

The Minister of Foreign Affairs
Mr J.J. van Aartsen
P.O. Box 20061
2500 EB The Hague

Date 9 November 2000

Ref AIV-154/00

Re Charter of Fundamental Rights

Dear Mr Van Aartsen,

On 8 June 2000, the Advisory Council on International Affairs (AIV) presented you with its report "A European Charter of Fundamental Rights?". The AIV would like to thank you for your letter of 11 September 2000, co-signed by the Minister of Defence, the Minister for Development Cooperation and the State Secretary for Foreign Affairs, in which you discussed the report in detail.

On 2 October 2000, the Convention charged with drawing up the draft Charter approved a definitive text and presented it to the informal Council meeting held on 13 and 14 October 2000 in Biarritz. The European Council welcomed the results and decided that further decision making on this issue would take place at the Summit in Nice in December 2000. The deliberations in Nice will include discussions on the legal status of the Charter and will also affect that status.

As announced in the discussions you held with the AIV Human Rights Committee on 28 August 2000, the AIV has now examined this most recent draft Charter. This letter contains a summary of its conclusions.

The present text of the draft Charter was drawn up extremely rapidly and in a rather unusual manner. If it is approved at Nice, it can in any event be seen as a step towards further constitutionalisation of the European legal order. The AIV acknowledges the value of such a step, but at the same time wishes to emphasise that its first option (the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and other conventions, with all the consequences this would have for the level of protection of human rights that the EU should provide) remains preferable. The question arising now is how the present text relates to that option.

The method adopted by the Convention was based on the premise that a text had to be drafted that could later be incorporated in the Union's binding treaty law without fuss and without undermining the Strasbourg *acquis*. This method left its mark on the outcome of the process, most clearly in articles 52 and 53 of the draft text. Article 52 states explicitly that the meaning and scope of the rights laid down in the Charter should be at least the same as those of the ECHR. Article 53 goes on to state that nothing in the Charter may be interpreted as adversely affecting rights and freedoms as recognised in national and international legal instruments (including Union law and the constitutions of the member states). The AIV nevertheless wonders whether these safeguards are sufficient. Without being able to subject the entire Charter to a systematic examination, it would point to three specific problems.

The first concerns the general power laid down in article 52, paragraph 1 to limit the exercise of fundamental rights. This provision is too loosely worded, in the AIV's view. This is particularly the case where limitations are permitted in order to serve 'objectives of general interest recognised by the Union'. The AIV understands the need for such a provision, but suspects that the Luxembourg Court will be moved by very different considerations in such matters than the Strasbourg Court. It would point out in this connection that the ECHR has no such general limitation clause (see for example article 10, paragraph 2 of the Convention setting out in detail the grounds for limiting freedom of expression). The AIV has already stated that it is prepared – subject to certain conditions – to accept what in its view is a limited risk of a certain divergence of opinion between the two courts (p. 16 of the report). It has found support for this view in the letter of 29 September 2000 from the State Secretary for Foreign Affairs to the Lower House of Parliament, which states that in the opinion of Council of Europe observers present during the Convention's deliberations, 'the ECJ has up till

now increasingly referred in a consistent manner to Strasbourg case law in cases where it was interpreting the ECHR'. The State Secretary added that it was to be expected that 'the ECJ will continue to act in this way, even when it is able to refer to a Charter'.¹ The question is of course whether the government is prepared to accept the AIV's previous recommendations that 'within at most ten years of adopting a Charter, a serious review should determine whether significant differences of interpretation have indeed arisen' (p. 16), perhaps deriving from a reliance on the above-mentioned 'objectives of general interest'. In addition, the AIV would refer to the obligation it cited 'to make further conventional agreements' if such significant differences of interpretation have indeed arisen (p.16).

A second problem is that while certain new fundamental rights have been incorporated in the draft Charter, others have been omitted. The former include the freedom to conduct a business (article 16) and of 'access to services of general economic interest' (article 36). In other cases the draft Charter actually constitutes a step backwards in comparison to existing protection. The right to education (article 14), for example, is very weakly formulated in comparison to provisions in other international agreements, while paragraph 2 of the same article, relating to the 'possibility to receive free compulsory education' gives rise to questions, rather than establishing rights. The right to housing, on the other hand, is not even mentioned.

A third shortcoming in the draft Charter is the way in which apparently random formulations are used throughout the text to denote those in whom rights are vested ('everyone', 'every citizen of the Union', generalities). In its earlier report the AIV urged that efforts be made to limit as far as possible the great differences between the rights of Union citizens and those of third-country nationals. A distinction should, it felt, be made only where it was 'objective and reasonable', and the general principle should be equality of rights between the citizens of the member states and those from third countries. In its response to the report the Dutch government indicated that it shared this view. Nevertheless, there are various formulations in the draft Charter that do not appear to conform to this standpoint of 'equal rights with certain exceptions', or are drafted in such a vague manner that it is unclear who is being referred to (see for instance articles 13, 20 and 44). The AIV would advise the government to pay particular attention to this issue, either in explaining the reasons for its vote at Nice, or elsewhere.

Finally, the provisions of the draft Charter are addressed to the institutions and organs of the Union, taking into account the subsidiarity principle, and to the member states when they are implementing Union law (article 51). From this perspective, the Charter will serve as a guideline for the ECJ and will have legal consequences, whatever legal form it acquires at Nice. It will serve as a source of 'soft law', or as 'law in development', particularly if it is adopted unanimously at the meeting of the European Council, despite all the intentions of making it a 'purely' political document. Although the draft Charter is described as a step on the way to a binding text, it remains unclear how direct progress can be from a bold political move to the ultimate aim of optimal legal certainty for EU citizens, and to what extent this process can be centrally directed, namely by the European Council. The Dutch government must exercise vigilance in this respect, without however viewing these potential dangers as insuperable obstacles to the creation of a solid legal position for all those (Union citizens and third-country nationals) who live in the territory of the Union. In the AIV's opinion, the government must ensure that the decision-making process regarding the further constitutionalisation of the European legal order maintains its momentum. In doing so, it must make every effort to ensure that this process has a democratic basis. The views of democratically elected bodies, both within the Union and at member-state level, must be taken into account. In the case of the Netherlands, the AIV would suggest that it might be reasonable to ask Parliament for a political judgment in this matter. It goes without saying that the AIV believes that the views of leading human rights organisations should also be taken into account. The present text is therefore to be regarded as a step on the way to a catalogue of fundamental rights that can be incorporated in the Community legal order in binding form.

In view of the fact that the original request for advice was made at the request of the General Committee on European Affairs of the Lower House, chaired by Mr M. Patijn, the AIV intends to send a copy of this letter to the Committee as a matter of courtesy.

Yours sincerely,

Professor R.F.M. Lubbers
(chair AIV)

¹ Lower House of Parliament, 2000-2001, 21501-20, no. 136, p. 2