Primacy of Community Law: A Hidden Agenda of the Charter of Fundamental Rights

By Stefan Griller *

I. Introduction**

In December 2000, the Charter of Fundamental Rights was the subject of a joint solemn proclamation by the European Parliament, the Council and the Commission in Nice.((1)) The European Council welcomed this proclamation and highlighted that the Charter combines "in a single text the civil, political, economic, social and societal rights hitherto laid down in a variety of international, European or national sources". The European Council then continued: "The European Council would like to see the Charter disseminated as widely as possible amongst the Union's citizens. In accordance with the Cologne conclusions, the question of the Charter's force will be considered later."((2)) At the same time, Declaration 23, the "Declaration on the Future of the Union", which is part of the final act of the Intergovernmental Conference, calls for the continuation of the debate about the future development of the Union. At the European Council meeting in December 2001, a declaration shall be agreed upon containing "appropriate initiatives for the continuation of this process". Along with the issues of delimitation of competencies, simplification of the Treaties and the role of national Parliaments, this process should address, as the European Council expressly mentions, the Charter of Fundamental Rights. What is to be addressed is "the status of the Charter of Fundamental Rights of the European Union proclaimed in Nice, in accordance with the conclusion of the European Council in Cologne"((3)).

One point of the future debate will certainly be whether or not the Charter should undergo any changes before its eventual explicit incorporation into the Union and Community legal order. Having said this, it should also be stressed that it would be misleading to currently look at the Charter as a legally irrelevant document. By contrast, widespread consent assumes that the ECJ will treat the Charter as an important source of the Member State's common constitutional traditions as mentioned in Article 6 TEU.((4)) Thus the impact of the Charter on future case law of the Court must not be underestimated – it might come near to that of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Against this background, the relevance of a debate on any revision of the Charter is twofold: First, it addresses eventual prerequisites for making the Charter per se a binding part of Union and Community law. Second, it touches upon the important issue of the actual characteristics of the Charter: Can the Charter, as it stands, really be taken as a document of the general principles of EC law as well as of the constitutional traditions common to the Member States, or could it bring about substantial changes to that acquis? In this paper, I shall argue that the Charter has a hidden agenda: that of revamping the concept of primacy of EC law as it currently stands in the case law of the ECJ. I shall argue that the issue deserves thorough deliberations and discussion, which appear to have been missing during the elaboration of the Charter in the Covenant.

For the sake of brevity,((5)) I shall address only two points: The level of Fundamental Rights Protection under Community law as seen by the ECJ (below under II.), and the level of protection as guaranteed by Article 53 of the Charter (below under III.).

II. The Relation between Community Law and National Law with Regard to Fundamental Rights Protection

The ECJ has frequently underlined that the guarantee of fundamental rightsin Community law does not follow a particular State's legal system of fundamental rights' protection. "Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. [...] [T]he law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure."((6)) The protection of Community fundamental rights as integral part of the general principles of law, albeit being inspired by the constitutional traditions common to the Member States "must be ensured within the framework of the structure and objectives of the Community"((7)).

It is sometimes submitted that the ECJ, when identifying the standard of protection to be guaranteed, takes or at least should take recourse to the national legal system which offers the highest level of protection.((8)) This solution has already been proposed to the Court by one of its Advocates General at an early stage.((9)) However, the Court never followed such proposals.((10)) Analysing its jurisprudence one can neither ascertain a "maximum standard approach" nor a "minimum standard approach" on the basis of the lowest common denominator of national fundamental rights' orders. The ECJ's position defined in the statements mentioned above has been described as a comparative method including discretionary elements ("wertende Rechtsvergleichung").((11))

In principle, the Court's solution – despite its shortcomings in specific occasions like the Banana case – is to be welcomed. Any other conceivable alternative is not convincing.((12)) A differentiated approach, varying from country to country would jeopardise the uniform application of Community law, as the Court has correctly underlined.

Apart from that, the differentiated approach, like the maximum standard approach, exposes Community law making to the fundamental rights scrutiny by Member States in an unbalanced manner. The creation of new fundamental rights or the extensive interpretation of existing rights at national level could significantly weaken the Community's harmonisation competences.

Furthermore, the maximum standard approach is not workable in many cases. In a situation of a conflict between different fundamental rights – e.g. in the case of abortion the right to life on the one hand and the mother's right to self-determination((13)) on the other hand – solutions can only be found by rebalancing the conflicting rights by means of interpretation.

Constellations of that type exclude per se a maximum standard solution in the sense that a right is guaranteed to its widest possible extent. Instead, the effect of one right is inevitably limited in favour of the other right.

Similarly, a maximum standard approach would appear unjustified with regard to limitations in favour of the public interest((14)), since the individual solution of one State would be forced upon all other Member States. This can be illustrated by the example of the right to property. Almost every national constitution authorises expropriations for e.g. the construction of railways. It would be incomprehensible, that Community law should prohibit such a limitation in favour of the public interest only because one Member State has opted for a more "owner-friendly" approach in its national legal order.

Mutatis mutandi the same arguments can be put forward against the minimum standard approach.((15)) Another more pragmatic objection to this method is that it would inevitably lead to open conflicts with national constitutional courts. No provision in the treaties can be interpreted in a manner that it requires Member States to adapt their level of fundamental rights' protection to the lowest level existing in the Community.

With a view to EU enlargement, it should also be mentioned that the yardstick of the constitutional traditions common to the Member States might be affected by the accession of new members. According to the Court their constitutional traditions evidently would have to be taken into consideration when determining the extent of Community fundamental rights protection.((16))

III. Article 53 of the Charter: a Turnaround?

1. Exposition

Article 53, under its heading "Level of protection", reads as follows: "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." ((17))

As regards the legal relationship between the mentioned instruments of international law this solution raises no principal objections and will not be tackled further.((18)) It is the reference to national constitutions that appears to be highly problematic. This is the issue I concentrate on. Article 53 guarantees the protection according to the standards of national fundamental rights even if they provide for a higher level of protection than the Charter itself. It is obvious that in this case Community law would be examined in the light of national fundamental rights standards. As mentioned, the ECJ has explicitly rejected such types of examinations, stressing that it would conflict with primacy of Community law.

That national fundamental rights standards are only relevant for their specific scope of application according to Article 51 of the Charter cannot eliminate concerns about the danger of conflicts. Past experience has demonstrated that the most sensitive cases of conflict have taken place in areas of overlapping scopes of application, namely in areas

where Member States implemented Community law – to mention only the so called Solange I and Solange II decisions and the recent banana judgement of the German Constitutional Court (Bundesverfassungsgericht).((19)) Implementing acts had come under "constitutional fire". It had been argued that they were in conflict with national fundamental rights, the plaintiffs aiming at the setting aside of the respective Community law provisions.

It is well known that such implementing acts are under the restraint to respect subjective Community rights.((20)) The ECJ holds that according to "wellestablished case-law, the requirements flowing from the protection of fundamental rights and principles in the Community legal order are also binding on Member States when they implement Community rules and the Member States must therefore, as far as possible, apply those rules in accordance with those requirements..."((21)). This binding effect of fundamental rights does not only unfold where directly applicable Community law is at stake, but also in the case of the transposition and enforcement of directives.((22)) Article 51 para. 1 of the Charter reconfirms this stage of affairs when stating that the Charter is addressed to the Member States "only when they are implementing Union law"((23)).

Should, in situations of this kind, the level of protection of the Charter lag behind that of a Member State, Article 53 would invite to set aside secondary Community law which is found to violate the standards of the national constitution, even if no violation of the Charter could be established.

2. Evaluation

a) Affirming Constitutional Reservations of the Member States?

The likeliness and the detrimental effects of conflicts resulting from differing levels of fundamental rights protection at national and EC level seemed reduced after a recent judgement of the German Bundesverfassungsgericht on the constitutionality of the Community banana market order. In June 2000, the German BVerfG((24)) recalled and developed further its well-known position of restraint, which evolved during the last decades. As a consequence the court refrained from a detailed fundamental rights scrutiny of the Community regulation at issue. Reconfirming its Maastricht-judgement((25)) the BVerfG stressed that it "guarantees by its jurisdiction in a relationship of co-operation with the European Court that an effective protection of basic rights for the inhabitants of Germany will also generally be maintained as against the sovereign powers of the Communities and will be accorded in the same respect as the protection of basic rights required unconditionally by the Constitution and" [...] [that it] "provides a general safeguard of the essential content of the basic rights. The Court thus guarantees this essential content as against the sovereign powers of the Community as well.((26)) … Subject to the conditions laid down by the senate in Solange II (judgement of the BVerfG 73, 339) the ECJ is also responsible for protecting the fundamental rights of German nationals against infringements by acts of national (German) public authorities based on secondary Community law. The BVerfG will only exercise its jurisdiction, if the ECJ abandons the standard which the BVerfG identified in its judgement BVerfGE 73, 339 (340, 387).

Article 23 para 1 of the GG [German Basic Law] has reconfirmed this position, since it does not require Community law and the ECJ's jurisprudence in that context to guarantee a level of protection identical to that of the GG.

The constitutional requirements as identified in BVerfGE 73, 339 (340, 387) [Solange II] are met, as long as the jurisprudence of the ECJ in general ensures an effective protection of fundamental rights against the sovereign powers of the Community, which is in its substance comparable to the indispensable standards of the GG and provides a general safeguard of the core guarantees of the basic rights."((27)) The situation appears to be similar in Italy.((28))

This position is now open to reconsideration in the light of Article 53 of the Charter. A cautious reading of Article 53 could claim that Member States' courts are, under Article 53, entitled to scrutinise secondary Community law according to the standards referred to by the BVerfG, namely that national fundamental rights review could be revived if the ECJ would fall short of the general level of protection guaranteed by that Member's constitution.

Obviously even such a cautious approach would be in contrast to the ECJ's jurisdiction and in particular to its findings in Internationale Handelsgesellschaft. But despite this conflict, such a stance could eventually be justified by looking at Article 53 as simply reflecting the remaining controversial aspects of the relation between Community law and national law. It is certainly true that unconditional and unlimited supremacy as purported by the Court e.g. in Internationale Handelsgesellschaft has always been contested and frequently challenged by national supreme courts.((29)) Consequently there is no acquis communautaire which would fully correspond to the position of the ECJ.((30)) Article 53, it could be argued, reaffirms objections of that kind.

b) Back to the Maximum Standard Approach?

However, an alternative reading of Article 53 could go much further. We have just seen that the opposition of the German Bundesverfassungsgericht has been restricted to sort of a rough equivalence test ("im Wesentlichen gleichzuhalten") of EC fundamental rights protection compared to that enshrined in the Basic Law. This is reflected in the language both of Article 23 GG and of the recent banana judgement. By contrast, Article 53 does not contain a restriction of the priority of national fundamental rights protection to its essentials vis-à-vis Community law. It might be argued that each deviation from national fundamental rights standards could be challenged. This appears to be the most critical element inherent to Article 53, since it would to a very large extent undermine the general principle of supremacy of Community law.

At first sight, this interpretation may appear to be provocative and farfetched. However, it might be reconciled with constitutional reservations in several Member States. It should be recalled that, while some of the Member States' constitutions like Article 23 GG call for a level of fundamental rights protection at EC level comparable to that provided for by the national constitution, attitudes differ in other Member States. While the absence of substantial reservations vis-à-vis supremacy over constitutional law, like in the Netherlands((31)) or in Austria((32)), appears as the exception, even more stringent positions than that of the BVerfG seem to prevail e.g. in Denmark and in Sweden. In Denmark, the Supreme Court ruled that Article 20 of the Constitution, which provides for the transfer of powers to the EC, would not authorise the enactment of measures conflicting with the constitutionally guaranteed freedoms. Furthermore, transferred competences would have to be specified. As a consequence, "…Danish courts must rule that an EC act is inapplicable in

Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the surrender of sovereignty according to the Act of Accession."((33))

The main issue in the case was democracy, and the Supreme Court dismissed the claim that EC membership was unconstitutional in this respect. Nevertheless, the court made it clear that also the surrender of fundamental rights protection is outside the constitutional authorisation as applied by the Act of Accession. However, it has to be said that the court did not elaborate clearly on this point.

In Sweden, according to Chapter 10 Article 5 paragraph 1 Instrument of Government, Swedish parliament may transfer decision-making powers to the European Communities "as long as they provide for the protection of fundamental rights and freedoms equivalent to that guaranteed by this instrument and the European Convention on Human Rights". However, important fundamental rights guarantees are not enshrined in the Instrument of Government, but in other constitutional acts. Good reasons strike for the position that, consequently, eventual derogations from the Freedom of the Press Act and the Freedom of Expression Act – which are the mentioned constitutional instruments other than the Instrument of Government –, but also from the fundamental rules concerning the governing of the State, could not take effect without prior amendment of the Swedish constitution.((34)) This implies a serious reservation against the principle of supremacy.

The maximum standard approach has also seen a revival in recent literature. The suggestion has been put forward that the ECJ should guarantee the maximum standard of protection in the Member States. And as long as the ECJ would not do that, the Member States should take care themselves.((35)) This implies that the Court should always base its decisions on the highest level of protection. The difficulties resulting from such an approach have been highlighted above.((36)) This position would either endanger the uniform application of Community law or, with regard to conflicting fundamental rights, does not provide any solution at all. Moreover, given that the ECJ does not follow the maximum standard approach, the suggestion is of major importance regarding the institutional balance between the ECJ and the Member States.

To sum up, it cannot be ruled out that Article 53 of the Charter could invite to a very fundamental challenge to the principle of supremacy of EC law. It might even fuel suggestions for a Solange III decision, meaning a decision which would uphold more or less unlimited constitutional law scrutiny of EC law by Member State's courts.((37)) This might be argued also with regard to Member States like Austria or the Netherlands without constitutional restrictions comparable to Article 23 GG or Article 20 of the Danish Constitution or Article 10 para. 5 of the Swedish Instrument of Government. It might be contended that such scrutiny is directly authorised if not even required by Article 53 of the Charter.

c) Subsidiarity and Fundamental Rights Protection

Rather surprisingly, in Article 51, the first sentence of the Charter of Fundamental Rights begins as follows: "The provisions of this Charter are addressed to the institutions and

bodies of the Union with due regard for the principle of subsidiarity"((38)). At first sight, this appears to be rather incomprehensible.

What should subsidiarity have to do with fundamental rights protection against secondary Community law? The suggestion can only be that fundamental rights protection vis-à-vis "the institutions and bodies of the Union" could in principle be "sufficiently achieved by the Member States"((39)) which would render Community action superfluous if not illegal!

Such a reading again meets with a recent suggestion in literature that Community law would not be endangered, if national Courts preserved their higher standards as long as the ECJ would not adopt the maximum standard approach. Interestingly, this view has been submitted with reference to the principle of subsidiarity.((40)) Uniform application of Community law would not be possible in that case.

The mentioned interpretation implies a renationalisation of fundamental rights' protection at the expense of uniform application of Community law. It might be supported by the conjunct reading of Article 53 and Article 51 of the Charter, as considered. Thus the express reference to subsidiarity could be more than a simple editorial mistake, as one might suppose at first sight.((41)) The conclusion would be that fundamental rights' protection at Community level is degraded to a subsidiarity programme, even with respect to protection against Community powers. Also against the background of the ongoing debate on the ECJ's position as the ultimate guardian of legality within the Community legal system((42)) it is tempting to submit that the wording of these Articles has not been chosen by mistake. By contrast, it might be argued that Article 51 and 53 make sure that fundamental rights protection ultimately lies in the hands of the national courts, as long as these courts have the competence to deal with these issues. This view goes together with reports on the developments in the drafting convention. For some Member States, the recognition of a certain national margin of manoeuvre with regard to the further development of fundamental rights' protection was an important precondition for their consent to the Charter.((43))

The argument in question might be further fuelled by implications flowing from Article 68 para. 2 TEC, as inserted by the Treaty of Amsterdam. This provision prevents the ECJ from reviewing measures relating to the maintenance of law and order and the safeguarding of internal security in relation to internal border controls in the so-called area of freedom, security and justice (Title IV TEC). Whatever might have been the intention of the drafters of the Treaty – it can by no means be justified to interpret this provision to the end that fundamental rights protection would have been erased in this highly sensitive area. The conclusion must be that the Treaty has, in this area, conferred the task of protecting fundamental rights on national courts.((44)) However, this transfer takes place to the detriment of primacy of Community law. Thus in Article 68 para. 2 the Treaty itself provides an example for the renationalisation of fundamental rights protection. Article 51 of the Charter might be regarded as another step into the same direction, with more caution but also with a more enlarged scope.

d) Efforts to Avoid the Detrimental Effect of Art 53 of the Charter

To avoid any misunderstandings: It is not my intention to render absurd any attempt to

interpret Article 53 in a more restrictive manner than discussed above. Also, there seem to be differences regarding the weight of the three positions mentioned. To address this point first, it might be said that the"subsidiarity suggestion" might not appear to be very convincing.((45))Article 220 ECT explicitly makes it the core duty of the ECJ to "ensure that in the interpretation and application of this Treaty the law is observed". This makes the contention highly questionable that fundamental rights scrutiny should still be primarily vested with the member states. Better reasons strike for the position that – at least in principle – legal scrutiny including fundamental rights scrutiny of secondary Community law is an exclusive competence in the sense of Article 5 ECT. Yet, it must be recalled that Article 51 of the Charter itself mentions the principle of subsidiarity when determining the binding force of the Charter vis-à-vis the "bodies of the Union", and not in paragraph 2, where the "no new power principle" is to be found.

However, to my apprehension, it is even more difficult to convincingly rule out the other two readings presented above, namely that the Charter might cause a revival of member states' reservations against the application of Community law, be it in the sense of the maximum standard approach or as a reconfirmation of the "equivalence test reservation".

To give an example: It might be suggested to interpret the phrase "the Member States' constitutions" as if it were "the constitutional traditions common to the Member States". However, given the fact that the drafting convention easily could have opted for this wording of Article 6 para.2 TEU, this is not very convincing. Moreover, it has to be said that a proposal including such a wording was indeed presented in the course of the deliberations, but did not find its way into the final text.((46))

Similar objections raise the idea to limit the application of Article 53 to cases where Community law itself merely establishes a minimum standard of rights. As the Charter explicitly mentions in chapter IV, this applies in particular to social rights. In this area a more "stringent" standard guaranteed by national rights cannot be considered as a jeopardy to Community law. However, the wording of Article 53 does not provide any indication for such a restrictive interpretation.

Another suggestion is that Article 53 of the Charter should not be given more importance than comparable "safeguard clauses" in other international instruments, notably Article 53 ECHR.((47)) This provision reads as follows: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party." However, it has to be said that there is a fundamental difference between the inclusion of such a provision in a Convention which is solely aiming at the promotion of Human Rights protection, and the guarantee of a minimum level of protection within a legal system like the EU which inevitably not only guarantees such rights but also has to restrict them in many instances for reasons of public interest. The ECHR aims at the restriction of state power, but not at the restriction of any "ECHR-power". By contrast, the EU Charter of Fundamental Rights primarily aims at the restriction of Union and Community power respectively. In such a context, an authorisation of the national legislator to establish or uphold additional standards as minimum protection standards

inevitably brings to life an eventual authorisation to restrict the Union and Community power by national Constitutional law, and therefore also raises the supremacy issue.

Against this background, the following narrow grammatical interpretation of Article 53 of the Charter of Fundamental Rights it is not convincing: "The Article specifically says that 'nothing in this Charter' may lead to restrictions of rights in national constitutions. In other words, the Charter does not exclude the possibility that other Community instruments may have such an effect." ((48)) But the minimum protection guarantee is directed against the Union and the Community legislator. It is not less than changing that purpose into the opposite by insinuating that it would enshrine an authorization of the Community legislator to restrict the application of national Constitutional law.

And what could be the justification of such a provision under the heading"level of protection"? Moreover, the close vicinity of the rule regarding national constitutions to that guaranteeing the standard of the ECHR as a minimum level of protection renders the argument equally fallacious. For, as for example the ECHR, such a restrictive interpretation is certainly not applicable. Or should the suggestion be that Article 53 authorises the restriction of guarantees included in the ECHR by "other" Community instruments than the Charter?

IV. Conclusions

Taken altogether, Article 53 (together with Article 51) of the Charter of Fundamental Rights appears to encourage reservations of the Member States against the notion of supremacy of Community law over national law as it currently stands in the case law of the ECJ. This might amount to a substantial change of the Community legal system without having been sufficiently discussed during the course of the elaboration of the Charter.

But even if the ECJ should follow the mentioned suggestions to avoid the detrimental impact of Article 53 to supremacy, it is doubtful whether national courts will accept it. And this is exactly where the Charter fuels the dispute on the "correct amount" of primacy of Community law, and the power of Member States' courts to review secondary Community law including its scrutiny by the ECJ.

Seen from the more general angle of the constitutional aspects of fundamental rights protection in the European Union the question emerges how the Charter should become a new focus of European identity if it is understood that it is always second to subjective rights enshrined in national constitutions?

On the one hand, it is understandable that the Charter of Fundamental Rights was not adopted as a legally binding instrument per se in Nice. On the other hand, and in the light of the arguments presented, one might feel inclined to withhold such criticism. The current state of affairs opens the opportunity to discuss this delicate aspect of the Charter without immediately provoking severe damage to the constitutional system of the Community as such.

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1) OJ 2000/C 364/1: "The European Parliament, the Council and the Commission solemnly proclaim the text below as the Charter of fundamental rights of the European Union."

2) Presidency Conclusions, Nice European Council Meeting, 7, 8 and 9 December 2000, SN 400/00.

3) Treaty of Nice, SN 1247/1/01 REV 1, 14 Feb 2001, Declaration No 23, para. 5.

4) Compare in this respect the Opinion of AG Tizzano in case C-173/99, BECTU, 8 February 2001, not yet reported. After admitting that the Charter "has not been recognised as having genuine legislative scope in the strict sense", which means in other words that "formally, it is not in itself binding", the AG submitted "that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the Community context" (para. 28). In the same sense the Opinion of AG Alber, case C-340/99, TNT Traco SpA, 1 February 2001, not yet reported, para. 94.

5) For a more detailed analysis of this and of related issues compare Griller, Der Anwendungsbereich der Grundrechtscharta und das Verhältnis zu sonstigen Gemeinschaftsrechten, Rechten aus der EMRK und zu verfassungsgesetzlich gewährleisteten Rechten, in Duschanek/Griller (Hrsg), Grundrechte für Europa. Die Europäische Union nach Nizza, Wien – New York 2001 (forthcoming).

6) Case C-11/70 Internationale Handelsgesellschaft, [1970] ECR 1125, at para 3. See also Case C-44/79 Hauer [1979] ECR 3727, para. 14.

7) Case C-11/70 Internationale Handelsgesellschaft, [1970] ECR 1125 at para 4.

8) For a recent contribution to that end see Besselink, Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union, ELRev 1 98, 629, at 670 ff.

9) See the conclusions of AG Warner, in Case C- 7/76, IRCA, [1976] ECR 1213 at p.1237. The Advocate General held that, .."a fundamental right recognised and protected by the Constitution of any Member State must be recognised and protected also in Community law. The reason lies in the fact that [...] Community law owes its very existence to a partial transfer of sovereignty by each of the Member States to the Community. No Member State can, in my opinion, be held to have included in that transfer power [sic] for the Community to legislate in infringement of rights protected by its own Constitution. To hold otherwise

would involve attributing to a Member State the capacity, when ratifying the Treaty, to flout its own Constitution [...]." Whether national constitutions do actually contain such stringent provisions, as the AG submits, appears to be dubious. This hypothesis would render quasi inapplicable the authorisation to transfer sovereign rights to the EC or the EU respectively, which can be found in the constitutions of all Member States, since it requires the State to impose its fundamental rights corpus on all the other Member States. Under such preconditions the foundation of a Community based on the equality of its members would be impossible. See in this context Griller, Die Übertragung von Hoheitsrechten auf zwischenstaatliche Einrichtungen (1989) 508 ff. But see also below under III. B. Furthermore, it is obvious that nowadays several constitutions more or less explicitly allow for a more cautious approach which can be reconciled with the jurisprudence of the ECJ; compare esp. Art 23 GG [German Basic Law] an below in the text near fn 27 and 28.

10) It is submitted that an eventual attitude of the ECJ to adopt certain views of national Courts does not amount to a revision of the explicit jurisprudence cited above. Thus it is submitted that Besselink (fn 8) 659 ff would be mistaken if he should mean that the Court could be understood to apply the "maximum standard approach". It is remarkable that Besselink does not discuss the obvious discrepancy to Internationale Handelsgesellschaft.

11) See for example Rengeling, Grundrechtsschutz in der Europäischen Gemeinschaft – Bestandaufnahme und Analyse der Rechtsprechung des Europäischen Gerichtshofs zum Schutz der Grundrechte als allgemeine Rechtsgrundsätze (1993), 224 ff. with further references.

12) See in particular Joseph H. Weiler, Methods of Protection, Towards a Second and Third Generation of Protection, in Cassese/Clapham/Weiler (eds), Human rights and the European Community: The Substantive Law: Volume III (1991) 555 (585 ff).

13) Based on Art. 8 of the ECHR.

14) Including limitations which are based on norms other than fundamental rights, e.g.limitations based on specific legal authorisations to limit the content of a particular right.

15) See amongst others Rengeling (fn 11) 224 ff.

16) Even if this has to be squared with Article 49 TEU.

17) Emphasis added. In its explanatory note the presidency of the drafting Convention stated: "The aim of the provision is to maintain the level of protection currently afforded by Union law, the law of the Member States and international law. Owing to its importance, mention is made of the European Convention on Human Rights, which constitutes in all cases a minimum standard. The level of protection afforded by the Charter may not, in any instance, be lower than that guaranteed by the Convention, with the result that the arrangements for limitations may not fall below the level provided for in the Convention."

18) However, it has to be said that also with regard to these international guarantees a number of new questions arise: see Griller (above fn 5).

19) Solange I: BVerfGE 37, 271 (esp. at 285); Solange II: BVerfGE 73, 339 (esp. at 383 f); Banana judgement: 2 BvL 1/97, 7 June 2000.

20) Compare Griller/Droutsas/Falkner/Forgó/Nentwich, The Treaty of Amsterdam (2000) 143 ff. with further references.

21) Case C-351/92, Graff, 1994 ECR, I-3361, para. 17.

22) Compare e.g. Case 222/84, Johnston, 1986 ECR, 1651, esp. para. 18.

23) The language of this Article causes some additional problems which shall not be deepened here. One is the notion of "Union" law which should at least include EC law, if it is not restricte to it. Another is the issue of Member States' derogations from fundamental freedoms, which might not come under "implementing" EC law in a technical sense. However, also such derogations are subject to EC fundamental rights scrutiny.

24) 2 BvL 1/97, 7 June 2000.

25) BVerfGE 89, 155.

26) The English version of this part of the citation is taken from Brunner v. The European Union Treaty, German Federal Constitutional Court, (1994) 69 (2) Common Market Law Reports 79. 27 2 BvL 1/97, 7 June 2000, emphasis added.

27) 2 BvL 1/97, 7 June 2000, emphasis added.

28) For an evaluation compare Cartabia, The Italian Constitutional Court and the Relationship Between the Italian legal system and the European Union, in Slaughter/Stone Sweet/Weiler (eds), The European Court and National Courts (1998) 133 ff.

29) See the short survey given in Lenarts/van Nuffel, Constitutional Law of the European Union (1999), paras. 14-012 to 14-031.

30) For a recent discussion see Hartley, Constitutional Problems of the European Union (1999) esp. at 148 ff.

31) See Claes/de Witte, Report on the Netherlands, in Slaughter/Stone Sweet/Weiler (eds), The European Court and National Courts (1998) 171 ff. But even in the Netherlands (as in the case mentioned next: Austria) limits resulting from the ultra-vires issue are "conceivable" (see at 187 f).

32) See Griller, Introduction to the Problems in the Austrian, Finnish and Swedish Constitutional Order, in Alfred E. Kellermann/Jaap W.de Zwaan/Jenö Czuczai (eds), EU Enlargement – The Constitutional Impact at EU and National Level, The Hague (T. M. C. Asser Press) 2001, 147 ff.

33) Judgment 6 April 1998, Carlsen/Rasmussen, I 361/1997, UfR 1998, 800. English translation taken from Henning Koch, The Danish Constitutional Order (or the Hamletian position), in Alfred E. Kellermann/Jaap W.de Zwaan/Jeno Czuczai (eds), The Constitutional Impact of Enlargement at EU and National Level, T. M. C. Asser Press 2001 (forthcoming). Compare also F.C. Mayer, Kompetenzüberschreitung und Letztentscheidung (2000) 213 ff.

34) Compare Griller (fn 32) 169 ff.

35) Besselink (fn 8) in particular 670 ff. As for the second element, which is founded on the principle of subsidiarity, see below under II. B. 3.

36) See above II.

37) E.g. Dauses, Eine Lanze für "Solange III", Europäische Zeitschrift für Wirtschaftsrecht 23/1997, editorial, Scholz, Wie lange bis "Solange III"? NJW 1990, 941 ff.

38) Emphasis added.

39) Article 5 TEC.

40) Besselink (fn 8) 674 ff. However, it shall be mentioned that in the context of subsidiarity there is also a contrasting – and, it is submitted, equally not fully convincing – concern: That a passage in the Protocol on Subsidiarity and Proportionality attached to the Treaty of Amsterdam might erase every possible legal fundament for constitutional reservations; compare Rupp, Ausschaltung des Bundesverfassungsgerichts durch den Amsterdamer Vertrag? JZ 1998, 213 (216 f). The passage in the Protocol runs as follows: "The application of the principles of subsidiarity and proportionality shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law"

41) One could argue that the intention was only to prevent the creation of new competencies of the Community or the Union. The reference to subsidiarity would, under this reading, for reasons of an editorial mistake, somehow have found its way from Article 51 para. 2 to para. 1.

42) Compare Hartley (fn 30) 149 ff; Schilling, The Autonomy of the Community Legal Order – An Analysis of Possible Foundations, Harvard International Law Journal 1996, 389 ff; Weiler, The Constitution of Europe (1999) 286 ff.

43) E.g. COM (2000) 644 final of 11 Oct 2000, where the Commission states that the concern of several members states that the Charter would force them to change their constitutions had turned out to be unjustified and that the Charter would not replace national fundamental rights.

44) Cf. Lenaerts, Respect for Fundamental Rights as a Constitutional Principle of the European Union, Columbia Journal of European Law 6/No 1, 2000, 1 (at p. 6) who rightly

emphasises the unconditional jurisdiction of the ECHR in this area given the limitations for the ECJ.

45) It should be stressed that no in depth discussion is intended here.

46) Amendment No. 436 (Dehaene, De Gucht and Lallemand, all Belgian members of the Covenant), mentioned in Doc 4383/00 CONVENT 41 of 3 July 2000, which was set up by the Secretariat as a document de synthese.

47) Liisberg, Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot? Harvard Jean Monnet Working Paper 04/01, 33 ff. Liisberg also discusses similar provisions included in the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights (both from 1966), and the Ninth Amendment to the US Constitution. These parallels are not taken up here (the suggestion being that they would not lead to a different result).

48) Liisberg (fn 47) 34 f (after fn 125 in the text).