

**PRESENTATION by**

**Ms. Salla Saastamoinen, Administrator  
Directorate General for Justice and Home Affairs  
European Commission**

**4<sup>th</sup> CONGRESS OF EUROPEAN WOMEN LAWYERS ASSOCIATION:  
THE FUTURE OF EUROPE: ENLARGEMENT**

**Organised by EWLA and Women Lawyers in Finland**

**Helsinki, 6.-8. June 2003**

**LINE 3:  
THE DRAFT CONSTITUTIONAL TREATY OF THE EUROPEAN UNION**

Madame President,

Dear Members of the Association,

Ladies and Gentlemen

I am pleased to be able to share with you some thoughts on subject of Draft Constitutional Treaty, today. In particular, my presentation will concern the Charter of Fundamental Rights of the European Union in the framework of the draft constitution.

I am happy to visit my home country and this old Finnish House of Estates, which I find a very appropriate place for this workshop. You may have noticed a group of symbolic bronze figures up in the façade of this building, The relief was completed by sculptor Emil Wikström in 1903, that is hundred years ago The central figure there is the Russian Emperor Alexander I confirming the laws and national rights of Finland. We are here discussing the laws and rights of Europeans and of the European Union, to be confirmed by the Constitution. Not anymore issued by any emperor but prepared by a Convention and agreed by the Member States.

But before going to the subject matter, I would like to thank the European Women Lawyers Association for the opportunity to participate to this Conference. The European Commission finds the European wide co-operation in the area of gender equality and non-discrimination very valuable, because it promotes efficiently the respect of these fundamental rights around the Union.

Second, the possibility to attend this Conference links well with the Commission actions to support the enlargement project of the European Union. I understand that there are participants from most of the accessing countries in the conference and I hope that the women lawyers from new member States find their place also in this association. I am sure that we can learn a lot of each others.

I would also like to thank our hosts, the Women Lawyers in Finland, for their hospitality and outstanding organisations.

I am working in the Directorate-General for Justice and Home Affairs, in the unit “Citizenship, fundamental rights, racism and xenophobia, Daphne programme”. I represent thus the services of Commissioner Antonio Vitorino, who is the Commissioner for Justice and Home Affairs and especially in charge of fundamental rights within the EU. Mr. Vitorino is a member of the Convention and of its praesidium, representing the European Commission in the Convention together with Commissioner Barnier. He represented the Commission also in the previous Convention preparing the Charter of Fundamental Rights.

In the framework of the draft Constitutional Treaty, one of the major issues for our Directorate General and for Mr. Vitorino is the inclusion of the Charter of Fundamental Rights to the draft Constitution. Other important points include the establishment of a legal basis in the Treaty making the accession of the European Union to the European Convention of Human Rights possible and the development of provisions relating to the area of justice, freedom and security.

I will concentrate in my presentation to the first subject, the inclusion of the Charter of to the draft Constitution and my aim is to give you an overview of the developments so far. I believe that this subject is important and relevant to all citizens, both women and men.

I am thus not dealing with specific rights including to the Charter, as I am sure that you are better experts as regards for example the provisions relating to the gender equality.

#### WHAT IS THE CHARTER – LEGAL VALUE

I would like to next recall shortly the current legal value of the Charter. It can be defined in two ways: Negatively said it is NOT

- a way to transfer new competencies to the EU;
- a way to accede to or to compete with the ECHR;
- a way to oblige Member States to modify their own legislation.

Positively, it can be described being

- firstly, an explicit catalogue of Fundamental rights including 54 articles: with features of universality and indivisibility and of horizontal provisions, it gives visibility to the fundamental rights
- Second, a catalogue of already recognised fundamental rights. No new rights were included, but chosen from a plurality of sources.
- Third, a tool to control the exercise by EU institutions and bodies (like Europol or Eurojust for example) of their attributed competencies and by the Member States.

You all know the most important provisions of the Charter relating to gender equality:

- Article 21 prohibiting discrimination based on sex;
- Article 23 ensuring equality between men and women;
- Article 33 concerning reconciliation of work and family life;
- Article 34 on entitlement on social security benefits e.g. in cases of maternity.

We are aware of the critics presented inter alia by European Women Lawyers Association concerning these provisions, namely that they would represent lower level of protection as the existing Community law relating to gender equality. Here, I would state that the Commission services do not fully share these views. I stress that according to horizontal Articles, the Charter does not modify powers or tasks defined by the Treaties in any way. The rights recognised by the Charter, which are based on the Community law, shall be exercised under the conditions and within the limits defined by those Treaties. Lastly, nothing in the Charter shall be interpreted as restricting or adversely affecting fundamental rights as recognised by Union law. We consider that these provisions guarantee fully in law that the level of protection defined by Articles 23 and 33 is as high as it was before the Charter under the Community law.

#### **WHY TO THE CONSTITUTION: MAIN POLITICAL GOAL**

One of the main political goals of the Commission as regards of the draft Constitution is the inclusion of the Charter to the Treaty.

In December 2001, the Laeken Declaration set up the Convention and gave it the task of preparing the ground for the Intergovernmental Conference as broadly and openly as possible. One of the basic goals laid down in the Laeken Declaration was to assert the values that guide the Union, define the citizen's fundamental rights and duties and clarify the relationship between Member States within the Union.

For the Commission the realisation of this goal means the incorporation of the Charter to the draft Constitution. This was consequently proposed e.g. in the above-mentioned Communication "A Project for European Union".

There are also other arguments for this:

First, the Commission wants citizens put at the centre of the European construction and one way of doing this, among others, is to make the fundamental rights more visible in the Union.

Second, the objective of establishment of area of freedom, security and justice has created new developments of EU from economic fields to new fields like asylum, immigration, fight against criminality and terrorism and judicial co-operation. The Union deals with sensitive matters that are very near fundamental rights. The binding Charter is a precondition to development of this area.

We may also take into account of enlargement to numerous new Member States having difficult past as far as fundamental rights are concerned. The Charter in the Treaty would create a common framework and vocabulary in fundamental rights also to that direction.

#### **WG ON CHARTER AND ACCESSION TO THE ECHR**

The question of the Charter was discussed under the Convention's Working Group II, which was chaired by Commissioner Vitorino. The Working Group submitted its report in October 2002. The main conclusion were:

- All members of the Group either supported strongly an incorporation of the Charter in a form, which would make the Charter legally binding and give it constitutional status or at least would not rule out such incorporation.
- The Group presented certain basic options as regards the technique of inclusion, large majority favouring model of an insertion of the text of the Charter articles at the beginning of the Constitutional Treaty, in a Title or Chapter of that Treaty.

- The Group did not consider any changes to the content of the Charter as regards the material provisions.
- It recognised that certain technical drafting adjustments in the Charter's "general provisions" were nonetheless possible and appropriate. The Group did not however intend to cause any modifications of substance with these adjustments, but to clarify certain key elements of the overall consensus on the Charter on which the previous Convention had already agreed.
- The Group proposed consequently adjustments concerning the horizontal articles of the Charter: articles 51 (on scope) and 52 (on scope of the guaranteed rights). I'll come back to these later.

#### DRAFT CONSTITUTIONAL TREATY – FIRST VERSION

The first draft of the Constitutional Treaty by presidium in the beginning of the year took already the standpoint that the Charter would be an integral part of the draft Constitution. However, it left open, whether the Charter would be part of the Treaty or a Protocol attached to it. As regards the accession to the European Convention on Human Rights, the draft proposed a legal basis, which would allow the accession but leave the decision about the accession to the member States.

#### LATEST DEVELOPMENTS:

##### SECOND VERSION OF THE CONSTITUTIONAL TREATY

Since last week, we have the second draft for the Constitution. It is rather amazing but there seems to be now almost unanimity that the Charter should be inserted to the draft Constitution and it will receive legally binding status. We are very satisfied with this result in our service.

The second draft Constitution first refers to the Charter in Article I-7 of the First Part, which states that the Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes the Second Part of the Constitution. The wording of this article comes actually from the last sentence of the preamble of the Charter.

We support the solution chosen which is to place the Charter to the second part of the Treaty, reproducing exactly the wording and the order of Charter articles as proclaimed in December 2000, except for the amendments to the Charter's general provisions. The draft follows thus the conclusions of the Vitorino Working Group, approved by large consensus in the Plenary:

No changes in substance are suggested but only the revisions of the horizontal clauses, and some purely technical adaptations to the language. An interesting point is that also the preamble is included.

Regarding general provisions, the main clarifications are as follows: Article 52 § 2 would ensure that those Charter rights which merely "restated" rights already enshrined in the EC Treaty (notably the rights of EU citizens) are subject to the conditions and limits which so far figured in the EC Treaty and will now be taken over in Part III or, in some cases 1, in Part I of the Constitution.

Article 52 § 4 aims for harmony of interpretation between fundamental rights in the Charter and in the constitutional traditions, insofar as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States.

An important question is the classification between "rights" and "principles". Article 52 § 5 stipulates that the provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions and bodies

of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

Finally, some technical adaptations have been made to the Charter text, like the terms "Community" and "Treaty establishing the European Community" / "Treaty on European Union" have been replaced with "Union" and with "Constitution", and where the current Charter text refers to the "institutions and bodies of the Union", the formula "institutions, bodies and agencies of the Union" must now used.

One general question in relation with incorporation of the Charter is, whether certain fundamental rights should be kept in Part I of the Constitution although they will also appear in part II of the Constitution. In this respect, the second draft Constitution takes the line that the duplication is justified. E.g. the reference to the rights of EU citizens (as well as that to non discrimination on the basis of nationality) both in Part I and the Charter is considered acceptable in that these rights are constitutive of the very notion of European citizenship. At least some of them, such as freedom of movement or voting rights of EU citizens are special to the Union, and, by definition, cannot be guaranteed at national level. That distinguishes them from the other Charter rights, such as freedom of expression, of religion, etc., which are analogous to fundamental rights protected in national constitutions.

Something that has not yet been finalised relates still to the language: the Charter uses gender-inclusive language; for example, in all articles on EU citizenship, the Charter uses, in French and some other languages (the issue did not arise in English), consistently the expression "les citoyens ou citoyennes" and "tout citoyen ou toute citoyenne de l'Union". Draft articles of Part I of the Constitution do not follow this pattern, but simply speaks of "citoyens" and of "tout citoyen". Upon incorporation of the Charter as Part II, it might be desirable to harmonise that language use.

#### **UPDATE OF EXPLANATIONS**

The last topic of my presentation is the update of explanations. Working Group II stressed that the "Explanations" to the Charter are one important tool of interpretation ensuring a correct understanding of the Charter. They had been drawn up under the Praesidium of the Charter Convention, and even if not submitted to the Plenary of that Convention, played a role in securing consensus on the Charter text.

Working Group II recommended that its own explanations on the drafting adjustments to the horizontal clauses of the Charter should be fully integrated with the original Explanations. Furthermore, attention should be drawn in an appropriate manner to the Explanations which, though they have no legal value, are intended to clarify the provisions of the Charter; in particular, it would be important to publicise them more widely.

Following that recommendation, the Praesidium has agreed that the technical work of producing an updated and consolidated version of the Explanations of 2000 should be carried out under the authority of Commissioner Vitorino, the Chairman of Working Group II who is to consult with members of that Working Group and then submit the product to the Praesidium for endorsement, before the end of the Convention.

This work is under way, with the purpose to take into account the modifications of the final provisions of the Charter as well as new cases-law or new Community legislation, which give complementary explanation to some provisions of the Charter.

#### **CONCLUSIONS**

I would like to finish by summarizing main points:

1) Near Future: Insertion into the Constitution, with legally binding effect. There exists already a far-reaching consensus on this principle.

2) No discussion any more on the substance; with the exception of the horizontal clauses.

3) Discussion rather technical on the modalities of the insertion, ie the way in which the Charter should be inserted into the Constitution.

4) Update of the explanations as well: more publicity should be given.

5) Lastly, I recall the second major theme I mentioned shortly in the beginning: At the same time with the insertion, the accession of the EU to the European Convention on Human Rights should be guaranteed as a complementary measure. Here, the second Draft Treaty goes further than the first one: it reads now that the Union "shall seek" the accession, guiding the Union actions instead of just creating a legal basis for the accession.

I thank you for your attention and interest.

I am looking forward to your questions and the discussion.