

Working group II “Incorporation of the Charter/accession to the ECHR”

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1. The following is an attempt to address the questions formulated in Convention document of June 18, 2002 (Conv.116/02) concerning the incorporation of the Charter into the Treaties and the accession of the Union/Community to the European Convention of Human Rights (ECHR). At this point I wish to focus on responding to the first question.

2. Ad preliminary

I am in favor of incorporating the Charter into a new basic Treaty. It would be the optimum solution if the final document was the one and only document binding on Union members, replacing the present Treaties on the European Union and on the European Community. The present situation of a multitude of treaties does not facilitate comprehension of the organization and operation of the European structures, so knowledge about them has become a kind of “secret knowledge”.

Ad 1. The incorporation of the Charter into the new Treaty should be implemented in accordance with option (f). Thus, the Charter would become a chapter (title) of the new Treaty. That kind of regulation would be clear, transparent and more readily understandable, thus bringing Union law closer to its citizens with regard to the crucial issue of protection of fundamental rights. That would also enhance identification of the average citizen of united Europe with the goals of integration.

The position presented above I base on the conviction that the Charter is, because of the character of its contents, a normative act. The analysis of each of the articles of the Charter ascertains me that they fulfil the rigours for the legal norms applied in the theory of law-making. I therefore reject the view that the Charter is a document - declaration, an act of a programmatic character. The Charter will become legally binding if it is included as a part of the future Treaty.

The question whether the Union is prepared for guaranteeing to the citizens of the member states that all the rights contained in the Charter are respected is another matter.

Ad 2. A logical consequence of adopting option (f) would be deletion of article 6(2) of the TEU, since full incorporation of the Charter would make it redundant to invoke the Convention or the constitutional traditions of the member states in the sphere of fundamental rights. The Charter as part of the Treaty would account for the sources of legal inspiration mentioned in article 6 (2) and would strengthen the protection of fundamental rights. The regulations enclosed in the art. 6 (2) of the TEU that refer to the ECHR and the constitutional traditions will be replaced by the art. 52 of the Charter, in particular its paragraph 3, and by the art. 53 of the Charter. In other words, the functions of the art. 6 (2) of the TEU will be taken over by the art. 52 and 53 of the Charter, and also, to some extent, the relevant provisions of the introductory part of the Charter having them transferred to the introductory part of the Constitutional Treaty.

Ad 3. The preamble to the Charter should become – after appropriate editorial changes – part of the Preamble to the Treaty because of the contained in it universal system of values and references to the basic documents on the protection of the rights and freedoms of the individual.

Ad 4. Incorporation of the Charter would necessitate a review of those provisions of the Treaties that deal with rights guaranteed by the Charter, and their adaptation to the new construction. In accordance with the suggestion contained in the question, ensuring the substantive and editorial cohesiveness of the new Treaty should be tackled in the future, after resolving the basic preliminary issues.

Ad 5. As regards interpretation of the new Treaty in its entirety, it would be enough to retain (after appropriate re-editing) the clause contained in article 52 (2) of the Charter, which would eliminate the need for numerous repetitions of that clause.

Ad 6. (a) The suggestion contained in the question to eliminate the reference in article 46 of the TEU to action of institutions should be accepted, since it corresponds to the established case-law of the Court of Justice.

(b) The issue taken up in the question goes beyond the basic problem of incorporation of the Charter. However, in line with the spirit of the whole reform, it would be desirable to extend the jurisdiction of the Court of Justice to subject matter related to justice and home affairs.

(c) It is probably too early at this point to introduce direct constitutional appeals to the Court of Justice with regard to fundamental rights. First, an assessment should be made of the experiences in this regard of the member states and the possibilities incorporated in the community appeals system (article 230-4 of TEC) and the institution of preliminary rulings (article 234 of TEC).