

**CONV 368/02**

**CONTRIB 128**

**COVER NOTE**

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from Secretariat

to The Convention

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**Subject : Contribution from Mr Iñigo Mendez de Vigo, Mr Klaus Hänsch and  
Mr Andrew Duff, members of the Convention  
"European Parliament resolution on the impact of the Charter of Fundamental  
Rights of the European Union and its future status"**

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The Secretary-General of the Convention has received the attached contribution from Mr Iñigo Mendez de Vigo, Mr Klaus Hänsch and Mr Andrew Duff, members of the Convention.

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**European Union Charter of Fundamental Rights**

**European Parliament resolution on the impact of the Charter of Fundamental Rights of the European Union and its future status (2002/2139(INI))**

*The European Parliament,*

- having regard to its resolution of 16 March 2000 on the drafting of a Charter of Fundamental Rights of the European Union,<sup>1</sup>
- having regard to its assent to the draft Charter of Fundamental Rights of the European Union on 14 November 2000,<sup>2</sup>
- having regard to Rule 163 on 14 November 2000 of its Rules of Procedure,
- having regard to the report of the Committee on Constitutional Affairs and the opinion of the Committee on Legal Affairs and the Internal Market, the opinion of the Committee on Women's rights and Equal Opportunities and the opinion of the Committee on Petitions (A5-0332/2002),

Whereas:

***Legitimacy of the Charter***

- A. The Treaty of Maastricht (1992) first made provision for the concept of European Union citizenship and established, in Article 6(2), that the Union should 'respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.<sup>3</sup> For the next decade progress was made in developing the Union's human rights profile mainly in its external policies, but also in the Copenhagen criteria for enlargement (1993);
- B. In June 1999 the European Council of Cologne agreed to establish a Charter of Fundamental Rights of the Union 'in order to make their overriding importance and relevance more visible to the Union's citizens'. It resolved that once the Charter had been proclaimed 'it will then have to be considered whether and, if so, how the Charter should be integrated into the treaties'. To draft the Charter the European Council convened an ad hoc body (that decided to call itself a Convention) made up of representatives of the Heads of State and Government and representatives of the President of the Commission, and Members of the European

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<sup>1</sup> OJ C 377, 29.12.2000, p. 329.

<sup>2</sup> OJ C 223, 8.8.2001, p. 74.

<sup>3</sup> The European Court of Justice had already considered fundamental rights to be part of the general principles of Community law at least since 1969 (Stauder v. City of Ulm).

Parliament and of national parliaments,

- C. The Convention worked from 17 December 1999 until 2 October 2000 under the chairmanship of Roman Herzog, former Federal President of the Federal Republic of Germany. The European Council developed the mandate of the Convention at its meeting in Tampere in October 1999 and reviewed progress at Feira in June 2000. The Convention worked in a very open manner and consulted widely. Notwithstanding the question of the Charter's ultimate status, it decided, famously, to work 'as if' it were drafting a legally binding juridical text and with the express intention of ensuring legal certainty. The Convention precisely fulfilled its mandate from the European Council, which, in turn, unanimously accepted the draft Charter at Biarritz on 13-14 October 2000;
- D. After having received the affirmation of the European Parliament (14 November 2000) and Commission (6 December 2000), as well as that of several national parliaments, the Charter was solemnly proclaimed by the presidents of the three EU institutions at Nice on 7 December 2000. The Intergovernmental Conference also committed itself to considering the future status of the Charter in a year's time as one of four specific items of further constitutional reform of the Union to be concluded in a new IGC in 2004;
- E. In the Laeken Declaration of 15 December 2001 the European Council established a constitutional Convention with legitimacy corresponding to that of the Charter Convention, under the chairmanship of Valéry Giscard d'Estaing, former President of the French Republic, to consider, among other things, whether the Charter 'should be included in the basic treaty and ... whether the European Community should accede to the European Convention on Human Rights';
- F. The Convention has set up a working group under the chairmanship of Commissioner Vitorino to deal with the modalities and consequences of the incorporation of the Charter into the Treaty and accession by the EC/EU to the European Court of Human Rights<sup>1</sup>;

### ***Content***

- G. The Charter embraces the classical human rights of the ECHR as developed by the jurisprudence of the European Court of Human Rights in Strasbourg. It has a much wider scope, however. First, as befits a catalogue of rights that stem from the competence of the European Union as laid down in the Treaties and as developed by the case law of the European Court of Justice in Luxembourg. Second, importantly, the Charter reaffirms the rights and principles resulting from the constitutional traditions and international treaty obligations common to Member States. Third, the Charter addresses modern scientific and technological developments. Fourth, the Charter fully reflects and respects the European social model;

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<sup>1</sup> For the mandate of the working group see CONV 72/02, and for a paper on modalities CONV 116/02.

- H. Like the Bills of Rights common to the constitutions of most Member States, the Charter draws together in a single text a comprehensive catalogue of not only specific rights but also general freedoms, values and principles. In style, form and precision it is a familiar document;
- I. While the Charter was not intended to create new rights, it succeeded in making existing rights more visible. In building a fresh, large consensus around a new formulation of rights, the Charter brings greater clarity and salience to them. It reflects contemporary European norms of good governance with respect to equality and anti-discrimination, social policy, ecology, civic rights, administration and justice. The rights are indivisible: in Europe, liberty, equality and solidarity hang together;
- J. The Charter is a dynamic document, seeking, as in the Preamble, to “strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments”. Its purpose is to assist the Union in its task of further developing common values while respecting the diversity of national identities. Its formulation allows for the future development of the *acquis communautaire*;
- K. The Charter, therefore, has a durable quality. Despite its unsettled legal status, it was fully legitimised by the manner of its drafting, and it was designed to last. While no such constitutional document can be perfect, and all such documents must be amendable, to open it up now for revision, especially so early in its life, might reduce its integrity and moral force. Experience of the application of a mandatory Charter is needed before amendment can be contemplated. In any case, the current Convention has not been mandated by the Laeken Declaration to re-write the Charter; it should be made clear that such a revision can only be carried out using, at the very least, the same method as for revision of other constitutional provisions,
- L. There may nevertheless have to be some technical changes made to the Charter in relation to the 'horizontal clauses' to enable it to be incorporated in the Treaty;

### *Scope*

- M. The Charter does not attribute competence to the Union. On the contrary, it has the effect of limiting the exercise of power by the EU institutions because of their obligation to respect the Charter. The institutions also have the duty within their competence to promote respect for the provisions of the Charter;
- N. The Charter does not limit the competences of Member States under the Treaties. It is not a substitute for the fundamental rights regimes of Member States, but a complement to them;
- O. The Charter is addressed to the institutions and bodies (and agencies) of the European Union and the Member States when and in so far as they implement Union law and policy;
- P. In so far as the Charter postulates a direct relationship between the citizen on the one hand and supranational authority on the other, it will help the Union respect the principle of subsidiarity. The Charter should set the tone for the whole constitutional settlement;

## *Effect*

- Q. Although the Charter is not directly justiciable, its status as a solemn proclamation means that it has already become, as expected, an important reference document. It is respected by the EU institutions and is invoked by both Member States and citizens<sup>1</sup>, in particular through the petitions submitted to the European Parliament and the complaints lodged with the European Ombudsman. The Commission is determined to regard the Charter as binding upon itself and instituted internal procedures to ensure compliance with its provisions.<sup>2</sup> It treats the Charter as a general principle of Community law. In making legislative proposals, the Commission lays claim to have respected the Charter on a systematic basis<sup>3</sup>;
- R. The Council has not yet chosen to regard the Charter as mandatory, but it has referred expressly to the Charter in four Decisions and in two Resolutions<sup>4</sup>;
- S. Rule 58 of its Rules of Procedure states that Parliament shall pay particular attention to ensuring that legislative acts are in conformity with the Charter of Fundamental Rights; furthermore, Parliament has used the Charter as a template for its annual reviews of the situation as regards fundamental rights in the EU; references to the Charter have appeared frequently in the Parliament's reports and resolutions, as well as in MEPs' questions to the Commission and Council;
- T. Three acts adopted under the codecision procedure have also relied on references to the Charter (access to documents, social exclusion and financial collateral).<sup>5</sup> Numerous others are pending;
- U. The Ombudsman and the Committee on Petitions have received many petitions and approaches from citizens citing the Charter, although there are numerous apparent misunderstandings of its scope or level of protection. Nevertheless they have been in the forefront of those who have actively deployed the Charter in the interests of the citizen. They have upheld complaints and used their powers of own initiative over discrimination in the recruitment and employment policies of the EU institutions in respect of age, sex, race, freedom of expression and parental leave. They also apply systematically the Code of Good Administrative Behaviour to seek to give effect to the provisions of the Charter. They consider that the Charter should be binding whenever Community law is being applied. The

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<sup>1</sup> See for example judgment of the Court of Justice, 10.9.2001, Case C-377/98, Netherlands v. Parliament and Council.

<sup>2</sup> Commission Communication, Application de la Charte, SEC(2001)380/3, 13 March 2001.

<sup>3</sup> Draft acts in which articles of the Charter are cited cover competition policy, labour conditions, data protection, scientific research, asylum and refugee policy, advertising and sponsorship of tobacco, drug trafficking, parental responsibility and the rights of the child, access to justice, the arrest warrant, disabilities, health protection, racism and xenophobia, and staff regulations.

<sup>4</sup> Council Decision 2001/903/EC of 3 December 2001 on the European Year of People with Disabilities 2003; Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime; Council Framework Decision 2002/475/JHA on combating terrorism; Council Framework Decision 2002/584/JHA on the Europe arrest warrant and the surrender procedures between Member States and Council resolutions 2002/C50/01 and 2002/C163/01 on languages and life-long learning.

<sup>5</sup> Respectively, Regulation (EC) No 1049/2001; Decision No 50/2002/EC; Directive No 2002/47/EC.

Committee on Petitions and the European Ombudsman and his network of national ombudsmen could play an important role in promoting and monitoring the implementation of the Charter, and the Ombudsman could be empowered to refer important fundamental rights cases to the Court of Justice;

- V. There have been several attempts to call the Charter in aid of litigation in the European Courts. Advocates-General are making an increased number of references to the Charter in their Opinions, and it has become an important source of guidance for the judges.<sup>1</sup> In one case the Court of First Instance has decided that the Charter confirms a right to judicial review as a general principle of Community law.<sup>2</sup> In another case, the same Court, citing the Charter, has sought to widen the access to effective judicial remedy of a party directly but not individually concerned<sup>3</sup>; even though the Court of Justice has ruled against that interpretation because it would cause the Community courts to go beyond their competences<sup>4</sup>, it has nevertheless, at the same time, suggested amending the Treaty accordingly<sup>5</sup>. The European Court of Human Rights has also begun to make positive references to the Charter<sup>6</sup>;
- W. Not only the European Parliament and Commission<sup>7</sup> but also the Economic and Social Committee and the Committee of the Regions have called for the Charter to become legally binding. This powerful message was recently reinforced by the Convention's Civil Society Forum and Youth Convention;

### *Consonance with ECHR*

- X. Fears the Charter would pose a threat to the credibility of the ECHR and the European Court of Human Rights have not been realised. The jurisdiction of the Strasbourg court provides an external monitoring of and the assertion of minimum standards upon the human rights performance of the 44 States of the Council of Europe. The jurisdiction of the Luxembourg court provides an internal control on and an insistence on a high level of respect for human rights within the European Union's legal space. The significance of the Charter is that it provides for a more extensive rights-based regime within the European Union;
- Y. As has been said repeatedly by both the European Parliament and the Parliamentary Assembly of the Council of Europe, the best means of ensuring coherence between the ECHR and EU human rights law would be for the Union to accede to the former. It is important to remove the anomaly whereby the EU, which enjoys competences attributed by its Member States. Is not a high contracting party to the ECHR alongside those same Member States. If it were to sign up to the ECHR, the EU would be subject to the same external control in respect of human rights as that of its Member States. On the one hand, the existence of the Charter makes EU accession to the ECHR neither unnecessary nor irrelevant. Accession is desirable

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<sup>1</sup> See for example the Opinions of Advocate General Tizzano in C-173/99, BECTU and Leger in C-353/99, Hautala.

<sup>2</sup> T-54/99, Max.mobil.

<sup>3</sup> T-177/01, Jégo-Quéré.

<sup>4</sup> Judgment 25 July 2002, Case C-50/00 P, Unión de Pequeños Agricultores, Rn. 44 f.

<sup>5</sup> Judgment 25 July 2002, Case C-50/00 P, Unión de Pequeños Agricultores, Rn. 45 f.

<sup>6</sup> ECHR Application no. 25680/94, Judgment 11 July 2002.

<sup>7</sup> COM(2000) 644.

for its own sake whatever the status of the Charter. On the other hand, accession to the ECHR does not render the incorporation of the Charter into the Treaty any less necessary or relevant; considers this accession as a forerunner to other EU accessions to international instruments for the protection of fundamental human rights;

- Z. Even after accession of the EU to the ECHR, the European Court of Justice would remain the court of last instance for Community law. Its relationship with the European Court of Human Rights would be exactly the same as that of national supreme or constitutional courts who recognise the role of the European Court of Human Rights to verify consistency and compatibility with pan-European human rights norms. The European Union, once endowed with international legal personality, would be represented directly at the Court of Human Rights, thereby strengthening the authority and autonomy of both the European Court of Justice and the European Court of Human Rights;
1. Notes that the procedure adopted for the Charter's creation, in conjunction with the wide use made of it by the institutions already, courts and citizens, invests it with great authority; believes that the Charter's effectiveness would be significantly strengthened if the rights laid down in it were to become enforceable under EU law before the courts;
  2. Urges the Convention to enhance legal certainty and end political confusion as to the Charter's scope and level of protection by giving it the status of primary law, thereby making it a central reference point for the Court of Justice and national courts; to this end, stresses that the Charter should be incorporated into the constitutional law of the European Union;
  3. Warns of the dangers of refusing to make the Charter mandatory upon all the EU institutions, bodies and agencies and on Member States when and in so far as they implement EU law and policy, thereby disappointing the expectations of European citizens;
  4. Maintains that an increased status for the Charter is highly desirable in the context of enlargement because it will serve to enshrine a fundamental rights regime at the heart of the European integration process thereby reassuring old, new and potential Member States alike;
  5. Points out that making the Charter binding will initiate a new phase in the development of EU citizenship and that, in order to protect the citizen from any abuse by the European Union of its enlarged powers, judicial remedies will need to be developed;
  6. Proposes, therefore, that the Convention, in close consultation with the Courts, draws up measures to improve direct access to the Court of First Instance (with a right of appeal to the Court of Justice) to enhance the legal protection of individuals; believes that national courts in the Member States and candidate countries must be made more aware of their obligation to deploy the Charter on behalf of the citizen;
  7. Finds it unthinkable to have a modern constitution of the European Union without a binding Bill of Rights, and takes the view that if the Convention drafts a new treaty without the Charter it will fall short of having the constitutional effect which is both necessary and desirable;
  8. Believes that the Charter should be incorporated in the new constitutional treaty without making any changes to its provisions;

9. Notes that the Charter once incorporated should be amendable only according to the most solemn constitutional provisions; insists that any subsequent development of the Charter must be drafted by a new special Convention, to be established at a later stage;
  10. Expects that such a new Convention would be gender-balanced and would work to reinforce the principle of equality between the sexes;
  11. Acknowledges the already good collaboration between the Court of Justice and the European Court of Human Rights; reiterates its support for the opening of accession negotiations by the Union, to become a high contracting party to the ECHR and other international instruments in the field of human rights;
  12. Recalls that European Union accession to the ECHR is a complement to and not a substitute for the granting of mandatory status to the Charter under EU law, both actions being necessary and timely;
  13. Invites the European Parliamentary delegation to the Convention to submit this resolution as a formal contribution to the Convention;
  14. Instructs its President to forward this resolution to the Council, the Commission, the governments and parliaments of the Member States and candidate countries, the Court of Justice and the European Court of Human Rights.
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