

# From the European Convention on Human Rights to the European Charter of Fundamental Rights: The prospects for the protection of human rights in Europe

*Klaus Stern*

## I. International recognition of fundamental human rights

For centuries, the protection of fundamental human rights has been part of the historical conceptual and constitutional legacy of the peoples on both sides of the Atlantic. Great thinkers from all nations have contributed towards the generation of human and fundamental rights. Nowadays these rights (or at least their substance) are universally recognised, beyond the continents of Europe and America. Virtually all the UN nations recognise them at least verbally. The fact that they are not put into effect, let alone observed, everywhere, does not alter their claim to validity. Practice and theory operate at different speeds, and politics carries the duty to change this.<sup>1</sup> The academic world is only able to send out reminders and to encourage progress.

The General Assembly of the UN adopted a “Universal Declaration of Human Rights” on 10 December 1948. Following on from the origin of their spiritual forefathers, it was rooted in the European and American declarations of human rights, and embodied human dignity, protection of personality, individual rights to freedom, equality under the law, basic judicial rights and rights to political co-determination. However, these traditional rights were extended to include more recent legal rights, which had become manifestly threatened through experiences in the Thirties and Forties, namely bans on torture and deportation, the right of asylum and the right to citizenship. Certain social, economic and cultural rights were also added. However, it must be noted that the Declaration has not acquired the status of a binding international legal rule, despite the fact that a minimum standard (irrespective of how this may be circumscribed), has by now become a constituent of customary international law.<sup>2</sup>

Further markers *en route* to an international Charter of Human Rights have included numerous special declarations and conventions, and in particular the International Covenants on Civil and Political Rights and on Economic and Social and

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<sup>1</sup> Cf. *N. Bobbio*, *Das Zeitalter der Menschenrechte*, 1998, p. 63, 84.

<sup>2</sup> Cf. *K. Doehring*, *Völkerrecht*, 1999; para. 974; *K. Ipsen*, *Völkerrecht*, 4th edn. 1999, § 50.

Cultural Rights dating from 1966.<sup>3</sup> Internationalisation, positivisation and generalisation have all seriously intensified.<sup>4</sup> However, it cannot be denied that the international protection of human rights exhibits a number of deficiencies. Whilst a global desire for improvement prevails, this is not what we are concerned with at the present time.<sup>5</sup> We are concerned with Europe, where the situation is better.

## II. The European Convention for the Protection of Human Rights and Fundamental Freedoms

Following the disaster of the Second World War and the horrors and ravages afflicted upon it in the 20<sup>th</sup> Century, Europe was predestined to become especially actively involved in the protection of human and fundamental rights beyond the provision of guarantees at national level. Following lengthy preparatory work, the first Congress of the European Movement, which came about through private initiative, was held in The Hague in May 1948. In addition to the formation of a European Parliamentary Assembly, as the basis of a future union of the European states, it demanded a charter of human rights and for this to be protected by a European court of justice. The initial result of these communications was the Statute of the Council of Europe, within which the free democratic states of Western Europe united in 1949, and a draft text of the Convention of Human Rights drawn up by an international committee of legal experts.<sup>6</sup> Art. 1(b) of this Statute set out in concrete terms what appears in the Preamble, which speaks of the common heritage of the peoples of Europe, their individual freedom, political liberty and the rule of law, and states that agreements are to be concluded which relate to the “maintenance and further realisation of human rights and fundamental freedoms”. According to art. 3, “Every member of the Council of Europe” (which now has 45 Member States, so that it includes virtually the whole of Europe) “must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms”.

It took until 4 November 1950 before the Committee of Ministers of the Council of Europe adopted the “European Convention for the Protection of Human

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<sup>3</sup> Cf. *K. Stern*, Handbuch der Grundrechte, Vol. I, 2004, § 1 para. 38.

<sup>4</sup> Cf. *G. Peces-Barba* (ed.), Derecho positivo de los derechos humanos, 1987, p. 13 et seq.

<sup>5</sup> The development of international human rights has been widely discussed; only a selection can be offered here: *Henry J. Steiner/Philip Alston*, International Human Rights in Context, 2000; *Chr. Tomuschat*, Menschenrechte – eine Sammlung internationaler Dokumente zum Menschenrechtsschutz, 2004, 2nd edn. 2002; *E. Riedel*, Die Universalität der Menschenrechte, ed. by *Chr. König* and *R. A. Lorz*, 2003; *Th. Schilling*, Internationaler Menschenrechtsschutz, 2004; *A. Weber*, Menschenrechte – Texte und Fallpraxis, 2004.

<sup>6</sup> Cf. *Chr. Walter*, in: *D. Ehlers* (ed.), Europäische Grundrechte und Grundfreiheiten, 2002, § 1 para. 5 et seqq.

Rights and Fundamental Freedoms” (ECHR), following painstaking preparatory work in the government committees and committees of experts, with the involvement of the Advisory Committee of the European Council. This has been extended and supplemented over time by the addition of 13 protocols. The 11<sup>th</sup> Protocol, which dates from 1994 and which entered into force on 1<sup>st</sup> November 1998, was especially important. This not only adds to the list of fundamental rights within the Convention, similarly to the previous protocols, but drastically alters Art. 19 et seqq. of Section II of the Convention. This ability of the Convention itself to alter means, first of all, that it was not possible for it to be ratified subject to reservation (as could the protocols), and secondly, that it was necessary to wait until all the Convention States had ratified the Protocol. In summary this means that the second section of the Convention, entitled “European Court of Human Rights”, was amended in its entirety and converted to a monistic court system. At the same time, new Rules of Procedure for the Court was adopted with effect from 1<sup>st</sup> November 1998.

The core of the 11<sup>th</sup> Protocol is therefore the establishment of a new permanent European Court of Human Rights (ECtHR) as the single controlling body for the protection of European fundamental rights. The Commission and the formerly non-permanent Court were abolished. The duties of the Committee of Ministers are restricted to supervising implementation of the judgments, by which the parties are required to abide (Art. 46 of the new version of the ECHR).

Every natural person or group of individuals, including non-governmental organisations, may now make an individual application to the Court, claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto (Art. 34 of the new version of the ECHR). No High Contracting Party may hinder in any way the effective exercise of this obligatory right.

The ECHR is a multilateral international treaty, which in contrast to most international treaties, not only governs relationships between individual states, but primarily the relationship between individuals and states, and which creates rights and obligations in this area. Internationally therefore, it ranks amongst the law-making treaties, and has acquired considerable significance in relation to the behaviour of states towards their citizens, in view of the large number of human rights cases referred to the ECtHR (and previously to the European Commission of Human Rights). Under constitutional law, the Convention has had a significant effect on the interpretation of national fundamental rights, and in general terms on individual legal systems. This applies in particular to Art. 6,<sup>7</sup> which is afforded a broad sphere of application.<sup>8</sup> Moreover, in Great Britain, where human rights were not formalised, the Convention initiated the 1998 Human Rights Act, forced the

<sup>7</sup> Cf. in particular the acceleration of the judicial procedure in the ECHR, NJW 2001, 211, 213; on fair procedure: *Pache*, NVwZ 2001, 1342, and on the presumption of innocence in the ECHR: EuGRZ 1987, 399; NJW 1988, 3257 as well as BVerfGE 74, 358 (370); 82, 106 (115); BVerwG, DÖV 2004, 206 et seq.

<sup>8</sup> Cf. *Chr. Grabenwarter*, Europäische Menschenrechtskonvention, 2003, § 24.

British courts to develop a greater range of case law in relation to fundamental rights, but failed to impact upon the sovereignty of the Parliament.<sup>9</sup>

The ECHR only enjoys the constitutional status in Austria. In many countries it ranks above simple statutes,<sup>10</sup> whilst in others, including Germany, Italy and Scandinavia, it enjoys the status of a statute. Therefore, in Germany the rights contained in the ECHR are not capable of supporting a constitutional complaint, although the German Federal Constitutional Court is prepared to take the ECHR rights into account when interpreting the fundamental rights laid down in the Grundgesetz (“Basic law” of the Federal Republic of Germany – GG).<sup>11</sup> Attempts to afford the ECHR constitutional status have not so far been accepted in legal practice.<sup>12</sup>

The system of fundamental rights laid down in the Convention essentially comprises the same elements as those fundamental rights guaranteed under the individual constitutions of Member States. They primarily include the traditional rights of freedom and political co-determination, complemented by the ban on torture and inhuman treatment, the equality rights and the special ban on discrimination set out in Art. 14 ECHR with a supplement in the shape of the 12<sup>th</sup> Protocol and also far-reaching judicial guarantees. As a result, a pan-European standard of fundamental rights is guaranteed, equivalent to the high level of most of the constitutions of Western Europe since the Second World War. During that era following the Second World War, which was so traumatic for the nations of Europe, the European legacy of fundamental rights, for which we have to thank the best that all the nations of Europe had to offer, was translated into a set of legal rules of which all those involved could be proud. In these rules, Europe became for the first time the real embodiment and precursor of that close integration that we now know as the European Union. In legal parlance, we can now truly describe the Convention as the “First European Statute”, and in fact as part of a European Constitution. Without doubt, the Convention is an element of a European constitution of fundamental rights, which has also achieved regard under supranational law since the Maastricht Treaty, as expressed in Art. 6.2 TEU.

### III. Further developments in the course of European integration

These soon followed the first cautious stage towards European integration, taken by the Council of Europe, with the formation of the – no more existing – European Coal and Steel Community on 18 April 1951, although this was of no great significance in terms of fundamental rights. Developments in the sphere of funda-

<sup>9</sup> Cf. *Grote*, ZaöRV 1998, 309 et seqq.; *M. Baum*, EuGRZ 2000, 281 et seqq.

<sup>10</sup> Cf. *Chr. Grabenwarter*, Europäische Menschenrechtskonvention, 2003, § 3.

<sup>11</sup> Cf. BVerfGE 74, 358 (370); on the significance of the ECHR for administrative Courts and authorities: *G. Britz*, NVwZ 2004, 173.

<sup>12</sup> Cf. finally *F. Hoffmeister*, Der Staat Vol. 40 (2001), 349 et seqq.

mental rights and freedoms only came with the Treaty signed in Rome on 25 March 1957 establishing the European Economic Community, known since the 1992 Maastricht Treaty simply as the European Community. Art. 3 EC-Treaty (in the version of the 1997 Treaty of Amsterdam) describes the creation of an “internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital”. These are referred to in commonly accepted parlance as the four fundamental freedoms, and occasionally even as fundamental rights.<sup>13</sup> An indispensable associated freedom was the free movement of payments (Art. 56.2 EC-Treaty). Furthermore, the ban on discrimination on grounds of nationality and other criteria are anchored in the Treaty (Art. 12.1 and Art. 13 EC-Treaty). The case law of the European Court of Justice has developed the general principle of equality into a fundamental right, both on this basis and on the basis of Art. 34.2.2 and Art. 141 EC-Treaty.<sup>14</sup> The Court of Justice (ECJ) has also laid down and applied other Community fundamental rights in individual cases.<sup>15</sup> It has considered these fundamental rights as elements of the unwritten general principles of the Community legal system and the general constitutional principles transmitted by Member States. As its “sources of inspiration”, the Court has primarily taken the ECHR and other European and international agreements, and also individual national constitutional rules. Art. 6.2 now explicitly obliges the Union to respect the fundamental rights laid down in the European Convention on Human Rights.

Two principal problems arise, the first being “What are the fundamental freedoms?” and the second “What does the clause in Art. 6.2 TEU relating to the respect of fundamental rights mean?”

1. Neither the TEU nor the EC-Treaty contain a numbered list of fundamental rights like those in the national constitutions of individual Member States, although they do include individual statements relating to fundamental rights, principally to general and special prohibitions against discrimination, the right of equal pay for male and female workers (Art. 141 EC-Treaty), the right of association (Art. 137.1 (f) EC-Treaty), the right of citizenship of the Union and the associated rights of free movement, the right to vote and to stand as a candidate at municipal elections, the right to petition and to protection by the diplomatic and consular authorities (Art. 17 et seqq. EC-Treaty) and the right to data protection (Art. 286 EC-Treaty). However, specific fundamental freedoms, also referred to as fundamental freedoms, are inherent in Community law. These are freedom of movement of goods (Art. 23 et seqq. EC-Treaty), freedom of movement of work-

<sup>13</sup> Cf. on the development *G. Hirsch*, Gemeinschaftsgrundrechte als Gestaltungsaufgabe, in: *Karl F. Kreuzer* (ed.), *Europäischer Grundrechtsschutz*, 1998 p. 9 et seqq.; *A. Bleckmann*, *Europarecht*, 6th edn. 1997, para. 755 et seqq.; *R. Streinz*, *Europarecht*, 5th edn. 2001, para. 652; *J. Hengstschläger*, *Grundrechtsschutz kraft EU-Rechts*, *Juristische Blätter* 2000, 409 et seqq., 494 et seqq.; *R. Steinberg*, *Zur Konvergenz der Grundfreiheiten auf der Tatbestands- und Rechtfertigungsebene*, *EuGRZ* 2002, p. 13.

<sup>14</sup> *U. Kischel*, *Zur Dogmatik des Gleichheitssatzes in der EU*, *EuGRZ* 1997, p. 1 et seqq.

<sup>15</sup> Cf. the cases listed in *Streinz*, (note 13) para. 372.

ers (Art. 39 et seqq. EC-Treaty), freedom of establishment (Art. 43 EC-Treaty), freedom of provision of services (Art. 49 et seqq. EC-Treaty) and freedom of movement of capital (Art. 56 et seqq. EC-Treaty). In the light of national dogma relating to fundamental rights, these primarily constitute characteristics of the principle of equality and of certain economically-related fundamental rights. As demonstrated by the *Bosman* judgment of the ECJ, these Community fundamental rights, just like the national fundamental rights, are capable of developing duties of protection as a third party effect. In the case in question, these applied to sports associations, although their fundamental right of association arising out of art. 11 ECHR was not examined.<sup>16</sup> We were therefore spared the conflict of laws involving Community fundamental rights versus the ECHR. However we should be aware that this question needs to be addressed.<sup>17</sup>

The fundamental rights under Community law that are set out above have undergone a major enhancement as a result of the case law of the Community courts. In its development of the law, the ECJ primarily relies on the common constitutional principles transmitted by the Member States and on the international treaties designed to protect human rights, in particular the ECHR and its protocols, in their interpretation by the ECtHR.<sup>18</sup> On this basis, important fundamental rights such as human dignity, protection of private life, home and postal communications, religious freedom, professional freedom, freedom of opinion, property, the ban on the retroactivity of criminal statutes and procedural guarantees have been transformed into Community law.<sup>19</sup>

2. This ECJ case law was contributory to the addition of the following wording to the Treaty in 1992 (Art. 6.2 TEU (formerly Art. F (2) TEU), as mentioned above: "The Union shall respect 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, as general principles of Community law". Art. 46 (d) TEU explicitly affords the ECJ jurisdiction to apply this provision. This was in some respects already heralded in the Preamble to the 1986 Single European Act, in which reference was made to the ECHR and the European Social Charter.

<sup>16</sup> Case C-415/93 ECJ *Union Royale Belge des Sociétés de Football Association Jean-Marc Bosman* [1995] ECR I-4921; see recently also Case 60/00 ECJ *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

<sup>17</sup> Cf. *Chr. Grabenwarter*, (note 8) § 4; *D. Ehlers*, (note 6). § 13 para. 12 with fn. 30.

<sup>18</sup> Cf. for the first time Case 11/70 ECJ *Internationale Handelsgesellschaft* [1970] ECR 1125 and [1974] 2 CMLR 540, German Constitutional Court, and Case 4/73 ECJ *Nold v Commission* [1974] ECR 491; since then consistent case law. Cf. *Th. Kingreen*, in: *Chr. Calliess/M. Ruffert* (eds.), *Kommentar zu EU-Vertrag und EG-Vertrag*, 2<sup>nd</sup> edn. 2002, art. 6 TEU, para. 19 et seqq.

<sup>19</sup> Cf. *Th. Oppermann*, *Europarecht*, 2nd edn. 1999, para. 492; *D. Kugelmann*, *Grundrechte in Europa*, 1997; *Wetter*, *Die Grundrechtscharta des EuGH*, 1998; *E. Chwolik-Laufermann*, *Grundrechtsschutz in der Europäischen Union*, 1994.

Art. 6.2 TEU henceforth explicitly links the law of the European Union with the ECHR, although the use of the term “respect” makes for a good deal of ambiguity. There are many indications that it is not thereby intended to make the ECHR into a direct component of Union law, “but ‘only’ to gain access to it in the guise of the general legal principles”.<sup>20</sup> Only in this way can we explain the political attempts to achieve the accession of the Union to the ECHR, which dominated the fundamental rights debate within the Community for a long time.<sup>21</sup> These attempts have not yet been subdued, and have gained momentum through Art. I-9.2 of the Treaty establishing a Constitution for Europe, although they must now tackle the strong position which favours of the European Union having its own schedule of fundamental rights, which originates from the declaration by the European Parliament on 12 April 1989 on fundamental rights and freedoms.<sup>22</sup> There is no doubt that Art. 6.2 TEU “emphasises the constitutionalising, integrating and legitimising function of a written schedule of fundamental rights”.<sup>23</sup>

We should not therefore have been surprised by the fact that in Cologne in June 1999 and in Tampere in October 1999, the European Council set the course towards the establishment of a positive schedule of fundamental rights. It was resolved to establish a Convention comprising 62 members of the European Parliament, the national parliaments and governments of Member States and the Commission, with the mission of drafting a Charter of Fundamental Rights. The ECHR and its protocols and the other relevant Conventions of the European Council, together with the national fundamental rights and statements made in the EC-Treaty, were to be used for orientation purposes.

The background of the mission of the European Council was the acknowledgement that despite the fundamentally positive case law of the ECJ, it was considered necessary to explicitly draw up a schedule of fundamental rights, in view of the shortfalls in the Treaty text, in particular given the lack of legal certainty, precision and visibility of the fundamental rights. Moreover, it was believed that on constitutional grounds, the increasing range of powers of the Community institutions necessitated an explicit schedule of fundamental rights, guaranteeing citizens their fundamental rights even in relation to “Brussels”. Fundamental rights are after all an element of European identity and part of the incipient process of European constitutionalisation.

When the Convention was established (it was the committee itself, not the instituting resolution, which chose the name), the evolution of the Community moved along a new path, which is not envisaged in the Treaty text and is not therefore exempt from reservations in relation to legitimacy. Therefore, a greater degree of

<sup>20</sup> See *Chr. Grabenwarter* (note 8) § 4 para. 2; *Th. Kingreen* (note 18) para. 18.

<sup>21</sup> See Memorandum EC Commission, Bull. EC 1979, Annex 2; opinion 2/94 ECJ [1996] ECR I-1759; *K. Strasser*, Grundrechtsschutz in Europa und der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention, 2001; *S. Winkler*, Der Beitritt der Europäischen Gemeinschaften zur EMRK, 2000; *Chr. Grabenwarter*, Festschrift Steinberger, 2003, p. 1129 (1145 et seqq.).

<sup>22</sup> Cf. OJ 1989, C 120/51; *B. Beutler*, EuGRZ 1989, 185.

<sup>23</sup> *Th. Kingreen* (note 18) para. 18.

transparency was ensured that had been the case during traditional intergovernmental conferences. The Convention chairman, former German Bundespräsident *Herzog*, steered it towards a generally welcomed submission in less than a year. Parliamentary committees in particular immediately demanded that it be legally anchored in treaty law.<sup>24</sup>

In contrast, the Nice European Council in 2000 noticeably wavered. It simply solemnly proclaimed the Charter and declared that it would become legally binding in the future. The pros and cons of the Charter have since been a topic of lively debate, and a vast body of literature has been generated on the subject.<sup>25</sup> The future of the Charter has now become closely linked to the fate of the European Constitution, into which it is to be incorporated as the Second Part. Since legal experts make poor prophets, I do not intend to prophesy about the Constitution, but will instead concentrate on the Charter itself. In summary, it is clearly easier to reach agreement on fundamental rights than on institutions and competences, because a homogenous legacy in relation to fundamental rights has accrued over the centuries amongst the European nations.

#### IV. The implications of the Charter of Fundamental Rights

1. There is no doubt that the Charter of Fundamental Rights is (still) not a constituent of binding Community law. Despite this fact, reference is made in Commission documents, including draft directives, to the fact that the Commission is acting in accordance with the Charter.<sup>26</sup> Even the European Ombudsman, and some of the Advocates General at the ECJ, including the German one, and the European Court of First Instance,<sup>27</sup> have made reference to the Charter and have pleaded in favour of some kind of self-commitment on the part of the European institutions.<sup>28</sup> It remains to be seen what attitude the European Court of Justice will take. The German Federal Constitutional Court has drawn on the Charter at least as an instrument of support.<sup>29</sup> Nevertheless, it cannot develop the nature of a

<sup>24</sup> Cf. *S. Magiera*, in: *Europäische Verfassungsordnung*, ed. by D. H. Scheuing, 2003, p. 118.

<sup>25</sup> Cf. *Chr. Calliess*, in: *D. Ehlers* (note 6), § 19 para. 3; *S. Magiera* (note 24); *P. Dagtoglou*, in: *Festschrift für W. Schmitt Glaeser*, 2003, p. 569, fn. 1; *U. Haltern*, *AöR* 128 (2003), 512 (522, fn. 75).

<sup>26</sup> Cf. *A. Zimmermann*, *Die Charta der Grundrechte der Europäischen Union zwischen Gemeinschaftsrecht, Grundgesetz und EMRK*, 2002, p. 17 et seq.

<sup>27</sup> Case T-54/99 ECJ *max.mobil Telekommunikation Service GmbH v Commission of the European Communities* [2002] ECR II-313.

<sup>28</sup> Cf. *A. Zimmermann* (note 26); *M. Borowsky*, in: *J. Meyer*, (ed.), *Kommentar zur Charta der Grundrechte der EU*, 2003, preliminary note to art. 51 para. 3 et seq.; *S. Alber*, *EuGRZ* 2001, 349 (351).

<sup>29</sup> *BVerfG*, *EuGRZ* 2002, 669 et seq.

legally binding instrument, nor can it be adopted “through the back door”.<sup>30</sup> The proper treaty amendment procedure laid down in Art. 48 TEU must be adhered to.

Despite the proclamation in Nice, the Charter is not binding in relation to Member States. The Charter could therefore be amended prior to its incorporation into the EU Constitution Treaty, bearing in mind that the Constitution Convention has incorporated it unchanged (apart from a few exceptions introduced for clarification purposes, e.g. Art. II-112) into the draft Constitution. If it should become legally binding in the form submitted, then Art. II-111.1.1 TEC determines its sphere of application somewhat restrictedly. The Charter applies to the institutions and bodies of the Union and Member States “only when they are implementing Union law”. The reference to the Union therefore extends the scope beyond the Communities to common foreign and security policy and to police and judicial cooperation in criminal matters. In order to avoid being seen as an extension to the sphere of competence of the Union, despite the fact that the principle of subsidiarity is explicitly mentioned and paragraph 2 contains a clause which affords Member States protection in matters of competence. There is no doubt that the fundamental freedoms of the Treaty are progressing and apply within the entire sphere of application of Community law, and to this extent also influence national law, as the ECJ has ruled on a number of occasions.<sup>31</sup>

2. The provisions laid down in Chapter VII of the Charter under the heading “General Provisions” also govern the relationship between the Charter and the ECHR. It is a known fact that the wordings of the ECHR have significantly influenced the text of the Charter. It was also a known fact that the power of the Community was not and is not immune from committing breaches of the ECHR. For example, the ECtHR declared the withholding of the right to vote in the European Parliamentary elections from British citizens resident in Gibraltar to be in breach of the Convention.<sup>32</sup> We cannot therefore exclude the possibility of conflict between fundamental rights under the Charter and those under the ECHR.<sup>33</sup> They may also affect the relationship between the two jurisdictions established to protect them. Art. II-112.3 and II-113 TEC offer solutions for the substantive conflict situations.

First of all, the rights under the Charter which correspond to those of the ECHR have the same meaning and scope as they are afforded in the Convention. However, this does not affect the possibility of more extensive protection under Union law. This “transfer clause” also transfers the case law of the ECtHR and thereby establishes a dynamic referencing procedure. Meanwhile, we have the problem of when rights do correspond. We could be confronted with the same questions as those which arise in relation to Art. 142 GG with respect to the “correspondence”

<sup>30</sup> A. Zimmermann (note 26), p. 19.

<sup>31</sup> See references in S. Magiera (note 24), p. 127 fn. 32 and generally S. Jones, *Die Bindung der Mitgliedstaaten an die Grundrechte der Europäischen Gemeinschaft*, 1999.

<sup>32</sup> Cf. *Mathews v United Kingdom*, Appl.No. 24833/94, judgment of 18 February 1999, RJD 1999 – I, p. 251 et seqq.

<sup>33</sup> Cf. *St. Kadelbach/N. Petersen*, EuGRZ 2003, 693.

of fundamental rights under the Grundgesetz and those in the constitutions of the individual German Länder.<sup>34</sup>

Secondly, Art. 113 TEC states that “nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised ... by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the Member States’ constitutions”. This “principle of favour” and this “most favoured status clause” guarantees any existing higher standard of fundamental rights laid down in the ECHR or in Member States’ constitutions. On this basis, the highest “level of protection” of fundamental rights must always apply. This could be considered to constitute a certain level of “rationalisation” of European protection of fundamental rights and to put at risk the priority status of Community law. However, in practical terms, the “added value” of a national or Convention-based standard of fundamental rights will arise extremely seldom, so that we need not fear any prejudice to Community law.<sup>35</sup> Therefore, the analogous incorporation into the Charter of the almost identically worded Art. 53 ECHR was in line with the well understood principle of subsidiarity.

Nevertheless, it cannot be denied that in practice, Art. II-112.3 and Art. II-113 TEC will bring about serious conflicts or competition, which will in particular truly put to the test the cooperative willingness of the jurisdictions involved, i.e. the ECJ and the constitutional courts of Member States. Since every institution sees itself as a supreme court, tensions and rivalries are bound to arise.<sup>36</sup>

3. If we examine the guarantees under the Charter of Fundamental Rights, we need pay less attention to the inclusion of the traditional liberal fundamental rights of freedom, equality and fair hearing, because these largely correspond to the rights under the ECHR and under the European tradition of fundamental rights. I do not intend to examine these in detail.

We need to pay greater attention to some innovations, which go beyond the German list of fundamental rights, to numerous economic and social promises, and also to the lack of a catch-all fundamental right in accordance with Art. 2.1 GG. Finally, we must examine the limitation system and the Preamble.

- a) In Art. II-63.2 TEC, the Convention sought to tackle risks which progress in the fields of medicine and biology could generate. For example, the Charter prohibits reproductive cloning of human beings and eugenic practices and also making the human body and its parts a source of human gain. The provision was the subject of lively and contentious debate by the Convention.<sup>37</sup> This cannot be considered as a true fundamental right. “Observance” of the

<sup>34</sup> Cf. on this *K. Stern*, *Staatsrecht III/2*, 1994, § 93 V 3.

<sup>35</sup> Similarly *Chr. Calliess*, in: *D. Ehlers* (note 6), § 19 para. 26; cf. to the primacy of Community Law *H. D. Jarass/S. Beligu*, *NVwZ* 2004, 1.

<sup>36</sup> Cf. *J. Limbach*, *EuGRZ* 2000, 417; *J. Schwarze*, *Festschrift 50 Jahre Bundesverfassungsgericht*, Vol. I, 2001, p. 223; *Th. Von Danwitz*, *JZ* 2003, 1125 (1130).

<sup>37</sup> Cf. *N. Bernsdorff/M. Borowsky*, *Die Charta der Grundrechte der Europäischen Union*, 2002, p. 272.

prohibitions which are based on the Convention of the European Council on Human Rights and Biomedicine of 4 April 1997 is of a purely objective legal nature and obliges Member States to introduce protective measures during the exercise of fundamental rights, namely that of the freedom of research referred to in Art. II-73 TEC, this being the provision in which the time-honoured “academic freedom” surprisingly appears again.

- b) On the other hand, Art. II-67 TEC is a broadly worded fundamental freedom to general and special protection of private life. This is accompanied in Art. 68 TEC by a right to protection of personal data, albeit subject to a restrictive statutory reservation. Both rights together are incapable of replacing the right to free personal development. In this respect the protection of fundamental rights contains a loophole, which was not closed even when the Charter was incorporated into Part II of the TEC.
- c) The chapter headed “Solidarity”, which proved to be the subject to most dispute during all the Charter consultations, deserves special attention. This chapter was modelled on the European Social Charter and the Community Charter of Fundamental Social Rights of Workers. The advocates and opponents of the fundamental social rights, which are granted under twelve articles within this chapter, “were initially so irreconcilably opposed that the entire negotiation process threatened to collapse”.<sup>38</sup> In fact, several circumstances tipped the balance in favour of the inclusion of fundamental social rights, the first being the demand by the Cologne European Council that the Charter should afford legitimacy to EU citizens. Secondly, the failure to include fundamental social rights would have been a retrograde step from the *acquis communautaire* of Community law (see Art. 136 et seqq. EC-Treaty) and from the legal status according to the International Pact on Economic, Social and Cultural Rights and the European Social Charter. Thirdly, the intention was to future-proof the Charter, so that no State was to be involved in rights of freedom without social safeguards. This itself could constitute the added value of the Charter in comparison with the ECHR. “European citizens may not be given stones for bread” commented the German Convention delegate *Peter Altmaier*.

The compromise achieved between the advocates and opponents was radically influenced by the German Parliamentary delegate *Jürgen Meyer* and the French Parliamentary delegate *Guy Braibant*. This provided for a Three Pillar Model. As the first pillar, fundamental social rights were initially to be based on the Preamble or, in a separate provision, on the principle of solidarity, as a value decision additional to liberty, equality, democracy and the rule of law. The economic and social rights which would generally be undisputed within Member States, were to serve as the second pillar. As the third pillar, the fact was to be acknowledged that rights to be included should not be allowed to fall below Member States’ national or international standard. In the light of this, the Preamble refers to solidarity, social progress and the European Social Charter.

<sup>38</sup> See *E. H. Riedel*, in: *J. Meyer* (note 28), preliminary note to Art. 27 para. 4.

Art. II-87 et seqq. lay down rights to participate and duties to protect in relation to individual and collective employment law, protection of children and young persons, family protection, health protection, social security and support, environmental and consumer protection and “access to services of general economic interest”. However, some provisions may only be considered to be “Union objectives”. The extensive requirements of the statutes of Member States confirm this. At all events, no clear line has been drawn to indicate when a true right is granted. *P. J. Tettinger* rightly demands more extensive “work on the structure of the dogma” in this area.<sup>39</sup>

- d) As regards the limitation system, no special limits (for example a statutory reservation) have been laid down, in contrast to the ECHR, in which there are limits in virtually all the fundamental rights provisions (with the exception of Art. 8, 17 and 23.2), because it was believed that this would have doubled the length of the text. Instead an extremely complicated limitation provision has been included in Art. II-112 and 114 TEC, which states that all limits to the fundamental rights require legislation. This may be an act of Member States or of the Union. In the latter case, we must of course question whether the legislative acts in question will require the involvement of the European Parliament in the competence and participation procedure, so that the reservation must be understood as one of a parliamentary nature. This wording does not match Art. 249 EC-Treaty, although it perhaps anticipates Art. I-33 et seqq. TEC. The commentating literature considers both sides of the question of the quality of the legislative act.<sup>40</sup> The limitation system is occasionally even described as the “Achilles heel” of fundamental rights protection.<sup>41</sup>

Even Art. II-112.3 TEC, which we have already discussed, and which subjects to the ECHR limitation system those Charter rights guaranteed under the ECHR, does not contribute anything towards legal clarity.

Over and above the statutory reservation, sentences 1 and 2 of Art. II-112 TEC require, in the manner of a substantive limit of limitation, respect of the “essence” of the rights and freedoms and of the principle of proportionality (welcomed by Art. 19.2 GG and the case law of the German Federal Constitutional Court) and of a similar wording which arises both in the case law of the ECJ<sup>42</sup> and in that of the ECtHR,<sup>43</sup> the latter of which states as follows: the restriction must be “necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”. This statement is certainly more

<sup>39</sup> *P. J. Tettinger*, NJW 2001, 1014 et seq.; see also *A. von Bogdandy*, JZ 2001, 157.

<sup>40</sup> Cf. on pros and cons: *Chr. Calliess* (note 35), § 19 para. 15.

<sup>41</sup> See *M. Kenntner*, ZRP 2000, 423 et seq.

<sup>42</sup> Cf. for example Case 292/97 ECJ *Karlsson* [2000] ECR I – 2737.

<sup>43</sup> Cf. the legitimate objectives stated in the second paragraph of the ECHR and the case law emanating from this.

precise that the phrase “protection of legitimate interests”<sup>44</sup> which was originally employed, but it will equally give rise to serious problems of interpretation.

Art. II-114 TEC contains a misuse clause, the content of which corresponds to that of Art. 17 ECHR. It is contextually related to Art. 7 TEU, and also seeks to be seen as a warning against moves towards totalitarianism. There was no major debate regarding its content, since even Art. 17 ECHR has been applied relatively seldom.<sup>45</sup>

4. We cannot conclude our cursory consideration of the fundamental Charter rights without examining the Preamble to the Charter. Since such preambles are common in Community treaties, other international human rights documents and the constitutions of Member States, there was never any doubt regarding the need for a Preamble in the Charter. Despite this, the Convention hotly debated the question of whether the Charter Preamble should be excluded if the fundamental rights were to be incorporated into a constitutional treaty.<sup>46</sup> Meanwhile, the TEC in its submitted form contains Preambles both before Part I and also before Part II which deals with fundamental rights. In the event that the TEC enters into force with the Charter of Fundamental Rights incorporated into it, this situation cannot remain. It is absurd to have two preambles in a single legislative act, so that they should be fused into one. They already have common features in some respects. They also both have their weaknesses, especially their excessive lengths<sup>47</sup>.

- a) It is true that both Preambles do emphasise traditional political, legal, intellectual, moral and ethical values on which a European union of states is based. They are evidence of the community of values which Europe represents.<sup>48</sup> The first and second paragraphs of the Preamble to the Charter are more felicitous than those of the Preamble to the Constitution itself. Paragraph 3 of the Charter Preamble is also more attractive, although it would have been sufficient to simply make a general reference to the fundamental freedoms in the Treaty. In contrast, paragraphs 4 and 5 of the Constitution Preamble are more convincing than the wordy paragraphs 4 to 7 of the Charter Preamble. Paragraph 6 of the Constitution Preamble constitutes self-adulation on the part of the members of the Convention, with the reference to the establishment of the Constitution “on behalf of the citizens” of Europe being somewhat arrogant, since they neither commissioned nor legitimised the Convention. Paragraph 8, which was added by the Constitution Convention at the last minute to the Preamble of the Charter of Fundamental Rights, and which stated that the Charter will be interpreted by the courts “with due

<sup>44</sup> Cf. *St. Barriga*, Die Entstehung der Charta der Grundrechte der Europäischen Union, 2003, p. 159.

<sup>45</sup> Cf. *J. Meyer-Ladewig*, EMRK-Handkommentar, 2003, remarks on Art. 17.

<sup>46</sup> Cf. *N. Bernsdorff/M. Borowsky* (note 37), p. 245.

<sup>47</sup> On the ‘identity buildingsbricks’ of the preamble, cf. *A. von Bogdandy*, JZ 2004, 53 (54 et seq.).

<sup>48</sup> On this *Teoria del Diritto dello Stato – Rivista Europea di Cultura e Scienza Giuridica* 2003 N. 1-2 with contributions of *O. Höffe*, *H. Schambeck* and others.

regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter” was deleted by the IGC. No court would allow itself to be influenced by such a “softener”.<sup>49</sup>

- b) Both Preambles avoid the invocatio Dei. The Charter Preamble refers in German to the “geistig-religiöse und sittliche Erbe” [scil. – literally: “spiritually, religious and moral heritage”] of Europe, whilst the Constitution Preamble refers to the “cultural, religious and humanist inheritance”. In contrast, the French version uses the word “spirituel” in place of “geistig-religiös”, and the other language versions copy this approach. The translation into German using the term “geistig-religiös” is somewhat bold.<sup>50</sup> However it is worded, this reference is far too sparse for a Europe whose roots are unquestionably Christian, albeit alongside other factors of influence. Let us recall the defensive slaughter committed by the knights originally known as Europaeenses in the Battle of Tours/Poitiers in 732 against the Arabs.

As we know, the “religious question” was the hottest point of dispute within the Preamble of the Charter<sup>51</sup> and of the Constitutional Treaty alike. The French in particular were vehemently opposed to any religious reference (apparently the French Prime Minister made an approach to the Convention Chairman Herzog), because it would not be compatible with the lay Constitution of France,<sup>52</sup> although the French Declaration of the Rights of Man and of the Citizen is still made “under the auspices of the Supreme Being”. I cannot envisage why a reference to the responsibility of “God”, such as appears in the Grundgesetz, the Swiss Bundesverfassung and other European constitutions, should amount to constitutional sacrilege and should be deemed to exclude religions other than the Christian religion. Works of Man, which include constitutions, all take place in the face of a higher authority, whatever our beliefs and indeed, whether or not we have any. Following the disasters and injustices of the past century, it is more important than ever before to make the accountability and responsibility of all political acts to be recognised before a higher power and to be established in the form of rules. Who else should this higher power be than God? Such a reference does not create a Christian religious state. Neither Germany, Switzerland, nor any other state incorporates the use of the word God in the Preamble to its Constitution.<sup>53</sup> As *Herbert Schambeck* correctly notes, “People have many different concepts of God, dependent upon their religious affiliation. However, this difference does not exclude the fundamental reference to a God who, according to our belief (excluding

<sup>49</sup> To the point *V. Epping*, JZ 2003, 821 (826).

<sup>50</sup> Cf. on this *J. Meyer*, in: *Meyer* (note 28), preamble, para. 18, 32 et seqq.; *Bernsdorff/Borowsky* (note 37), p. 246 et seqq.; *St. Barriga* (note 44), § 69 fn. 265.

<sup>51</sup> Cf. *C. Busse*, EuGRZ 2001, 565; *P. J. Tettinger*, NJW 2001, 1011.

<sup>52</sup> On laicity in France, cf. *H. G. Franzke*, ZRP 2003, 357.

<sup>53</sup> On the invocation of God in constitutions, cf. generally *P. Häberle*, Rechtsvergleichung im Kraftfeld des Verfassungsstaates, 1992, p. 213 et seqq.; *Chr. Starck*, in: *von Mangoldt/Klein/Starck*, GG I, 1999, preamble para. 36 et seq.

that of strict atheists) accompanies mankind even in a pluralist democracy.<sup>54</sup> At least the compromise found in the Polish constitution, which both mentions God and includes those who “derive universal values from other sources”, could have been adopted. If it is correct that a Preamble is an expression of the constitutional culture of the Constitution drafters and of those whom they represent, then the *invocatio Dei* must not be omitted from the Constitution for Europe.

## V. The incorporation of the Charter into the Constitution Treaty

All in all, the Charter of Fundamental Rights may be considered to have taken us a long way towards the goal of a European Constitution. It was accepted by a majority of 80% (410 against 93 with 27 abstentions). This does not mean that it does not need to be improved upon and touched up. I have referred to a few points, but there are others.<sup>55</sup> The Convention members may be rightly satisfied with their work. Their text was approved in December 2000 at the European Council meeting in Nice and was the subject of a solemn proclamation. It was signed unchanged by the Presidents of the Council, the Commission and the European Parliament. The Charter thus constitutes “a visible and credible crystallisation” of European constitutional development.<sup>56</sup> If it were to enter into force, this would significantly improve the protection of fundamental rights vis-à-vis the institutions of the EU.<sup>57</sup> But of course, the Charter is not yet legally binding. The question posed in Cologne in 1999, namely “whether, and if so how the Charter should be incorporated into the treaties”,<sup>58</sup> remains unanswered. The Nice Council failed to answer this question, as it failed to answer to many others, but simply postponed it to a “later date”.<sup>59</sup>

On 15 December 2001, the Laeken European Council established the European Constitution Convention, whose mission was also to deal with the fate of the Charter of Fundamental Rights during the creation of an EU Constitution. In fact the Convention incorporated the Charter into the Constitution Treaty virtually unchanged, making it Part II. In doing so it followed ideas which the Fundamental Rights Convention had already considered, namely to include the Charter in the form of a protocol to the Treaties, instead of proposing it independently alongside

<sup>54</sup> *H. Schambeck*, Gott und das Verfassungsrecht, *L'Osservatore Romano* of 16/01/2004 (weekend edition in German).

<sup>55</sup> Cf. e.g. the points for revision mentioned by *St. Barriga* (note 44), p. 176 et seq.).

<sup>56</sup> *S. Magiera* (note 24), p. 128.

<sup>57</sup> Cf. *U. Everling*, *EuZW* 2003, 225.

<sup>58</sup> Cf. Conclusions by the Presidency, Annex IV EUGKZ 1999, 364.

<sup>59</sup> Cf. the declaration on the future of the Union adopted by the European Council, OJ 2001 C 80, 85.

the Constitution.<sup>60</sup> In my view, the incorporation into the Constitution Treaty is correct and logical, since fundamental rights are generally understood as an essential element of the Constitution, although that of the European Union is not that of a single state but a union of states, and at all events where it exercises sovereign powers of a legislative, executive and judicial nature in the manner of a state. Of course, the fate of the Charter of Fundamental Rights is linked to the decision on the Constitution, which remains in the lap of the gods. However, I am hopeful that we shall be able to experience the two texts as a binding legislative act in the not too distant future, as a more intensive move towards integration via constitutional law than we have experienced in the former treaties.<sup>61</sup>

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<sup>60</sup> On the draft, cf. e.g. *J. Schwarze*, *Europarecht* 2003, 535 et seqq.; *Th. Von Danwitz*, *JZ* 2003, 1125 et seqq.

<sup>61</sup> Cf. *St. Koriath* and *A. von Bogdandy*, *VVDStRL* 62 (2003), p. 117 et seqq., 156 et seqq.; *I. Pernice* and *P. M. Huber*, *VVDStRL* 60 (2001), p. 148 et seqq., 194 et seqq.; *A. Peters*, *Elemente einer Theorie der Europäischen Verfassung*, 2001; *A. von Bogdandy* (ed.), *Europäisches Verfassungsrecht*, 2003.