

The Final Clauses of the Charter of Fundamental Rights – Stumbling Blocks for the First and Second Convention

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European law, fundamental/human rights, EU Charter of Fundamental Rights, European Convention, supremacy, treaty reform, federalism, competences, subsidiarity, law

Abstract

Particular problems in EU human rights protection stem from the final clauses of the EU Charter of Fundamental Rights (Articles 51 ff). This paper examines these key provisions as well as the proposals for amendments which have been put forward by Working Group II of the Convention and which have been accepted by the Convention's Praesidium in February 2003. The author argues that a closer look at the adjustments to the final clauses reveals that cardinal problems with far-reaching systemic implications remain unsettled. This holds true, particularly, for the question of whether Member States will continue to be bound by EU fundamental rights when they derogate from Community law, or "Union law" in future. The same is true, second, as regards the question of whether and under what conditions the supremacy of Community law (or, according to the Praesidium's draft Article 9, "the law of the Union") cannot supersede national fundamental rights. A third fundamental problem has been added, unnecessarily, to the former two through Article 52 para 5 on "rights and principles" which is apt to negatively affect the significance and scope of fundamental rights set out in the Charter. As also the other proposed adjustments can hardly be regarded as adequately addressing actual or perceived constitutional concerns, this paper submits that existing doubts are reinforced as to whether the much-discussed "Convention method" really allows for an appropriate treatment of fundamental, albeit technically intricate problems.

Kurzfassung

Besondere Probleme des EU-Grundrechtsschutzes ergeben sich aus den Schlussklauseln der EU-Grundrechtecharta (Artikel 51 ff). Dieser Beitrag untersucht diese Schlüsselbestimmungen wie auch die Änderungsvorschläge der Konventsarbeitsgruppe II zur Charta, welche vom Konventspräsidium im Februar 2003 übernommen wurden. Der Autor argumentiert, dass eine nähere Betrachtung dieser Änderungsvorschläge zeigt, dass Kernprobleme mit weit reichender systemischer Bedeutung ungelöst bleiben. Dies gilt insbesondere für die Frage, ob die Mitgliedstaaten an die Unionsgrundrechte gebunden sind, wenn sie Gemeinschafts- bzw künftig Unionsrecht beschränken. Dieser Einwand gilt gleichermaßen für die Frage, ob und unter welchen Bedingungen sich der Vorrang des Gemeinschafts- (bzw künftig des Unionsrechts) nicht gegen nationale Grundrechte durchsetzen darf. Ein drittes grundlegendes Problem, welches die Tragweite der Grundrechtsverbürgungen der Charta durchaus beeinträchtigen kann, wurde den zuvor genannten in Artikel 52 Abs 5 (Charta-Rechte vs. Prinzipien) unnötigerweise hinzugefügt. Da auch die weiteren Änderungsvorschläge kaum als rechtlich angemessene Lösung grundrechtlicher Probleme betrachtet werden können, schließt diese Arbeit, dass sich bestehende Zweifel daran verstärken, ob die viel-diskutierte "Konventsmethode" wirklich eine sachgerechte Behandlung grundlegender aber zugleich rechtlich komplexer Fragestellungen ermöglicht.

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1

1 Introduction [↑]

The Charter of Fundamental Rights⁽¹⁾, which was solemnly proclaimed on 7 December 2000 in Nice, has been adopted as an inter-institutional agreement⁽²⁾ and arguably should have the same legal status as the general principles which the ECJ has been deriving from sources like the European Convention on Human Rights (ECHR). Whereas, however, the ECJ has not relied upon the Charter so far, the Court of First Instance (CFI), the Commission, the European Parliament and the Court's Advocates General have started to routinely refer to the Charter.⁽³⁾

Particular problems stem from the so-called horizontal, or final, clauses contained in the concluding chapter (Articles 51 ff). This paper examines these key provisions of the Charter as well as the proposals for amendments which have been put forward by Working Group II of the Convention in October 2002. This Working Group, which was established to deal with the Charter, has proceeded from the explicit premise that it was neither to change the contents of the Charter nor to interfere with the explanations accompanying the Charter that were published by the Praesidium of the first Convention.⁽⁴⁾ Nevertheless, a closer look at the adjustments to the final clauses, which have been adopted by the Praesidium of the present Convention in February 2003, reveals that, while the majority of them appear legally superfluous, three cardinal ones are highly problematic.

2 Problems Stemming from the General Clauses and the

Convention's Proposals for Amendments [↑]

2.1 Scope of Application and Barrier to EU Competences

Article 51 is obviously meant to function as a counterbalance to the centralizing force emanating from fundamental rights catalogues in federal systems where they constitute the highest norm.⁽⁵⁾ Whereas the degree of constitutional discipline, which is required from EU Member States by EU law, is similar to that imposed in federal states, fundamental rights protection still constitutes an exception in this regard. ⁽⁶⁾ Thus, according to Article 51 para 1 the Charter is "addressed to the institutions and bodies of the Union with due regard to the principle of subsidiarity and to the Member States only when they are implementing Union law". According to Article 51 para 2, the Charter does not establish new powers for the Union or modify existing ones.

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The wording of Article 51 para 1 is misleading in several respects. First, it speaks of the institutions of the Union in a way similar to Article 6 of the EU Treaty. This can only be read as a reference to the institutions of the EC, since Union law is only exceptionally implemented by the Member States, ⁽⁷⁾ since the Union exercises its tasks by relying on the institutions of the Community, and, finally, since the objectives of the Union (cf. Article 2 EU Treaty) can only be pursued through Community action as the necessary powers are vested in the latter.⁽⁸⁾ Moreover, the significance of the subsidiarity principle, cited in Article 51 para 1, remains unclear in this context.⁽⁹⁾

Second, and this is of far more fundamental relevance, Article 51 para 1 seemingly restricts the binding effect of the Charter's provisions for Member States to cases where the latter *implement* Community law. This is not in line with the constant jurisprudence of the ECJ according to which Member States are bound not only when they implement Community law⁽¹⁰⁾ – among others directives⁽¹¹⁾ – but also when they *derogate* from Community law, in particular the internal market freedoms.⁽¹²⁾ Hence, the notion of the scope of application of EC law – as well as the corresponding binding effect of EU fundamental rights for Member States – is broader than the notion of the scope of implementation of EC law; a fact which accomodates the strong interpenetration of Community and national law.⁽¹³⁾ On the one hand, it arguably ensues from the explanations by the Praesidium of the first Convention that Article 51 para 1 is meant to cover Member State action also when Member States restrict Community law outside of the "scope of implementation" in the narrower sense, because the Praesidium explanations cite the aforementioned ECJ jurisprudence in this context.⁽¹⁴⁾ On the other hand, however, these explanations are not binding, although the ECJ may use them as a reference point since they have been published. Yet, in academic writing, it is rightly argued that the wording of Article 51 para 1 just as the Praesidium's explanations could cover both hypotheses, even though the drafting history appears to favour the applicability of the Charter rights to Member States also when they "merely" derogate from EC law.⁽¹⁵⁾ The latter reading is also welcomed by some authors on the grounds that "attention and respect for the protection of fundamental rights in derogation cases should be seen as a mere instance of the principle that the Treaties need to be interpreted and applied in light of fundamental rights requirements",⁽¹⁶⁾ and because it would appear hardly acceptable that Member State action could be justified under a derogation clause although it violates EU fundamental rights.⁽¹⁷⁾ Since this view entails the "danger" of a rather far-reaching applicability of EU fundamental rights to Member States (linked with a corresponding competence of the ECJ), some authors propose a more deferent application of EU fundamental rights to derogation cases,⁽¹⁸⁾ while others consider restricting the applicability of EU fundamental rights to Member States to cases in which the Member State act has a basis in EU law in the sense of the ECJ's *Cinethèque* jurisprudence.⁽¹⁹⁾ In view of the fact that Article 51 para 1 is not conclusive as regards the exact extent of the binding effect of the Charter's substantive provisions for Member States, *Pernice* has rightly called for a clarification by the second

Convention.(20)

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Disappointingly, the proposed amendment by Working Group II(21) does not bring about any additional clarification.(22) On the contrary, the final report by Working Group II appears to favour an interpretation against the Member States being bound in derogation cases;(23) yet, these comments have to be seen against the express reservation made by the Working Group according to which the contents of the Charter as well as the deliberations(24) on it must not be re-opened. Nevertheless, one cannot but conclude that in view of the present wording of Article 51 para 1, as well as the adjustment proposed by Working Group II, a cardinal issue of EU fundamental rights protection unnecessarily remains unclear.

Para 2 of Article 51 stipulates that the Charter neither establishes new competences, nor modifies any competences laid down in the treaties. In other words, while Article 51 para 1 attempts, in a quite unclear manner, to restrict the scope of application of the Charter, para 2 of Article 51 reflects the anxieties of some Member States that the competences at EU level might accrue: building on the principle of (limited) conferred powers, this clause is obviously meant to prevent the transfer of a general human rights power to the EU. Thus, *Eeckhout* emphasizes that this principle constitutes one of two opposing forces which will eventually pull the Charter to its proper place. According to him, the second force derives from the principle of non-discrimination on grounds of nationality: in *Eeckhout's* reading, the ECJ's judgments in *Cowan*, *Martinez Sala*, and *Bickel and Franz*(25) show that the necessary link with Community law is being weakened continuously, with the consequence that EU citizens are protected against nationality-based discriminations in virtually all practical respects. Hence, a tendency will emerge which will call for the application of Community fundamental rights, and of the Charter, to EU citizens.(26) One must not overlook the far-reaching consequences of such an increased applicability of "European" fundamental rights: the fact that a citizen of another Member State is entitled to rely on the Charter in conjunction with the mechanisms of direct effect, supremacy and preliminary rulings would result in reverse discrimination. As there would then be claims to sever the link with Community law so as to combat reverse discrimination, one might try arguing that the Charter was not meant to transform the EU into a general human rights organization. However, this tendency is likely to manifest itself, in the view of *Eeckhout*, who argues that it is not possible to tell so far which of these two forces will eventually shape the legal impact of the Charter.(27)

Moreover, it has been argued e.g. by *Hummer* that the stipulation in Article 51 para 2 is called into question by the fact of the "progressive codification" technique of the Charter which goes beyond merely making visible the fundamental rights recognized in the ECJ's jurisprudence. Furthermore, the competences may be affected because the fundamental rights provisions can also be interpreted as objective value judgments from which duties of protection and promotion can be derived.(28) In this context, one also has to point to the recent comments by *de Burca* and *Eeckhout* who both correctly argue that the Charter may indeed affect or modify the competences and tasks of the EU despite Article 51 para 2, since Article 51 para 1 contains a duty to promote fundamental rights protection.(29) Besides that, *Eeckhout* in his comprehensive analysis of Article 51 emphasizes that the EU has a *functional* power (i.e. a duty deriving from its primary legislative powers) to provide for adequate fundamental rights protection in the framework of its legislative activities, e.g. through inserting appropriate procedural requirements in acts of secondary law. This power cannot be questioned by virtue of Article 51 para 2, as this would run counter to the very idea and purpose of fundamental rights protection. As *Eeckhout* rightly underlines, one must not underestimate the importance to these functional competences in view of the accrued EU competences in fields such as the area of freedom, security and law.(30)

Pursuant to the drafting adjustments made by Working Group II to the general clauses, Article 51 para 2 shall read in future: "This Charter does not *extend the scope of application of Union law beyond the powers of the Union* or establish any new power or task for [the Community or] the Union or modify powers and tasks defined by *the other [Chapters / parts] of [this Treaty / the Constitutional Treaty]*." The sense of the first adjustment (printed in italics) does not easily become clear as it appears redundant. It is obviously meant to refer to the ECJ's jurisprudence, in which the Court has held that "although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of *extending the scope of the Treaty provisions beyond the competences of the Community*".⁽³¹⁾ Hence, one can conceive of this proposal as a confirmation of this line of jurisprudence:⁽³²⁾ Whereas the ECJ has clarified, in *ERT*, that Member States are bound by Community fundamental rights within the scope of application of Community law (which is broader than the field of implementation *stricto sensu*, see *supra*) the proposed adjustment obviously strives to clarify that this scope of application and the corresponding reach of "European" fundamental rights shall not be extended *further*. Thus, the Member States are "merely" bound by national fundamental rights and international conventions such as the ECHR, and do not come under ECJ control in this remaining field of national activities.

2.2 Limitations to Fundamental Rights and the Principle of Conformity (Article 52)



Pursuant to Article 52 para 1, limitations to the rights set out in the Charter have to be provided for by law, must respect the essence of these rights and must not violate the principle of proportionality. Thus, the Charter introduces a *general* rule on limitations to fundamental rights, whereas the ECHR differentiates, in this respect, between specific fundamental rights. However, this provision has to be seen in the immediate context of Article 52 para 3, pursuant to which rights that *correspond* to fundamental rights guaranteed in the ECHR, have the same "meaning and scope ... as those laid down by the [ECHR]". As regards the exact significance and scope of these rights, the jurisprudence of the ECtHR arguably is relevant too.⁽³³⁾ From the interplay of these provisions it ensues that the specific ECHR rules on limitations prevail if they guarantee a higher standard of protection. Consequently, Charter rights which at first sight seem restrictable (such as the prohibition on torture) are in fact governed by the pertinent ECHR rules which may even exclude limitations.⁽³⁴⁾ If, conversely, the Charter offers a higher level of protection than the ECHR, this standard remains applicable by virtue of Article 52 para 3 last sentence.

When dealing with the question of limitations to fundamental rights, the principle of proportionality necessarily comes into focus too. In this respect, German lawyers in particular have repeatedly voiced the criticism that the ECJ does not scrutinize EC acts under the proportionality principle according to the standards developed in German jurisprudence and academic writing. This criticism arguably has to be seen in the framework of the comparatively high importance of judicial review which has been established in Germany due to the experiences in the years before and during World War II. Nevertheless, one has to object to the insinuation that the ECJ should be required to adopt "German" concepts in all their details.⁽³⁵⁾

Turning to para 2 of Article 52, the principle of conformity set out in this provision proves to be rather complex. According to this rule, the rights recognized in the Charter which "are based on" the

EC Treaty or the EU Treaty "must be exercised under the conditions and within the limits defined in those Treaties." *Griller* has argued that this clause cannot apply to those fundamental rights which the ECJ has recognized in its jurisprudence as general principles of Community law, since this would be irreconcilable with the central function of the Charter, i.e. to enhance the visibility of fundamental rights. While the exact content of these rights is therefore delimited by the wording of the Charter, this also means that the Charter may comprise more concrete definitions and even deviations from established jurisprudence; however, such re-definition or alterations in their turn find their boundaries in Article 53 according to which the standard of protection granted by Union law must not be adversely affected.⁽³⁶⁾

Furthermore, the question arises as to whether the Charter's fundamental rights provisions must not only correspond to the conditions and limits set out in the Treaties, but also as to whether secondary law may function as a barrier to the scope of fundamental rights. A contextual interpretation of Article 52 para 2 corroborates the latter hypothesis. Hence, the right to free movement embodied in Article 45 para 1 of the Charter is limited by the EC Treaty *as well as* pertinent secondary law. The definitive barriers for limitations contained in secondary law ("*Schrankenschränken*") are to be derived, in this view, from the EC Treaty and, pursuant to Article 6 EU Treaty, from the ECHR.⁽³⁷⁾ A similar conclusion, as regards the ECHR, should be drawn from Article 5 para 3 of the draft treaty presented by the Praesidium of the second Convention. ⁽³⁸⁾

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A further example may render these complex relationships more accessible.⁽³⁹⁾ The contents of the right to vote and to stand as a candidate in elections for the EP and at municipal elections is governed not only by Articles 39 and 40 the Charter. According to the conformity principle set out in Article 52 para 2 of the Charter, one must, in the next step, refer to Articles 19 and 190 EC Treaty, and, third, any given secondary law. In the case at hand, these are directives 93/109 and 94/80. On top of that, pursuant to Article 53 on the minimum level of protection, one has to analyse the contents of Article 3 ECHR and the guidelines deriving from pertinent ECtHR jurisprudence. However, even this result is merely a preliminary one: by virtue of Article 53, the level of protection of national constitutions also serves as a minimum standard, with the consequence that, as a final step, the concrete level of protection according to national law has to be ascertained in the last step. *Whether this level* can legally prevail over the supremacy of Community law, however, arguably is the most controversial question. It will be dealt with in the next section.

In the course of recent academic debates, *Pernice* has advocated a deletion of all parallel provisions in the Charter and other parts of the Constitutional Treaty, upon which one should also delete para 2 of Article 52.⁽⁴⁰⁾ However, as *McCrudden* has rightly argued, an elimination of parallel guarantees in the present Treaties (or the Constitutional Treaty) in conjunction with a deletion of Article 52 para 2 might endanger the *acquis*, if one does not amend the substantive provisions of the Charter: thus, for example, the wording of the Charter provisions on equal treatment (Articles 21, 23 and 33) falls behind the *acquis*.⁽⁴¹⁾

Finally, paragraph 3 of Article 52 confirms that the ECHR serves as a minimum standard of protection. It will be discussed together with Article 53, which contains an analogous clause, in section 2.6 *infra*.

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2.3 Interpretation in Accordance with the Constitutional Traditions (Article 52 para

4) ↑

Article 52 para 4 of the draft reads: "Insofar as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions." According to the final report of Working Group II, the fundamental rights provisions of the Charter are to be interpreted "in a way offering a high protection" of fundamental rights rather than following "a rigid approach of a 'lowest common denominator'" ⁽⁴²⁾. This clause can be seen as an attempt to prevent a divergence between the standard of protection on the Union level and the standard of protection at the national level, which – one has to emphasize – is not necessarily higher, however. Obviously, this attempt has to be seen against the background of the concern of mitigating the perceived "threat" of supremacy. Nevertheless, it remains questionable whether this attempt can prove successful in every concrete case in which the standard of protection of a given *single* Member State diverges from the EU standard: one has to bear in mind, in this regard, that the method of determining the relevant level of protection will continue to be a comparison of the laws of the Member States necessarily involving value judgments ("*wertende Rechtsvergleichung*"), besides relying on the implications derived in particular from the ECHR (on the principle of conformity cf. above). The result of such a comparative analysis need not imperatively coincide with the standard of a given single Member State. There can be further differences due to the facts e.g. that the ECJ also is to take into account the Community interest, that the number and contents of fundamental rights recognised on the "European" level and in the various Member States are not identical, and that these rights are not necessarily attributed the same weight in cases of conflict. Hence, a provision like that suggested by Working Group II in its draft will neither *sufficiently* prevent divergent standards of protection in concrete cases, nor conflicts between between the ECJ and national Courts stemming from cases where the perceived or actual levels of protection diverge, such as in *Solange I* and *II* and the *Bananas* dispute.

2.4 Rights and Principles – A Reinforced Dichotomy? (Article 52 para 5) ↑

Article 52 para 5, as proposed by Working Group II, particularly merits a closer look, as it proves to be one of the most problematic "adjustments" undertaken by the Group. It stipulates: "The provisions of this Charter which contain principles may be *implemented* by legislative and executive acts by institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be *judicially cognisable only* in the interpretation of *such* acts and in the ruling on *their* legality."

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This amendment ties in with an essential characteristic of the Charter, which distinguishes between rights and principles, albeit without classifying the provisions under either category. This device, which was pivotal to reaching consensus in the first Convention, ⁽⁴³⁾ proves problematic, nevertheless, since several of the Charter's provisions, which are typically regarded as rights, are worded like principles and vice versa. Moreover, this drafting technique has given rise to legitimate doubts as to whether social rights might be ranked as principles in future jurisprudence and thus remain not binding. ⁽⁴⁴⁾ Such doubts may be nourished by the conclusions of AG Tizzano in *BECTU*, who restricts his considerations on the legal effect of the Charter by saying:

"I think therefore 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." ⁽⁴⁵⁾

Through its proposal, Working Group II obviously tries to avoid not only that Charter "principles" are either regarded as directly applicable or function as a yardstick in rulings on the legality of secondary law which has not been adopted on the "direct" basis of these provisions. It also strives to prevent that these provisions serve as points of reference in the interpretation of other primary and secondary law. Yet, such a function is primarily associated with principles. Although Working Group II underlines that its proposal is in line with ECJ jurisprudence cited in its final report,(46) it is submitted that one can hardly deduce such a reading from these judgments.

The obvious anxiety of Working Group II that the ECJ might embark on a more active fundamental rights jurisprudence e.g. in the field of social rights is in paradoxical contrast to the Group's explicit starting point(47) according to which it is not to classify Charter provisions as either "rights" or "principles": against this background, the Working Group nevertheless tries to indirectly curtail the effect of principles, as it must refrain from saying which provisions are principles that are, in its perception, perilous.

The result is clearly problematic. On the one hand, this amendment is particularly prone to changing the contents of the Charter. On the other hand, the ECJ is also placed in an awkward position with systemic implications: in case it uses Charter provisions as interpretative points of reference in its future jurisprudence, it will give rise to expectations that it will treat these provisions as "rights" in subsequent cases and will use them in rulings on the legality of legal acts. If the ECJ, however, treats provisions as "principles" by emphasizing that they need to be implemented by legal acts, it must, in future, not even explicitly refer to these provisions as points of reference in the interpretation of other norms.

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2.5 Reference to Subsidiarity (Article 52 para 6) ↑

By inserting new para 6 into Article 52, the Working Group intends to "recall"(48) the references to the subsidiarity principle which were made in the Charter. The amendment reads: "Full account shall be taken of national laws and practices as specified in the Charter." The question arises whether this clarification, or rather confirmation, is really necessary: Unsurprisingly, the final report of Working Group II is contradictory exactly in this regard, as it emphasizes "that the Charter was drafted with *due regard* to the principle of subsidiarity, *as is clear* from its Preamble, its Article 51 § 1 and those Charter articles which make references to national laws and practices."(49)

2.6 Minimum Level(s) of Protection (Article 53) ↑

According to Article 53, the minimum level of protection is determined by the ECHR, by international human rights agreements, and by the Member States' constitutions.(50) These linkages give rise to a series of fundamental questions. In the following, the relationship between the Charter and the ECHR will be addressed first. In a second step, the relationship between the Charter and the national legal orders will be examined.

2.6.1 The Relationship between the Charter and the ECHR ↑

In analogy to Article 52 para 3, Article 53 confirms that the ECHR serves as a minimum standard of protection vis à vis the Charter. This replication is partially due to the drafting history of these provisions.(51) It is worth mentioning that the relationship between the Charter and the ECHR may appear more important than that between the Charter and national law for Member States such as Denmark and the Netherlands, where the safeguard of individual rights through the ECHR plays a more prominent role than the protection derived from national constitutional law.(52)

The references to the ECHR in both Article 52 para 3 and Article 53 contain a stumbling block, namely the question of under what conditions a fundamental right provision in the Charter "corresponds" (cf. Article 52 para 3) to a right guaranteed in the ECHR. Although the explanations by the Praesidium of the first Convention include a list of those rights which, in the view of the Praesidium, have the same meaning and scope as the corresponding ECHR articles, a closer look reveals that the rights listed often are not identical to the provisions of the ECHR; sometimes the former even clearly deviate from the latter, a fact which is bound to incur problems in jurisprudence. Moreover, it will prove an intricate task to observe the minimum level "indicated" by the ECHR in cases where there is a collision between fundamental rights of which one is not contained in the ECHR.(53)

In view of these problems it appears understandable that there have been calls to delete this clause upon the incorporation of the Charter into the Constitutional Treaty.(54) Some authors argue that these and related issues – such as divergent rulings of the ECJ and the ECtHR – can only be settled if the EU accedes to the ECHR.(55) The latter stance is questioned by *Ress*, who submits that such accession is not necessary in light of the ECtHR's decisions in *Dufay* and *Melchers*. This view, one may add, is further corroborated by the ECtHR's ruling in *Matthews*.(56) According to *Ress*, the relationship between the ECJ and Community law, which may appear as a multidimensional one from the viewpoint of Community law, is a rather one-dimensional one from the perspective of the ECtHR, which has held that there cannot be any room exempt from the reach of ECHR human rights (57): as ensues clearly from these rulings, Member States cannot abscond from their responsibility under the ECHR through the transfer of competences to international or supranational bodies.(58) This countervails the fact that neither the EU nor the Community and its bodies can directly be held liable before the ECtHR in default of their accession to the ECHR. It is worth noting, in this context, that it is not completely clear which of the two possible arguments have been decisive in *Matthews*: (59) on the one side, one can argue that the dispositive circumstance in this leading case has been the fact that the legal acts at issue were instruments of "international law"(60), which means that it was not possible to bring the case before the ECJ. On the other hand, the judgment can also be read as meaning that it was decisive for the ECtHR that the UK had voluntarily entered into these instruments, which the ECtHR regarded as international agreements. However, both lines of argumentation lead to the same conclusion, i.e. that the ECtHR should hold itself competent to decide on ECHR violations by acts of secondary law: if one holds that it was decisive that there was no direct access to the ECJ in *Matthews*, the ECtHR should be regarded as competent since, as a rule, an individual cannot directly bring a case before the ECJ. If one takes the opposite stance (i.e. that the decisive criterion was the UK's *assent* expressed in the course of the unanimous decision on the adoption of the act in question), then one should conclude that Member States are also bound by their ECHR commitments in case they adopt secondary law violating ECHR standards by *majority* decisions, because the possibility of majority decisions has originally been established through unanimous decisions.(61) Thus, both alternatives lead to the same result: Member States are comprehensively bound by the European Convention on Human Rights, and remain under the corresponding indirect, but comprehensive control of the ECtHR for their activities in the EU, including the adoption of secondary law.(62)

More clarity regarding the legal grounds, as well as other open questions on the relation between the ECHR and EU law, should be brought about by the *DSR-Senator Lines* case which is pending in Strasbourg, as this case concerns decisions by the Presidents of the CFI and the ECJ in which they

have rejected applications for non-execution of fines before decisions were reached in the main proceedings.⁽⁶³⁾ Hence, as the question arises of whether Article 6 ECHR has been violated in this case, the ECtHR will have to rule on a decision of the ECJ for the first time.

Pursuant to Article 5 para 2 of the Praesidium's February 2003 draft, the Union may accede to the ECHR. Although the Praesidium emphasizes that this clause is not meant to bar accession of the Union to other international human rights treaties,⁽⁶⁴⁾ one may ask why the wording does not take into account this view which is to be welcomed in any case. As long as the EU does not accede to the ECHR, however, the preceding considerations remain relevant.

2.6.2 The Relation between the Charter and National Law – Reversal of the Community Architecture?

A second minimum level of protection is established by Article 53, which states that no Charter provision "shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law ... and by the Member States' constitutions". This provision is *diametrically opposed* to the constant jurisprudence of the ECJ according to which the legality of Community law must not be questioned on the basis of national fundamental rights, but may only be ruled upon by the ECJ against the yardstick of Community fundamental rights. This clause therefore calls into question the uniform application of Community, a cardinal principle of the European integration process which essentially relies on the idea of a Community of law.

Article 53 also has to be seen in the context of Article 9 of the Praesidium's draft which is apparently meant to confirm the principle of supremacy (although it refers to "primacy"), albeit in a manner that raises several questions due to its present wording. Moreover, so far there is no consensus in the Convention on the exact wording; furthermore, several members reject the very idea of a supremacy clause.⁽⁶⁵⁾ As the starting points therefore remain rather vague, this section first addresses Article 53, which has not been changed by Working Group II and shall be included in the Constitutional Treaty without alterations according to the Praesidium's draft and the accompanying explanations. In a second step, Article 9 of the Praesidium's draft will be discussed.

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It is to be noted from the outset that the problematic character of Article 53 arguably is not reduced by its reference to the respective scopes of application of Community and national law. Although it can be concluded from the drafting history⁽⁶⁶⁾ that this reference was introduced in order to avoid questioning the supremacy and uniform application of Community law, national measures implementing Community law cannot in all cases be separated with absolute clarity from "purely" national legislative activities. ⁽⁶⁷⁾

Furthermore, one cannot dispel these intricate issues by asserting that Article 53 of the Charter "merely" functions in a way analogous to Article 53 ECHR⁽⁶⁸⁾ and similar clauses in other international human rights instruments, since the purpose and function of those clauses is quite different: as the ECHR establishes legal barriers to the sovereign powers of its contracting parties, higher national standards of protection against national powers is unproblematic. The Charter, however, is aimed at the exercise of powers by the Union and the Community *themselves*.⁽⁶⁹⁾ Hence, Article 53 in its present wording invites national courts to rule on the legality of Community acts on the basis of national constitutional law, and thus to question, first, the supremacy and uniform application of Community law and thereby, second, the essential character of the EC, i.e. a community based on the rule of law.⁽⁷⁰⁾

One could therefore consider narrowing down the problematic scope of this provision by restrictively interpreting the notion "Member States' constitutions" in Article 53 as "the constitutional traditions common to the Member States".(71) This approach would seem convincing since, first, such a constricted notion would correspond to the contents of Article 6 para 2 EU Treaty, and since, second, it coincides with the view that Article 6 EU Treaty is to be regarded as *ius cogens* (72): consequently, in case of *evident and serious violations* of fundamental rights, national supreme courts would be entitled and even obliged to suspend the secondary act at issue. This emergency competence, which arises only under markedly *restrictive* conditions (i.e. in necessity-type cases), (73) can also be seen as contributing to the *mutual reinforcement* in the European multi-level constitutional system.(74) However, a restriction of this type of the wording of Article 53 has been discussed, albeit in an evidently insufficient manner, in the first Convention, where it came to be discarded eventually.(75) This also casts the ECJ in a dilemma, because the aforementioned restrictive interpretation is rendered substantially more difficult, since the *travaux préparatoires* of the Charter have been published.

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Finally, it appears impossible to deduce a more satisfactory meaning from Article 53 by means of approaches which suggest that the ECJ should apply the highest standard of protection granted in the EU Member States.(76) Such suggestions overlook for example that one cannot carve out maximum solutions in cases where two or more fundamental rights are in conflict with each other; moreover, even if only one fundamental right is applicable in a given case, the uniform application of Community law would be impaired if the higher level of one Member State was regarded as dispositive for the standard of protection. Furthermore, it implicitly ensues from this view that a single Member State could impose its own "maximum solution" on the other Member States, an idea which is difficult to reconcile with the concept of European integration.(77)

According to a further approach, related to the one just mentioned, national courts should continue enforcing their own higher fundamental rights standards vis à vis community law as long as the ECJ does not apply the highest standard.(78) Seen from this perspective, the rather puzzling fact that the subsidiarity principle is mentioned in Charter Article 51 could appear more intelligible: one might hold that national courts are competent in principle to rule on the legality of secondary law against the yardstick of national law. This reading, however, is irreconcilable with the constant ECJ jurisprudence as well as Article 220 EC-Treaty, according to which the ECJ is exclusively competent to judge on secondary law; consequently, the subsidiarity principle is not applicable.(79)

Due to the aforementioned problems associated with this clause, one should raise the question of whether it should be deleted from the Charter. In addition, it would be more appropriate to address this and related issues in the pertinent provision on supremacy in the Constitutional Treaty.

This is where Article 9 of the Praesidium's draft comes into play. According to the draft provision "[t]he Constitution, and law adopted by the Union Institutions in exercising competences conferred on it by the Constitution, shall have primacy over the law of the Member States". The exact wording of this provision, which reportedly is supported by 24 Convention Members only,(80) continues to be disputed in the Convention.(81)

It is evident that the key principle of supremacy has to be spelled out in the Constitutional Treaty precisely because of its constitutional significance.(82) Yet, the present wording of Article 9 reflects the *acquis* of the ECJ's jurisprudence in such an imprecise manner that one might even think *prima vista* that it is rather meant to confirm the general international law principle of primacy of international treaties, than the specific principle of supremacy of EC law vis à vis national law. Even though it may evidently be necessary to adjust the supremacy principle in the course of the

reorganization of the treaties and the EU's structures, the present version of Article 9 is misleading to the extent that it insinuates that all primary and secondary law can and may be supreme vis à vis national law independently of any further preconditions⁽⁸³⁾ regarding specific provisions.

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One can only be astonished by the fact that the Praesidium has not devoted a single remark to this cardinal principle of European integration in its official explanations. One must raise the question of whether it would not have been more appropriate to discuss this principle, its scope *and* its limits in light of the *acquis* and the extensive literature published on this central issue.

As has just been indicated, studies focussing on international law, EU law and general state theory clearly show that EU Member States need not acquiesce in *serious and evident* violations of fundamental rights, nor of national competences and essential constitutional principles. Thus, the legal orders of the Member States are not exposed without safeguards to the supremacy of Community law: although the ECJ is in principle exclusively competent to rule on the legality of secondary law, national courts have the final say *after* a conciliation procedure has taken place without avail, subject to the aforementioned restrictive preconditions that violations are serious and evident.⁽⁸⁴⁾

A discussion openly taking into account these concepts would obviously have been better founded. This way, such a discussion, which despite its "risks" necessarily must take place in the context of attempts to create a (new) constitution, would arguably have been more successful in reaching a more satisfactory and considerably more lasting settlement of this constitutional conflict inherent to European integration.

3 Conclusions [↑]

An interim assessment of the results reached so far by the first and second Conventions in the field of fundamental rights has to be characterized as disillusioning. On the one hand, the majority of the "clarifications" inserted by Working Group II into the final, but central clauses of the Charter appear superfluous. On the other hand, two cardinal problems with far-reaching systemic implications remain unsettled: i.e., first, the question of whether Member States will continue to be bound by EU fundamental rights when they derogate from Community law, or "Union law" in future. The same is true, second, as regards the question of whether and under what conditions the supremacy of Community law (or, according to the Praesidium's draft Article 9, "the law of the Union") cannot supersede national fundamental rights. A third fundamental problem has been added, unnecessarily, to the former two through Article 52 para 5 which is apt to negatively affect the significance and scope of fundamental rights set out in the Charter. One has to hope, indeed, that the Convention will revise the final clauses.⁽⁸⁵⁾

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At least – but obviously not only⁽⁸⁶⁾ – from the perspective of fundamental rights protection, existing doubts are reinforced as to whether the much-discussed "Convention method" really allows an appropriate treatment of fundamental, albeit technically intricate problems: it may be comparatively easy to formulate the substantive fundamental rights provisions of a fundamental rights catalogue, as these necessarily consist of "open", i.e. indeterminate legal notions which have to be concretized on a case by case basis in years of jurisprudence. However, it arguably is disproportionately more difficult to embed such a catalogue into the multilevel EU and national legal

orders and their interlinked fundamental rights systems – the relations of which are partially disputed, and which are also interlaced with other European and international human rights instruments – in a manner which does not only avoid new but satisfactorily resolves future legal problems *ex ante*. However, this task is necessarily linked with the creation of a new constitutional treaty. It appears telling that both Conventions get into difficulties when they are to develop solutions for such technically intricate, yet fundamental problems.

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Endnotes

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(1) For most recent examinations of the Charter cf. among others G. de Burca, Fundamental Rights and Citizenship, in B. de Witte (ed.), Ten Reflections on the Constitutional Treaty for Europe, e-book published in April 2003 (available at <http://www.iue.it/RSCAS/e-texts/200304-10RefConsTreaty.pdf>); M. Dougan, Some Comments on the Praesidium's "Draft Treaty Establishing a Constitution for Europe", Federal Trust for Education and Research working paper, March 2003 (available at http://www.fedtrust.co.uk/constit_publications.htm); J. Dutheil de la Rochère, La Charte des droits fondamentaux et au delà. Rapport introductif, paper presented at the conference *Europe 2004 – Le Grand Débat: Setting the Agenda and Outlining the Options*, Brussels, 15-16 October 2001 (available at <http://jeanmonnetprogram.org/papers/01/013501.html>); P. Eeckhout, The EU Charter of Fundamental Rights and the Federal Question, CMLRev 2002, 945 ff; R.A. Garcia, The General Provisions of the Charter of Fundamental Rights of the European Union, Jean Monnet working paper 04/02 (2002); St. Griller, Der Anwendungsbereich der Grundrechtscharta und das Verhältnis zu sonstigen Gemeinschaftsrechten, Rechten aus der EMRK und zu verfassungsgesetzlich gewährleisteten Rechten, in: A. Duschanek & St. Griller (eds.), Grundrechte für Europa. Die Europäische Union nach Nizza (Springer, Vienna – New York, 2002), 131 ff; W. Hummer, Der

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(2) It has been published in [2001] OJ C 364 of 18 December 2001, 1 ff; according to Hummer, Grundrechtecharta, 65 f, one still has to provide evidence that the declarations by the Council, the Commission and the EP intended to establish an agreement; otherwise there would merely be an inter-institutional declaration.

(3) On this see P. Eeckhout, CMLRev 2002, 946 ff; E. Vranes, Der Status der Grundrechtscharta der Europäischen Union, Vol 124, issue 10 Juristische Blätter 2002, 630 ff with further references.

(4) Cf. the final report of 22 October by Working Group II on the Charter, CONV 354/02, 4-5 (available at <http://european-convention.eu.int>).

(5) Cf. P. Eeckhout, CMLRev 2002, 945-946 and 991.

(6) J.H.H. Weiler, Federalism and Constitutionalism: Europe's Sonderweg, Jean Monnet Working Paper No 10/00 (available at <http://jeanmonnetprogram.org/papers/00/001001.html>); P. Eeckhout ibidem.

(7) W. Hummer, Grundrechtecharta 76-77.

(8) On this see St. Griller, Anwendungsbereich 136-137.

(9) On this issue see section 2.5 *infra*, as well as the text accompanying footnotes 78–79 in section 2.6 *infra* for more details.

(10) Cf. Case C-351/92, *Graff*, [1994] ECR I-3361, para 17.

(11) Case 222/84, *Johnston*, [1986] ECR 1651, paras 18-19; on this see in particular Besselink, MJ 2001, 68 ff; W. Hummer, Grundrechtecharta 77 with further references (supra [note 2](#)).

(12) Case C-260/89, *ERT*, [1991] ECR I-2925, para 43; Case C-368/95, *Familiapress*, [1997] ECR I-3689, para 24.

(13) *Eeckhout* ibidem.

(14) Cf. CHARTE 4473/00 of 11 October 2000 citing *ERT*, [1991] ECR I-2925; on this see also R. A. Garcia, General Provisions 4 ff with further references.

- (15) See also P. Eeckhout, CMLRev 2002, 954-955 and 977 ff.
- (16) P. Eeckhout, CMLRev 2002, 978.
- (17) Cf. I. Pernice *ibidem*.
- (18) On this cf. also P. Eeckhout, CMLRev 2002, 977-978, referring to J.H.H. Weiler, *Fundamental Rights and Fundamental Boundaries*, in *idem*, *The Constitution of Europe* (Cambridge University Press, 1999), chapter 3.
- (19) St. Griller, *Anwendungsbereich* 136-137; in the same sense apparently *Pernice* *ibid*.
- (20) I. Pernice *ibidem*; in the same sense P. Eeckhout, CMLRev 2002, 993.
- (21) "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers *and respecting the limits of the powers of the Union as conferred on it by other parts of [this Treaty / the Constitutional Treaty]*" (proposal for amendment printed in italics).
- (22) In the same sense *de Burca*, 21-22; *Pernice* *ibidem*.
- (23) "The scope of application of the Charter is limited ... to the Member States *only* when they are implementing Union law." (emphasis in the original), cf. CONV 354, 5.
- (24) In the English translation, the term "deliberations" [i.e. on the contents of the Charter] is missing; compare however the French and German versions ("la Charte tout entière ... doit être respectée par la Convention actuelle, qui ne doit pas rouvrir le débat à ce sujet." – "...und die Beratung über den Inhalt nicht nochmals eröffnen"; CONV 354/02, 4).
- (25) Case 186/87, *Cowan*, [1989] ECR 0195; Case 85/96, *Maria Martines Sala*, ECR I-2691; Case C-274/96, *Bickel und Franz*, [1998] ECR I-7637.
- (26) P. Eeckhout, CMLRev 2002, 970, according to whom such a tendency can arguably be seen in recent ECJ practice (cf. *idem* citing AG Stix-Hackl in Case C-49/00, *Commission v Italy*, ECR 2001, I-8575, para 58; and Case C-60/00, *Mary Carpenter v Secretary of State for the Home Department*, ECR 2002, I-6279).
- (27) P. Eeckhout, CMLRev 2002, 969 ff.
- (28) W. Hummer, *Grundrechtecharta* 85 ff.
- (29) G. de Burca in B. de Witte (2003) 21 who underlines that it is "simply inevitable ... that the existence and incorporation of the Charter will influence the nature and interpretation of EU tasks and powers."
- (30) P. Eeckhout, CMLRev 2002, 982 ff.
- (31) Case C-249/96, *Grant*, ECR 1988, I-0621, para 45.
- (32) Cf. the final report of Working Group II: "...[T]he Group considers it useful to confirm expressly, in Article 51 § 2, in light of established case law, that the protection of fundamental rights

by Union law cannot have the effect of extending the scope of the Treaty provisions beyond the competences of the Union." The final report refers to the *Grant* judgment in the footnote accompanying this quote, cf. CONV 354/02, 5.

(33) Cf. the text accompanying footnote 39 as well as section 2.6.1 *infra*.

(34) Cf. M. Holoubek, Die liberalen Rechte der Grundrechtscharta im Vergleich zur Europäischen Menschenrechtskonvention, in: A. Duschaneck & St. Griller 32 ff.

(35) In the same sense e.g. I. Pernice *ibidem*.

(36) St. Griller, Anwendungsbereich 145 ff who illustrates these considerations by referring to the principle of equal treatment; but see also the divergent conclusions of K. Lenaerts & E. de Smijter, CMLRev 2001, 282 ff; on Article 53 see section 2.6 *infra*.

(37) See also St. Griller *ibidem*.

(38) Article 5 para 3 of the proposal by the Praesidium of the Convention (CONV 528/03) stipulates in a similar way as does Article 6 of the EU Treaty: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

(39) On this and further examples see also K. Lenaerts & E. de Smijter, CMLRev 2001, *ibidem*.

(40) I. Pernice *ibidem*.

(41) Chr. McCrudden, contribution as discussant to the presentation by I. Pernice in the conference *The Future Constitution of Europe* (Vienna, 21 and 22 October 2002). Cf. also the final report of Working Group II which emphasizes that it is necessary to retain Article 52 para 2, and that a certain degree of replication between the Charter and other parts of the Constitutional Treaty will be inevitable.

(42) CONV 354/02, 7.

(43) Cf. also CONV 354/02, 8.

(44) Cf. Chr. McCrudden, *Future of the Charter*, 15.

(45) AG Tizzano, conclusions in Case C-173/99, *BECTU*, ECR 2001, I-4881, para 28 (emphasis added).

(46) Case T-13/99, *Pfizer v Council*, 11 September 2002 nyr and Case C-265/85, *Van den Berg*, [1987] ECR 1155.

(47) CONV 354/02, 4-5.

(48) *Ibidem* 5.

(49) *Ibidem*.

(50) Article 53 reads: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of

application, by Union law and international law and by international agreement 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's constitutions."

(51) On this see the extensive account given in J. B. Liisberg, *Supremacy* 16 ff; see also the next subsection.

(52) Cf. e.g. *Besselink*, MJ 2001, 70.

(53) On this see also J. Dutheil de la Rochère 15 ff; St. Griller, *Anwendungsbereich*, 152 ff; M. Holoubek, 27 ff (supra [note 36](#)) ; K. Lenaerts & E. de Smijter, *CMLRev* 2001, 293 ff.

(54) Cf. J. Dutheil de la Rochère *ibidem*.

(55) Cf. N. Philippi, *Divergenzen im Grundrechtsschutz zwischen EuGH und EGMR*, ZEuS 2000, 97 ff; Chr. Krüger & J. Polakiewicz, *Vorschläge für ein kohärentes System des Menschenrechtsschutzes in Europa*, EuGRZ 2001, 93; K. Lenaerts & E. de Smijter, *CMLRev* 2001, 292; on this discussion see also *Hummer* *ibidem* 90 ff.

(56) Judgment of 18 February 1999, *Matthews/UK*, Appl. No 24833/94.

(57) G. Ress in A. Duschanek & St. Griller (eds.), 187.

(58) G. Ress, ZEuS 1999, 479 ff; *idem* in A. Duschanek & St. Griller (eds.), 196 ff with a discussion of the *Matthews* case.

(59) On the following cf. St. Griller in A. Duschanek & St. Griller (eds.), 158 ff.

(60) This was the ECtHR's classification in the *Matthews* case, Judgment of 18 February 1999, *Matthews/UK*, Appl. No 24833/94, paras 32-33.

(61) St. Griller in A. Duschanek & St. Griller (eds.), 161.

(62) The same result is reached by G. Ress *ibidem*; but see the divergent view of K. Lenaerts, *ELRev* 200, 584; on this issue see also W. Hummer, 90 with extensive further references.

(63) A summary of the complaint is reprinted e.g. in *EuGRZ* 2000, 334 ff.

(64) CONV 528/03, 13.

(65) On this cf. footnotes [80–81](#) and [accompanying text](#).

(66) On this see the extensive account in J. B. Liisberg, *Supremacy* 16 ff.

(67) Cf. S. Alber, *Die Selbstbindung der Europäischen Organe an die EU-Charta der Grundrechte*, *EuGRZ* 28 (2001), 349

; *Besselink*, MJ 2001, 72 ff; J. Dutheil de la Rochère, *Rapport introductif* 15-16; St. Griller in A. Duschanek & St. Griller (eds.) 135 ff, 140 ff, 165 ff.

(68) Article 53 ECHR, entitled "Safeguard for existing human rights", stipulates: "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.”

(69) Cf. also Griller in A. Duschanek & St. Griller (eds.), 173-174.

(70) See also the critical remarks by Besselink, MJ 2001, 74-75; Griller in A. Duschanek & St. Griller (eds.), 171-172.

(71) In the same sense Griller in A. Duschanek & St. Griller (eds.), 172.

(72) This view is advocated by I. Pernice, *Europäisches und nationales Verfassungsrecht*, VVDStRL 2001, 148 ff, particularly at 184 ff; I. Pernice in H. Dreier (ed.), *Grundgesetz Kommentar*, 2nd volume (1998), Commentary on Article 23, para 20 ff, particularly at 29 ff; U. Schmid, YBEL 1998, 463 ff.

(73) On this cf. E. Vranes, *European Human Rights Protection and the Contested Relationship between the ECJ and National Courts. Convergent Solutions under International, European and National Law*, in: F. Breuss, St. Griller & E. Vranes (eds.), *The EU Banana Dispute – An Economic and Legal Analysis* (2003 – in print); on the partial procedural requirements, which not only comprise the procedure pursuant to Art 234 EC-Treaty, but also a reconciliation procedure in analogy to Art 46 VCLT cf. I. Pernice, VVDStRL 2001, 184-185 and accompanying footnote 189 (cited in preceding fn); idem in: Dreier (ed), commentary on Art 23 paras 20 ff, 29 ff (cited in preceding fn); U. Schmid, YBEL 1998, 457 ff; Vranes *ibidem*.

(74) I. Pernice, VVDStRL 2001, 185 (cited in preceding fn).

(75) Cf. the account of the debate in J.B. Liisberg, *Supremacy* 7 ff with further references.

(76) This is advocated e.g. by Besselink, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, ELRev 1 98, 629, at 670 ff, who, however, does not maintain this postulate in a more recent work on Article 53 of the Charter, cf. Besselink, MJ 2001, 68 ff.

(77) See also the critical comments in Liisberg, *Supremacy* 40; Griller in A. Duschanek & St. Griller (eds.), 175.

(78) See again Besselink, ELRev 1998, 674 ff.

(79) On this see the extensive discussion in Griller in A. Duschanek & St. Griller (eds.), 178 ff, who calls this reading “a subsidiarity program for fundamental rights protection” against which one can cite the above arguments, but emphasizes that such a reading is not completely unfounded due to the wording of the Charter.

(80) *Bulletin Quotidien Europe* No 8409 of 27 February 2003, 6.

(81) *Bulletin Quotidien Europe* No 8415 of 7 March 2003, 4.

(82) But see M. Dougan, *Comments*, 5-6, who entertains doubts as to whether it is useful to re-open the debate on supremacy and suggests that Article 9 be deleted.

(83) On these requirements which essentially include the unconditional character and sufficient clarity cf. e.g. the detailed treatise of this issue in *Fischer/Köck/Karollus*, *Europarecht*, 4th ed. (2002), paras 850 ff.

(84) This ensues from the so-called evidence theory of public international law, but also from the international law – if not general legal – principle of necessity, which arguably *also* is embodied in Article 6 EU Treaty if one reads it as also applying *mutatis mutandis* vis à vis the EU; cf. the precited works by I. Pernice, VVDStRL 2001, 148 ff, particularly at 184 ff; I. Pernice in H. Dreier (ed.), Grundgesetz Kommentar, 2nd volume (1998), Commentary on Article 23, para 20 ff, particularly at 29 ff; U. Schmid, YBEL 1998, 463 ff; Vranes, European Human Rights Protection, in F. Breuss, St. Griller & E. Vranes (eds.), The EU Banana Dispute – An Economic and Legal Analysis (2003 – in print).

(85) In the same sense M. Dougan, Comments 15.

(86) Cf. the criticism in M. Dougan, Comments 15 on the Convention's results in other fields. He concludes with regard to the draft constitutional treaty: “[...] Most worryingly of all, sometimes there is an apparent failure to understand the current legal position, or appreciate the importance of certain legal consequences.”

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