Towards the Definitive Status of the Charter of Fundamental Rights of the European Union: Political Document or Legally Binding Text?

By Michiel Brand[*]

Introduction

At the Nice summit in December 2000, we witnessed the solemn proclamation of the Charter of Fundamental Rights of the European Union,[1] which can be seen as the remarkable product[2] of a revolutionary process.[3] The Convention that drafted the Charter had adopted the approach 'as if' it were to be incorporated into the European Treaties.[4] However, the question as to the final status of the Charter had not yet been decided when it was proclaimed. Instead, the issue was placed on the post-Nice[5] and post-Laeken[6] agenda and is currently being discussed in the Convention on the future of Europe.

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[1] OJ 2000 C 364/01.

[2] In the words of McCrudden: "It is elegantly conceived, beautifully drafted, and a masterly combination of pastiche, compromise and studied ambiguity."; see C. McCrudden, *The Future of the EU Charter of Fundamental Rights*, <http://www.jeanmonnetprogram.org/papers/ 01/013001.html>.

[3] G. de Búrca, *The Drafting of the European Union Charter of Fundamental Rights*, (2001) 26 EUROPEAN LAW REVIEW 126.

[4] COM (2000) 644, para. 7.

[5] See *declaration no. 23 on the future of the Union*, annexed to the Treaty of Nice.

[6] See *Laeken Declaration on the Future of the European Union*, annex I to the Conclusions of the Laeken European Council of 14-15 December 2001.

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This article focuses on the debate as to the Charter's future and final status[7] by taking a closer look at the available options.

I. The Charter

1. The Present Charter as a Political Declaration

The Charter currently has the formal status of a political declaration. However, this does not mean that the Charter is completely deprived of any practical significance. On the contrary, the Charter has considerable influence as practice shows. Not only has it been used by institutional actors like the European Commission and the European Ombudsman, but it has also made its influence felt in the European judicial framework. Advocates-General have referred to the Charter in their opinions numerous times[8] and the Charter has also entered the case law of the Court of First Instance.[9] Looking at the practical use of the Charter, it can be said that it "has legal bite even if it is formally not binding".[10] Thus, it is certainly more than just a political declaration of good intentions and it might perhaps best be characterised as European soft law.[11]

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[7] Note that this issue is closely connected to the longstanding debate on a possible EC/EU accession to the ECHR. On balance, such an accession is desirable (see also earlier M. Brand, *Quo Vadis Europa? Thoughts on the Future of the European Union*, (2002) 10 TILBURG FOREIGN LAW REVIEW 106, at 118-119). This issue will however not be discussed in this article.

[8] See *e.g.* A-G Alber in Case C-340/99, *TNT Traco SpA*, [2001] ECR I-4109, para. 94; A-G Tizzano in Case C-173/99, *BECTU*, [2001] ECR I-4881; and A-G Léger in Case C-353/99, *Hautala*, [2001] ECR I-9565.

[9] See *e.g.* Case T-54/99, *max. Mobil Telekommunikation Service*, [2002] ECR II-313 and the groundbreaking Case T-177/01, *Jégo-Quéré*, [2002] ECR II-2365; see hereto Dominik Hanf, *Facilitating Private Applicants' Access to the European Courts? On the Possible Impact of the CFI's Ruling in Jégo-Quéré*, in: 3 GERMAN LAW JOURNAL No. 7 (1 July 2002), available at: http://www.germanlawjournal.com/past_issues.php?id=166; see the ECJ's judgment on *Jégo Quéré* of 25 July 2002 - Case C-50/00 P *Unión de Pequeños Agricultores* and hereto the first commentary published: Dominik Hanf, *Kicking the Ball into the Member States' field: The Court's response to Jégo-Quéré* (Case P 50/00 P *Unión de Pequeños Agricultores*, Judgment of 25 July 2002), in: 3 GERMAN LAW JOURNAL No. 8 (1 August 2002), available at: http://www.germanlawjournal.com/past_issues.php?id=171 .

[10] A.J. Menéndez, *Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union*, (2002) 40 JOURNAL OF COMMON MARKET STUDIES 471 at 476.

[11] See E.M.H. Hirsch Ballin, *Een wezenlijke maatstaf voor alle actoren in de Gemeenschap; De voorlopige juridische status van het Handvest van de Grondrechten van de Europese Unie*, (2001) 49 SEW 330, at 335.

Be all this as it may, there is still a lack of clarity as regards the definitive status of the Charter.

2. The Future Status of the Charter: Outlining the Options

There are two available options for any future status of the Charter, both of which were outlined at the 1999 Cologne European Council[12]:

1. The Charter can maintain its current formal status of a political declaration, its practical status further to be developed by jurisprudence of Community Courts; or

2. The Charter can be given legally binding effect by incorporation into European primary law.

However, since then the contrast between the first, 'soft' option of a solemnly proclaimed and mainly political document and the second, 'hard' option of an incorporated Charter has been sharpened. After all, the Charter will now perhaps not 'just' be incorporated into the European Treaties, but possibly into a European Constitution(al Treaty). The second option has thus become a 'very hard' one, as it will lead to an even stronger entrenchment of the Charter's provisions in European law, indeed an elevation above current European law.

Both options will be considered more in depth in the following two sections. But first, the question of whether these two options are really so distinct and widely diverging will be considered. The last section will consider the preferable status for the Charter and examine how this should be given effect in practice.

II. Building on the Political Charter

1. The Charter and the Court

Morijn argues that "the Charter seems to have entered the case law of the Court of First Instance as an unmentioned source of 'confirmation' of the two sources of inspiration mentioned in Art. 6(2) EU".[13] At first sight, it may seem that the Charter as a source of confirmation is less important because it is inherently dependent

[12] There, it was decided that first, the Charter should be solemnly proclaimed and that "it will then have to be considered whether and, if so, how the Charter should be integrated into the treaties". See annex IV to the Presidency Conclusions of the Cologne European Council of 3-4 June 1999.

[13] J. Morijn, *Judicial Reference to the EU Fundamental Rights Charter; First experiences and possible prospects*, <http://europa.eu.int/futurum/documents/other/oth000602_en.pdf>, at 11-12.

upon the sources of inspiration. However, the Charter is in fact used on an equal footing with Article 6(2) in the CFI's case law and some Advocates-General have even placed the Charter's provisions at the apex of human rights sources.[14] Looking at this progressive stance towards the Charter, displayed especially by the Advocate-Generals', it can be assumed that, through jurisprudence, the Charter could develop *de facto* into a 'legally' binding document, despite it *formally* having only political status. With this in mind, it is possible to assume that jurisprudentially building on the political Charter could produce *similar* effects as Treaty incorporation.[15]

However, even though this particular jurisprudential line of development has been hinted at by the A-G's and the CFI, it has not yet been fully realised, as the ECJ has thus far been reluctant to take the Charter into account in its reasoning. It is unlikely, and even undesirable, that the Court set this particular development in motion before the next IGC in 2004; a final political decision of the Member States on this matter, preceded by the opinion of the transparent and highly democratically legitimated European Convention, would seem preferable.[16] However, such *de facto* development of the Charter could, and perhaps should, be taken up by the Court if the political process shows itself unable to solve the issue of the Charter's legal status.[17]

2. The Charter as a problematic source of exclusive reference

[14] See *e.g.* A-G Léger in Case C-353/99, *Hautala v. Council* [2001] ECR I-9565: "As the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a *privileged* instrument for identifying fundamental rights.", at para. 83 (emphasis added).

[15] Though similar, there would of course be differences nonetheless. Incorporation would formally give the Charter a higher status, creating a situation in which the European Courts would simply be forced to treat the Charter as the most important, primary source of human rights, whereas this would not directly be the case if Option 1 – formal political status and *de facto* legal development – were to be pursued.

[16] This may of course very well be one of the most important reasons for the Court's reluctant attitude towards the Charter. In fact, it can be argued that the ongoing work of the Convention has already specifically resulted in a display of a hands-off-attitude by the ECJ, namely with regard to the issue of the liberalisation of access to Community courts in the light of the fundamental right to effective judicial protection: see Johanna Engström, *Turning a deaf ear to effective judicial protection? – The ECJ's judgement in C-50/00 P Unión de Pequeños Agricultores*, forthcoming in TILBURG FOREIGN LAW REVIEW.

[17] Obviously, this would require the Court to take a very progressive stance towards the Charter, which may be undesirable if seen as another example of the ECJ violating the limits of its powers by circumventing the explicit will of the Member States. This could of course be remedied if the Member States decided explicitly to delegate the matter of the Charter's status to the ECJ at the next IGC.

It has been argued that the Charter "is a rather problematic source of exclusive reference"[18], for a number of given reasons. For example, it can be said that "the Charter contains *but a sample* (…) of the total range of fundamental rights whose respect is guaranteed by the Court of Justice."[19] Furthermore, it has been argued that "on the balance, the [Charter's] visibility- and simplicity-concerns have outweighed the 'as if'[20] goal".[21] Thus, the Charter's simple language, which was introduced for reasons of clarity and thus visibility, supposedly outweighs the Charter's legal certainty concerns, making the text not only a problematic source of exclusive reference, but perhaps also more generally, as Goldsmith has argued, making it unsuitable for having any legally binding force at all.[22]

It is arguably thus necessary to acknowledge that the Charter is a rather problematic source of exclusive reference. Even if this were not so, it is contended that the Charter should not, as a matter of principle, be treated as an exclusive instrument, for the fear that this would lead to overly narrow and short-sighted human rights protection within the EU.[23]

All this leads to the conclusion that there should be an attempt to retain a certain degree of flexibility in the use of human rights sources, a requirement which should thus clearly be taken into account when considering the two options as to the status of the Charter. If the first option of jurisprudential evolution of the Charter were chosen, this would obviously meet the flexibility requirement, as it would be consistent with the approach taken by the ECJ thus far, leaving the Court a certain leeway in the protection of human rights. In terms of flexibility, this would at first sight seem the better option, as the Charter would not emerge as the dominant and

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[18] Morijn, *op. cit. Supra* n. 13, at 24.

[19] K. Lenaerts and E. de Smijter, *A "Bill of Rights" for the European Union*, (2001) 38 COMMON MARKET LAW REVIEW 273, at 281. Emphasis added.

[20] See *supra* n. 4.

[21] Morijn, *op. cit. Supra* n. 133, at 24.

[22] See Goldsmith, *A Charter of Rights, Freedoms and Principles*, (2001) 38 COMMON MARKET LAW REVIEW 1201 at 1215: "[I]n the end, I believe the Charter lacks the precision of language necessary to allow it legal force. (…) So whilst it should be acceptable and valuable as a political statement, my own view is that this text is not suitable for incorporation in the Treaties whether directly or by cross-reference."

[23] For example, Weiler states that the Charter [although only where conceived of as an exclusive instrument] "runs the risk of inducing a more inward looking jurisprudence and chilling the constitutional dialogue", see J.H.H. Weiler, *Editorial: Does the European Union Truly Need a Charter of Rights?*, (2000) 6 EUROPEAN LAW JOURNAL 95, at 96.

exclusive source of human rights, such as, it could be argued, would happen if the Charter were to be incorporated in the Treaties. One may, however, question whether this latter assumption is entirely justified.

III. The Incorporation of the Charter

1. Incorporation and Flexibility

The second option of incorporating the Charter in European primary law, thereby creating formal legal obligations, is an ambitious project that would provide the Charter with a more constitutional and rigid status, but may as suggested above affect the desire for flexibility. It is argued, however, that this does not need to be the case.

Firstly, the Charter was not *intended* to be an exclusive source of reference. The drafting of the Charter was "a task of revelation rather than creation, of compilation rather than innovation".[24] The derivative and affirmative nature of the Charter, which can be shown by the elaborate references to other sources of human rights in the preamble[25] and in Article 53[26] of the Charter, points to a certain degree of openness and flexibility. A legally binding Charter would certainly be a *primary* source of reference but would not, and arguably should not, be an *exclusive* source.[27] Gold-

[24] COM (2000) 559, *Commission Communication on the Charter of Fundamental Rights of the European Union*, para. 7. However, it should be noted that even though the Charter's provisions are based on recognised human rights, it nevertheless "essentially contains new descriptions of existing fundamental rights": Lenaerts and de Smijter, *op. cit. supra* n. 19, at 281. Gráinne de Búrca describes the Charter as "a creative distillation of the existing fundamental rights-commitments from the fluid EU *acquis*": see G. de Búrca, *Human Rights: The Charter and Beyond*, Jean Monnet Working Paper No.10/01, <http://www.jeanmonnetprogram.org/papers/01/013601.html>.

[25] "This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.", para. 5 of the preamble.

[26] "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 agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

[27] As Lammy Betten has put it: "There is nothing in the EU Charter that indicates that the Court can no longer make use of its method of protection of fundamental rights by referring to this protection as a

smith thus misses the point when he concludes that the Charter's imprecise language impedes incorporation into the Treaties, as he overlooks the complementary rather than exclusive character of the Charter, which would not necessarily change with incorporation.

However, there is of course a *potential* danger for flexibility with incorporation into European primary law. The Charter's non-exclusivity claim will be harder to make once the Charter is positivised and constitutionalised. What was originally derivative and open-structured, could then certainly become constitutive and exclusive. Even though it is quite likely that the European Court of Justice will continue to adopt a flexible approach to the protection of human rights, the Charter's internal open approach, as evidenced by the references it makes to other human rights sources, may ultimately be insufficient and should thus be explicitly and externally re-affirmed and underlined.[28]

Therefore, it is suggested that to decisively prevent incorporation from closing the normatively open human rights *acquis*, this openness should be affirmed once again in the new Constitutional Treaty. This could be done by including, and extending, the wording of Article 6(2) TEU in the relevant article of the Constitutional Treaty (see further *infra*), thereby making clear that the Charter does not prevent the ECJ from continuing its flexible approach and from drawing on additional human rights sources alongside the Charter.[29]

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general principle of law. Of course, a binding EU-Charter would be then first port of call for the Court. However, in so far as the Charter does not (adequately) protect the right in question, the Court must still refer to general principles of law, to fill the remaining gaps." L. Betten, *The EU Charter on Fundamental Rights: a Trojan Horse or a Mouse?*, (2001) 17 INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 151, at 160.

[28] Regarding the Charter's references to other human rights sources, Gráinne de Búrca points out: "However [as regarding the references in the preamble], this seems merely to suggest that the rights actually specified in the Charter are derived from national constitutions and from these common international obligations, rather than that the EU continues to hold itself bound or at least inspired by international human rights obligations and standards more broadly. Further, while Article 53 of the Charter makes mention of human rights derived from international law and international agreements to which the Member States are party, this is done merely to affirm that the Charter should not be used in such a way as to restrict those rights within their proper sphere of application." She adds that what is missing, is any equivalent to the ECJ's more fluid and non-exhaustive approach to human rights sources. See G. de Búrca, *Fundamental Rights and Citizenship*, in: B. de Witte (ed.), Reflections on the Constitutional Treaty for Europe (EUI, Robert Schuman Centre, 2003).

[29] See CONV 116/02, pp. 9-10 (all Convention documents are accessible at <http://european-convention.eu.int>), where also some arguments for deletion of Art. 6(2) TEU are presented. In my opinion, however, there are no convincing arguments for not keeping an extra safeguard clause in the new Constitutional Treaty.

2. Comparing the Options: The Desirability of Incorporation

Comparing the two possible options for the status to be given to the Charter, the following assumptions can perhaps be made. Firstly, maintaining the Charter's political status and developing it in the ECJ's case law would generate similar effects in terms of the Charter's practical relevance as incorporation would have. Secondly, whereas a political Charter would probably leave more room for flexibility, it is reasonable to suggest that incorporation could also satisfy the *conditio sine qua non* of flexibility to a sufficient degree, especially when underlined by a clause explicitly affirming an open approach.

Thus, both options cannot perhaps really be considered particularly distinct, as the differences between them, at least with respect to the two important points mentioned, are not as great as might initially be thought. However, even though the legal status question of the Charter cannot perhaps really be seen as a vital question, this certainly does not mean that it is in fact a non-issue. After all, this would not explain the fact that this question is currently being discussed in depth.[30]

Looking again at the two available options more closely, there are a number of compelling reasons for pursuing the Charter's incorporation. Firstly, it should be stressed that the Charter was intended to increase legitimacy, visibility and legal certainty. It is clear that these goals can best, if not only, be served by an incorporation of the Charter that would truly make fundamental rights' "overriding importance and relevance more visible to the Union's citizens".[31] Thus, it is the very aims of the Charter itself that make the strongest case for incorporation.

Secondly, the process by which the Charter was drafted was of a transparent, participatory and democratically legitimated nature. In this respect, an incorporation of the Charter, which would have a high symbolic value, would be consistent with "the symbolic commitment which the entire process of drafting an EU Charter seems to have been intended to represent".[32]

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[30] B. de Witte, *The Legal Status of the Charter: Vital Question or Non-Issue?*, (2001) 8 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 81, at 89.

[31] Annex IV to the Presidency Conclusions of the Cologne European Council (3-4 June 1999).

[32] De Búrca, *op. cit. Supra* n. 24. It should furthermore be noted that in fact some Advocates-General have already referred to the special process in which the Charter was drafted so as to strengthen its force: See *e.g.* Advocate-General Mischo in Joined Cases C-20/00 and C-64/00, *Booker Aquaculture Ltd*, (not yet reported): "I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on

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Thirdly, it can be said that "the gap between the publicity and expectations generated by the process and the 'soft law' result at Nice remains palpable, and this may concentrate efforts towards a more formal constitutional incorporation".[33]

Fourthly, it can be argued that the position towards the Charter displayed by the European judiciary thus far, indicates that "a measure of anticipatory constitutional recognition [is being accorded] to the Charter". In this light, " *de jure* constitutionalisation" could be seen as the "'natural' next step".[34]

Finally, it should be pointed out that there is widespread support for incorporation of the Charter[35], most importantly, within the Convention itself.[36]

Ultimately, of course, the upcoming IGC will decide on the matter and it need not necessarily follow the recommendations of the Convention. Whether the IGC will decide in favour of incorporation, will depend more generally on the IGC's willingness to establish some kind of constitutional settlement for the European Union.

3. The Mode of incorporation

If it is accepted that incorporation is a necessary step in realising the purpose of the Charter itself, it is important to address the method by which incorporation should occur. The following main options have been suggested:[37]

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what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order.", at para. 126.

[33] Neil Walker, *The Charter of Fundamental Rights of the EU: Legal, Symbolic and Constitutional Implications*, in: P.A. Zervakis and P.J. Cullen (eds.), THE POST-NICE PROCESS: TOWARDS A EUROPEAN CONSTITUTION?, Nomos Verlagsgesellschaft, Baden-Baden, 2002, at 125.

[34] Walker, *op. cit.*, at 125. Similarly, one could argue that "[t]he Court may come to confirm the legal status of the Charter in such a way that it would appear to be pointless to resist formal incorporation into the treaties", McCrudden, *op. cit. supra* n. 2.

[35] See *e.g.* the Franco-German Declaration, Nantes, 23/11/2001, available at: <http://europa.eu.int/futurum/documents/offtext/doc231101_en.htm>, (01/12/02); COM (2000) 644; *European Parliament Resolution A5-0064/2000 on the elaboration of a Charter of Fundamental Rights*.

[36] *See e.g.* the Final Report of Working Group II on incorporation of the Charter and accession to the ECHR (CONV 354/02, at 2) and, notably, the drafts of the Constitutional Treaty CONV 369/02, Art. 6 and CONV 528/03, Art. 5.

[37] See also CONV 354/02, at 3 and CONV 369/02, Art. 6. More options were presented by Working Group II in an earlier stage, see CONV 116/02, at 7 *et seq*.

a) referral to the Charter in the Constitutional Treaty;

b) insertion of a reference to the Charter in the Constitutional Treaty, with the articles of the Charter being set out in
1: another part of the Treaty; or
2: in an annexed protocol;

c) insertion of the text of the Charter articles at the beginning of the Constitutional Treaty, in a Title or Chapter of that Treaty.

Option (a) represents a weak method of incorporation[38] and it is thus clear that it does not fit the present move towards a constitutional document for the Union, there being no particular justification for the Charter's complete omission from such a fundamental and symbolic document.

The Final Report of Working Group II indicates the Group's preference for option (c). The Report states that "a large majority of the Group" would prefer this option, as this would be "in the interest of a greater legibility of the Constitutional Treaty".[39] In general, "[i]t seems likely that the Working Group favoured full incorporation of all of the Charter articles primarily for symbolic purposes, in the sense of indicating the central place of these values and principles in the new constitutional text, rather as the Bill of Rights tends to be a central chapter in modern state constitutions".[40]

Even though this position is understandable, I am however not convinced that the incorporation of the Charter in the first part of the Constitutional Treaty is the best option to pursue. Firstly, it is exactly the objective of "greater legibility" mentioned by the Working Group that argues *against* a full incorporation of the Charter's provisions at the beginning of the Constitutional Treaty. After all, how would readability of the first part[41] of the Constitutional Treaty be promoted when a substantive

[38] As will be clear, the term 'incorporation' is used here, in line with the approach of the Working Group, "in the broad sense covering several forms and degrees of acknowledgement of the legal value of the Charter in the Treaties or in connection with them", CONV 116/02, at 7, n. 2.

[39] CONV 354/02, at 3.

[40] De Búrca, *op. cit. supra* n. 28.

[41] With its first, skeleton draft of the Constitutional Treaty CONV 369/02, the Convention essentially opted for a single text, the first part forming the true, constitutional part of the document and the second, more technical, part pertaining to Union policies and their implementation.

document of fifty-four articles[42] would be incorporated into a text which should instead be kept relatively short and comprehensible?[43] In this respect, it could, moreover be argued that devoting about half of the first part of the Constitutional Treaty to the provisions of the Charter might give "the rather distorted impression that fundamental rights play a centrally important role in the EU legal order".[44] Further, it should be pointed out that the Charter constitutes a complete, internally coherent and integral instrument, having its own preamble and its own set of final horizontal clauses; it was not designed to be one chapter of a larger text. Moreover, the Charter contains many provisions that duplicate or partially overlap with provisions that are presently contained in the EC Treaty[45] and that could subsequently be enclosed in the Constitutional Treaty. Even after a legal 'cleaning-up' job, it seems inevitable that some duplications will persist. Given the Charter's referral clause of Article 52(2)[46], this would not be harmful, but replications would then sit uncomfortably close to one another in the Constitutional Treaty.

Thus, it is my contention that a reference to the Charter in the Constitutional Treaty, with the Charter's provisions being set out in an annexed protocol (option b(2)), is the best mode of incorporation. It would constitute a full incorporation of the Charter's provisions in the Constitutional Treaty[47], thus giving the Charter equal legal status to the other provisions of the Treaty, whilst at the same time avoiding some of the disadvantages connected to option (c) and, to a certain extent, option (b)(1) (see also *infra*). It would promote greater legibility of the opening sec-

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[42] Note that the first part of the framework draft Constitutional Treaty, CONV 369/02, contains no more than 46 articles.

[43] However, it can be objected that "[a]ll contemporary constitutions are 'long' constitutions because the catalogue of fundamental rights that citizens want to be granted has widened and the complexity of procedures concerning the exercise of public powers in modern States has grown" and that "[t]his is all the more so for such a complex supranational entity like the European Union", see *Contribution of Elena PACIOTTI – MEP*, Convention Document WG II – WD 02, at 2.

[44] See Bruno de Witte, *Simplification and Reorganization of the European Treaties*, (2002) 39 COMMON MARKET LAW REVIEW 1255. Such an impression would be distorted because, as de Witte states, the role of human rights "is limited to the scope of EU activity (excluding the policy sphere left to the member states) and there are severe legal and practical limits to their effective enforcement", at 1280.

[45] Think of, for example, Art. 21 Charter and Art. 12 and 13 TEC (freedom from discrimination), and; Art. 23 Charter and Art. 141 TEC (equality between men and women).

[46] "Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties."

[47] Article 311 TEC provides: "The protocols annexed to this Treaty by common accord of the Member States shall form an integral part thereof."

tions of the Constitutional Treaty, would be in line with the nature of the Charter as an integral instrument and, finally, although it of course does not solve the problem of duplication, it would at least ensure that the Charter's provisions would not be present alongside the overlapping articles of the Constitutional treaty, thus preventing "visual and textual awkwardness".[48]

4. The Charter and the Constitutional Treaty

Taking account of the proposals made above, the relevant article of the new Constitutional Treaty could be drafted as follows:

> "The Union respects the rights, freedoms and principles enshrined in the Charter of Fundamental Rights of the European Union as set out in protocol X annexed to this Constitution(al Treaty). The Union shall also observe fundamental rights, as guaranteed by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, most significantly 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 Union law."

Interestingly, Article 5, paragraphs 1 and 3[49], of the latest draft of the first sixteen articles of the Constitutional Treaty, released on the 6 February 2003[50] are phrased similarly:

> 1. The Charter of Fundamental Rights shall be an integral part of the Constitution. The Charter is set out [in the second part of/in a protocol annexed to] this Constitution[51].

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[48] de Búrca, *op. cit. Supra* n. 28.

[49] Paragraph 2 of Article 5 specifically provides the legal basis for a possible accession to the ECHR.

[50] CONV 528/03. At the outset, it should be pointed out that this document of course is merely a draft, which moreover has been created solely by the Convention's Praesidium. Many critical opinions regarding the draft have already been voiced and thus far, more than 1000 amendments have been put forward with regard to the first 16 draft articles, 62 of which related to Article 5 of the draft (all proposed amendments can be consulted at the Convention's website <http://european-convention.eu.int>). See further *1000 Amendments to First Treaty Articles*, <www.euobserver.com> of 19/02/2003 and *Giscard tries to soothe critics of constitution*, THE TIMES, 8 February 2003.

[51] "Constitutional Treaty" was mentioned early on by President Giscard d'Estaing as the term to be used in the Convention's final document: see *Introductory Speech by President V. Giscard d'Estaing to the Convention on the future of Europe, 26 February 2002*,

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> 2. 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.

The approach taken thus far is indeed a desirable one. This article provides for the incorporation of the Charter, underlines its non-exclusivity by referring to additional human rights sources and at least includes what has been suggested as the best method of incorporation.[52] However, the provision proposed above would be preferable in several respects.

First of all, it would be better to incorporate the Charter in a Protocol than in the second part of the Constitutional Treaty, as while the latter option would not affect

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http://european-convention.eu.int/docs/speeches/1.PDF: "In order to avoid any disagreement over semantics, let us agree now to call it: a 'constitutional treaty for Europe'", at 11. It is noteworthy however that the *provisions* of the drafts put forward so far, consistently refer to the term "Constitution", rather than "Constitutional Treaty", whereas the document itself is entitled "Treaty establishing a Constitution for Europe". However, the name of the resultant text is ultimately not of vital importance (see also Brand, *op. cit. supra* n. 7, at 136-137). It could be argued that the term "Constitution" is more loaded and thus controversial, and that therefore the term "Constitutional Treaty" is to be preferred (see *e.g.* the amendment to Article 5 proposed by Mrs. Sandra Kalniete *et al.*). However, the use of the term "Constitution" has perhaps also been normalised, as it is used in certain Member States' contributions to the debate on the future of Europe and features in the Laeken Declaration. Moreover, a number of scholars contend that Europe is *already* endowed with its own "Constitution" (*e.g.* A. Føllesdal, *Drafting a European Constitution – Challenges and Opportunities*, Constitutionalism Web-Papers, ConWEB No. 4/2002, <http://les1.man.ac.uk/conweb> and J.H.H. Weiler, *The Constitution of Europe; "Do the New Clothes Have an Emperor?" and Other Essays on European Integration.* Cambridge University Press, 1999).

[52] The explanatory note to Article 5 of the draft Constitutional Treaty (see Annex II of CONV 528/03) provides the particular rationale behind the specific content of Article 5, which is similar to the arguments presented above. It is stated that "[a]s to the technique for incorporating the Charter, the fact that the complete text (…) will appear either in a separate second part of the Constitution or as a Protocol annexed to it will safeguard its fully binding legal nature and allow the general rules concerning future amendments of the Constitution to be applied to the Charter. Moreover, that technique will also keep the structure of the Charter intact and avoid making the first part of the Constitution more lengthy. At the same time, the reference to the Charter in the first few articles of the Constitution will underline its constitutional status." With regard to the need for non-exclusivity, the notes state that: "[p]aragraph 3 [of Article 5] draws on Article 6(2) TEU as it now stands and is intended to indicate clearly that, in addition to the Charter, Union law recognises additional fundamental rights as general principles resulting from two sources – the [ECHR] on the one hand and the constitutional traditions common to the Member States on the other. (…)[T]he usefulness of this provision is to make clear that incorporation of the Charter does not prevent the Court of Justice from drawing on those two sources to recognise additional fundamental rights which might emerge from any future developments in the ECHR and common constitutional traditions."

the legibility of the first, most fundamental part of the Constitutional Treaty, it is questionable whether the Charter would really be suited to the second and more technical half. Moreover, it would still not realise the nature of the Charter as an integral instrument and it would not prevent the afore mentioned visual and textual awkwardness of duplications being placed closely together. Secondly, draft Article 5(1) states merely that the Charter "shall be an integral part of the Constitution". This wording does not explicitly make clear the formal adherence of the Union to the Charter and thus from a symbolic point of view, it would be preferable to declare that the Union "respects the rights, freedoms and principles enshrined in the Charter".[53] Thirdly, it would be better to put the reference to the Charter and to the additional sources of human rights protection into the same block of text, or at least in two subsequent paragraphs, instead of putting it into two non-consecutive paragraphs.[54] This would not only be an improvement for reasons of logic[55] but would, moreover, better indicate the strong connection between the Charter and the other human rights sources and the complementary character of the latter in relation to the non-exclusivity of the Charter. Finally, draft Article 5(3) is more narrowly defined than the text proposed above, as it is more closely based on the current Article 6(2) TEU. The drafting of the new Constitutional Treaty would, however, be a good occasion to slightly extend the wording of Article 6(2) TEU, so as to codify the complete case law of the Court of Justice by including the Court's Nold formula into the text.[56]

Concluding Remarks

[53] Of course, stating that the Charter is an integral part of the Constitution also has the *de facto* effect that the Union will respect the contents of the Charter. It does not however imply this by the wording itself and therefore, for purely symbolic reasons, the alternative wording suggested is arguably preferable. See also e.g. the proposed amendments to Art. 5 by the representatives of the assembly of the republic of Portugal and by Ms. Palacio.

[54] See also the amendment to Art. 5 proposed by Joschka Fischer.

[55] *Ibid.*

[56] At Maastricht, only the core of the ECJ's human rights case law was codified. Article 6(2) TEU makes only explicit reference to the ECHR, whereas the ECJ draws inspiration more generally from "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories": see Case 4/73, *Nold* [1974] ECR 491, at para. 13. In this light, the Court has referred to *e.g.* the ILO Convention and the Covenant on Civil and Political Rights. Even though it may be assumed that the current wording of Art. 6(2) TEU does not intend to interfere with the Court's wider jurisprudence (see Lenaerts and de Smijter, *op. cit. supra* n. 19, at 277), it is the opinion of this author that there is no particular good reason *not* to bring the Constitutional Treaty's wording more in line with the ECJ's case law.

The final status of the Union's Bill of Rights is now the subject of considerable debate and will be definitively determined in the near future. The two available options for the Charter's status – jurisprudential evolution of a political charter and incorporation into European primary and constitutional law – are not, at least as far as practical effects and flexibility are concerned, as distinctive and widely-diverging as may be thought at first glance. The question of legal status remains considerably important nonetheless.

It has been the contention of this article that the preferable way forward is the incorporation of the Charter, to be given effect through a direct reference to the Charter in the Constitutional Treaty, followed by reference to complementary human rights sources – in the form of a slightly modified version of the current Article 6(2) TEU – in order to underline the Charter's non-exclusive character. Furthermore, the Charter's provisions should be included in an annexed protocol to the Constitutional Treaty.

Although Article 5 of the most recent draft Constitutional Treaty could be improved in certain respects, it does at least realise the desired elements of incorporation and affirmation of non-exclusivity. Moreover, it reflects what has been argued here to be the best mode of incorporation. However, the exact method of incorporation remains to be decided. In this respect, it should be noted that the proposed amendments tabled thus far do not indicate an overwhelming majority for either one of the two options currently enclosed in Article 5 – of the Charter as enclosed either in the second part of the Treaty or in a separate protocol. Moreover, amendments have also been proposed that desire an incorporation in the first part of the Constitutional Treaty[57] and there is, even within the Convention, an (minority British) opinion that the Charter should not be incorporated at all.[58] Thus, while nothing has yet been decided, the basic approach taken in draft Article 5 at least constitutes a first step in the right direction.

[57] See *e.g.* the proposed amendments by Elmar Brok *et al.* and that by Hannes Farnleitner.

[58] See the amendments proposed by David Heathcoat-Amory and by Tim Kirkhope.