001, C-184/99, *Rudy Grzełczyk*, 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. In its judgment of 11 July 2002, C-224/98, *d'Hoop*, ECR (2002) I-6191., the ECJ ruled that the situations falling within the scope of Community law include those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 18 (1) TEC, paragraph 29. In its judgment of 17 September 2002, C-413/99, *Baumbast*, ECR (2002) I-7091., the ECJ, as regards the right to reside within the territory of a Member State under Article 18 (1) TEC, clearly states that this right is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty and that purely as a national of a Member State, and consequently a citizen of the Union, a citizen of the Union has the right to rely on Article 18 (1) TEC, paragraph 84; see also Reich, Norbert, 'Union Citizenship yesterday, today and tomorrow', *Rīga Graduate School of Law Working Paper No. 3* (2001) at 10; Pernice, Ingolf, 'Der verfassungsrechtliche Status der Unionsbürger im Vorfeld des Vertrages über eine Verfassung für Europa', in: Colneric, Ninon/Edward, David/Puissochet, Jean-Pierre/Colomer, Dámaso Ruiz-Jarabo (eds.), *Une communauté de droit. Festschrift für Gil Carlos Rodríguez Iglesias* (Berliner Wissenschafts-Verlag: Berlin 2003) 177.

<sup>53</sup> 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.

<sup>54</sup> See ECJ judgment *d'Hoop*, *supra* note 52, paragraph 29.

<sup>55</sup> See ECJ judgement *d'Hoop*, *supra* note 52, paragraphs 36. This is also true for the provisions on the fundamental freedoms (Article I-4 (1) CT, Articles 28., 39, 43, 49, 58 TEC), see ECJ judgments of 11 July 2002, C-60/00, *Carpenter*, ECR (2002, I-6279 and of 23 September 2003, C-109/01, *Akrich*, not yet published in the ECR, for an extensive reading of Article 49 TEC. In both cases Member State actions were measured against Article 8 ECHR. Disapproving is Mager, Ute, 'Anmerkung zum Urteil Carpenter', *Juristische Zeitung* (2003) 204 at 206. These guaranties translate the ideas of freedom and non-discrimination into prohibitions for the Member States and corresponding individual rights of the citizen, (for this approach see Pernice, Ingolf, *supra* note 7) but – although the ECJ sometimes talks of



Though not unlimited,<sup>56</sup> this case-law results in a significant extension of the field of application for the rights guaranteed by the Charter. It may therefore recommend a more restrictive reading of Article 51 (1) CT according to the *Cinethèque* judgement,<sup>57</sup> to avoid scrutiny by the ECJ of national measures which have no basis in European Union law.<sup>58</sup>

## II. *Fundamental rights and the question of competencies*

The fundamental rights contained in Part II of the Constitution for Europe limit the exercise of the powers granted to the institutions of the European Union.<sup>59</sup> In particular, the provisions on social rights have the effect of "negative clauses on competence" regarding the respective social *acquis* on these rights in the Member States.<sup>60</sup> The new provision of Article II-52 (6) CT seems to confirm this interpretation in saying that "full account shall be taken of the national laws and practices as specified in this Charter".

Fundamental rights, however, might also have an effect on the division of competencies between the European Union and the Member States. Article II-51 (2) CT makes clear that this division of competencies is not altered by the Charter. Thus, it confirms the principle of limited attributed competencies of the European Union as formulated in Article I-9 (1), (2).<sup>61</sup>

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fundamental rights (see for example ECJ judgement of 15 December 1995, C-415/93, *Bosman*, ECR (1995) I-5040 and no. 3 of Regulation 1612/68 on the free movement of workers within the Community, OJ (1968) L 257/2) – they have a different function, namely 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).

<sup>56</sup> ECJ judgments of 29 May 1997, C-299/95, *Kremzow*, ECR (1997) I-2629 paragraph 15 and of 18 December 1997, C-309/96, *Annibaldi*, ECR (1997) I-7493 paragraph 13.

<sup>57</sup> ECJ judgement of 11 July 1985, joined Cases 60 and 61/84, *Cinethèque*, ECR (1985) 2618 paragraph 26.

<sup>58</sup> See Griller, Stefan, *supra* note 47, at 143; in favour of a clarification of Article 51 (1) CFR by a slight amendment of the wording to include or exclude national measures affecting the market freedoms, see Pernice, Ingolf, 'Integrating the Charter of Fundamental Rights into the Constitution of the European Union. Practical and Theoretical Propositions', *Columbia Journal of European Law* 10 (2003) 5 at 24; still different is Pernice, Ingolf/Mayer, Franz, in Grabitz, Eberhard/Hilf, Meinhard, *Das Recht der Europäischen Union. Kommentar. Band I (EUV/EGV)* (C.H. Beck: München August 2002) nach Art. 6 EUV no. 32.

<sup>59</sup> See *supra* Section B.II.

<sup>60</sup> See Pernice, Ingolf, *supra* note 18 at 673; for this effect see also: Meyer, Jürgen/Engels, Markus, 'Aufnahme von sozialen Grundrechten in die Europäische Grundrechtecharta?', *Zeitschrift für Rechtspolitik* (2000) 368.

<sup>61</sup> See Pernice, Ingolf, *supra* note 58, at 26, supporting a removal of Article 51 (2) CFR. Recent ECJ case-law permits Member States to derogate from fundamental freedoms on the basis of (European) fundamental rights, see the ECJ in *Schmidberger*, *supra* note 51. Restrictive but justified Member State

Explicitly excluding new competencies for the European Union, the Constitution for Europe could fail to live up to the citizen's expectations, however. The Charter would promise more than it could deliver.<sup>62</sup> Ambitious social rights raise hopes for the citizen without any corresponding competence of the European Union to promote such rights.<sup>63</sup>

It is arguable, therefore, that fundamental rights in the Charter should correspond to the competencies attributed to the European Union.<sup>64</sup> The Convention on Fundamental Rights decided to adopt 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. In this light, the general obligation to respect fundamental rights, indeed, is independent of the actual existence of specific competences 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'.<sup>65</sup>

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laws, regulations or administrative actions affecting the establishment and the functioning of the internal or common market, however, may then be subject to an approximation of legislation according to Articles 94 and 95 TEC (III-64 and III-65 CT), see ECJ judgment of 10 December 2002, C-491/01, *British American Tobacco*, ECR (2002) I-11453 paragraphs 58. It is in this sense that fundamental rights may eventually lead not to new competences, but to an extensive use of measures of approximation of legislation by the European Union, see the critics of Kanitz, Ralf/Steinberg, Philipp, *supra* note 51.

<sup>62</sup> See de Witte, Bruno, *supra* note 45, at 88.

<sup>63</sup> See Knöll, Ralf, 'Die Charta der Grundrechte der Europäischen Union. Inhalte, Bewertung und Ausblick', *Neue Zeitschrift für Verwaltungsrecht* (2001) 392 at 394; Lindner, Josef Franz, 'EG-Grundrechtscharta und gemeinschaftsrechtlicher Kompetenzvorbehalt: Probleme und Thesen', *Die Öffentliche Verwaltung* (2000) 543 at 549; Pernice, Ingolf, *supra* note 4 at 853. Some authors assume that this could lead to a Union incrementally seeking more legislative powers; see in this regard Hirsch, Günter, 'EG: Kein Staat, aber eine Verfassung?', *Neue Juristische Wochenschrift* (2000) 46 at 47, who speaks of the osmotic effect of a catalogue of fundamental rights.

<sup>64</sup> See Pernice, Ingolf, *supra* note 4 at 852 about the missing "Parallelität von Kompetenzen und Grundrechtsschutz"; along the same lines see Calliess, Christian, 'Die Charta der Grundrechte der Europäischen Union – Fragen der Konzeption, Kompetenz und Verbindlichkeit', *Europäische Zeitschrift für Wirtschaftsrecht* (2001) 261 at 264; Ritgen, Klaus, 'Grundrechtsschutz in der Europäischen Union', *Zeitschrift für Rechtspolitik* (2000) 271 at 273.

<sup>65</sup> Dutheil de la Rochère, Jacqueline, *supra* note 34, at 44; see also Dutheil de la Rochère, Jacqueline, 'La Charte des droits fondamentaux de l'Union européenne: quelle valeur ajoutée, quel avenir?', *Revue du Marché commun et de l'Union européenne* (2000) 674 at 678. See also Altmaier, Peter, 'Die Charta der Grundrechte der Europäischen Union', *Zeitschrift für Gesetzgebung* (2001) 195 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 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 droit de grève dans les services publics. Ainsi donc, la question des droits garantis n'est pas liée à celle des compétences."; Lindner, Josef Franz, *supra* note 63, at 549; Lord Goldsmith, Peter Henry,

### III. *Two standards of fundamental rights protection – a challenge to European multilevel constitutionalism?*

The question is whether the "double-standard" in the area of fundamental rights finds acceptance with the citizens of the European Union in the long run. They will hardly accept that a given action of a Member State 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 outside the scope of European Union law his freedom is not protected, whereas, if the case were within the scope of European law, his rights would be secured – or vice versa? While it is not the Charter that causes this problem, it becomes nonetheless more evident with the Constitution for Europe.<sup>66</sup>

On the other hand, the law in the European Union as a composed constitutional system, despite its dual national and European sources, forms a unity. The system produces for each individual case a single and ultimately binding legal solution. Part II of the Constitution for Europe and fundamental rights at the national level have two distinct scopes of application.<sup>67</sup> However, given the difficulties in defining the scope of application of European fundamental rights,<sup>68</sup> national courts will tend to

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*supra* note 34, at 1207; Rengeling, Hans-Werner, *supra* note 25, at 245/246; Zuleeg, Manfred, 'Zum Verhältnis nationaler und Europäischer Grundrechte. Funktionen einer EU-Charta der Grundrechte', *Europäische Grundrechte Zeitschrift* (2000) 511 at 517.

<sup>66</sup> Busse, Christian, 'Eine kritische Würdigung der Präambel der Europäischen Grundrechtecharta', 28 *Europäische Grundrechte Zeitschrift* (2001) 559., 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.

<sup>67</sup> National measures on implementation or transposition of directives have not yet been scrutinised by the ECJ with regard to fundamental rights, 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 at paragraph 21. 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 foreseeability 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. 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, see the decision of the Bundesverfassungsgericht of 9 January 2001, 1 BvR 1036/99, *Teilzeitarbeit*, published at [www.bverfg.de](http://www.bverfg.de), at paragraph 16. 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, See Engel, Christoph, 'The European Charter of Fundamental Rights, A Changed Political Opportunity Structure and its Normative Consequences', *European Law Journal* (2001) 151 at 167/168; Rengeling, Hans-Werner, *supra* note 25, at 238; Weber, Albrecht, 'Die Europäische Grundrechtecharta – auf dem Weg zu einer europäischen Verfassung', *Neue Juristische Wochenschrift* (2000) 537 at 542. On the other hand, it is in the *Bananen* judgement, *supra* note 41, at 147, 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.

<sup>68</sup> See *supra* Section D.I.

construe national fundamental rights in accordance with the Charter and the standards developed by the ECJ. In addition, when the value of respect for human rights has to be explained under Articles I-58 and I-2 CT, there is no other option than to refer to the Charter.<sup>69</sup> 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 expression in the Charter. Thus, European fundamental rights could eventually become a minimum standard within the Member States. On the other hand, according to Article 7 (2) CT, the constitutional traditions common to the Member States will continue to be a source of legal inspiration. The ECJ will further ensure that its case-law is in accordance with the standards developed at the national level for its jurisprudence to be accepted in the Member States. Some spontaneous approximation of standards can thus be expected.

Separate jurisdictions – two distinct scopes of application – are therefore not a danger to a European ‘multilevel constitutional system’. On the contrary, it rather is an emblematic feature of a system of divided public authority which is not a federal state.

## E. Conclusion

Although 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 fundamental rights, but it is the task only of the CFI and the ECJ to invalidate European measures violating fundamental rights. These Courts are, in turn, not competent to invalidate provisions of national law. Yet, the standards set by the ECHR and the access of the individual to the Court in Strasbourg, in the event of alleged violations of fundamental rights, are common to both the national and the European sectors of the “composed” system for the protection of fundamental rights in Europe. This ‘trias’ of distinct and sometimes diverging regimes and standards for the protection of fundamental rights does not threaten, therefore, but rather confirm and strengthen the concept of a European multilevel constitution.

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<sup>69</sup> See also the national reports referred to by Dutheil de la Rochère, Jacqueline/Pernice, Ingolf, *supra* note 4.