

The Charter of Fundamental Rights: a Human Rights Update

By Tim Ward and Marie Demetriou

Article published in the Solicitors' Journal, September 2004

This Human Rights Update provides a brief overview of the Charter of Fundamental Rights, which was adopted as part of the final text of the Treaty Establishing a Constitution for Europe ("the Constitution"). Part II of the Constitution contains the Charter of Fundamental Rights of the Union ("the Charter"). It has the potential – if the Constitution is ever adopted by the Member States – to be a human rights instrument of enormous practical significance.

When the Charter was first "proclaimed" at Nice in December 2000, it was said to be non-binding. Thus far, the European Court of Justice ("ECJ") has refrained from giving it legal force. If the Constitution is ever adopted, it will, however, have legal force. Moreover, it will have "supremacy". Article I-10 of the Constitution provides that the Constitution, including the Charter "shall have primacy over the law of the Member States". In other words, its provisions will trump those of national law.

The Content of the Charter

In theory at least, the Charter contains no new rights. Its preamble refers to the need to "strengthen the protection of fundamental rights", by "making those rights more visible in a Charter". All of the rights it contains supposedly exist already in Community law. Nevertheless, some commentators have remarked on just how far removed the formulations which the Charter contains are far from any previously identified "right".

The Charter includes rights which are equivalent to those contained in the European Convention on Human Rights ("ECHR"). It goes far beyond those (broadly) political rights, however, extending to a wide range of social and economic rights. Its content is divided into seven Titles. Title I is concerned with "Human Dignity". It contains a right to human dignity (Art II-61) which provides that "human dignity is inviolable", as well as the right to life (Art II-62) and a right to the integrity of the person (Art II-63). Title II is concerned with "Freedoms". It contains provisions equivalent to most of the substantive provisions of the ECHR such as the right to respect for private and family life (Art II-67), freedom of thought, conscience and religion (Art II-70), freedom of expression (Art II-71) and freedom of assembly (Art II-72). It also contains further

Monckton Chambers
1 & 2 Raymond Buildings
Gray's Inn
London WC1R 5NR

Tel 020 7405 7211
Fax 020 7405 2084
DX LDE 257

chambers@monckton.com
www.monckton.com

rights such as the "freedom to conduct a business" (Art II-76). Title III deals with "Equality". It contains broadly worded prohibitions upon discrimination which reach far beyond the scope of application of Article 14 ECHR. Title IV is entitled "Solidarity". It is concerned primarily with workers rights. It is here that the notorious and controversial "right to strike" may, or may not be found. Title V is concerned with "Citizens Rights". It contains rights to vote and to stand for the European Parliament (Art II-99), a right to good administration (Art II-101), a right to good administration (Art II-101) and the right to freedom of movement and of residence (Art II-105). Title VI is concerned with "Justice" and sets out minimum standards of due process. Title VII contains "General Provisions Governing the Interpretation and Application of the Charter". The most important of these provisions are further considered below.

The Explanations

The derivation of each provision of the Charter is explained in an accompanying text, known as the Explanations, which were drawn up by the Praesidium of the Convention which drafted the Charter. When the Charter was first proclaimed, the Explanations were said to have "no legal value". Article 112(7) of the Charter now provides, however:

"The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States."

The Explanations are absolutely vital to understanding the Charter's text. When consulting the Explanations, it is vital to ensure that the correct version is to hand. The preamble to the Charter, in the form incorporated within the Constitution makes clear that they will be "updated under the responsibility of the Praesidium". To date, there have been two versions. The first was published at the time the Charter was first declared, the most recent is dated 18 July 2003 (Conv 828/1/03). It can be found on the internet at <http://register.consilium.eu.int/pdf/en/03/cv00/cv00828-re01en03.pdf>. The difference between the first and second versions lies primarily in the reference to new case law of the Court of Justice.

The Charter and the ECHR

The importance of the Explanations is well illustrated by the treatment in the Charter of the rights contained in the ECHR. Whilst the ECHR is not part of Community law, the rights contained therein inform the content of the EU "general principle" of fundamental rights. The text of the Charter itself contains provisions which broadly reflect the provisions of the ECHR. Thus, Article II-66 provides:

"Everyone has the right to liberty and security of the person."

That is, evidently, broadly equivalent to Article 5 ECHR, but the latter provision contains a series of complex sub-clauses which set out in further detail how that right applies. Is Article II-66 to be interpreted in the same way? The Explanations provide that despite this difference this apparently important difference in wording, Article II-66 has "the same meaning and scope" as Article 5 ECHR. The Explanations also contains a list of those articles of the Charter which are said to correspond to provisions of the Convention. Moreover, Article II-112(3) provides for a general principle of interpretation:

"Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

The final words of this provision are of particular importance. They make clear that the Convention provides a "floor" and not a "ceiling" for Charter rights. Thus, Article II-107 provides:

“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law ...”

This is, obviously, broadly equivalent to Article 6(1) of the ECHR. But its language is not restricted in its application to the determination of any “criminal charge” or dispute as to “civil rights and obligations”. Since the passage of the Human Rights Act 1998 into law, our domestic courts have expended a great deal of energy in seeking to apply these “autonomous concepts” of Strasbourg law. They exclude large areas of (what English lawyers would recognise as) public law, such as immigration, and accordingly, lead to seemingly unjustifiable exclusions from the scope of the procedural protections offered by Article 6. This raises the question whether the omission of these words from Article II-107 of the Charter is merely a simplification of the language, as in Article II-66, discussed above, or a departure from the standard of the Strasbourg case law. The answer, once again, lies in the Explanations. They confirm that the language is deliberately more inclusive:

““In Union law, the right to a fair hearing is not confined to disputes relating to civil rights and obligations ... Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.”

This powerfully illustrates the dangers of seeking to interpret the Charter as a conventional piece of statute law, and the indispensability of the Explanations.

Balancing exercise

None of the substantive provisions of the Charter contain any reference to the need for a balancing exercise when a Charter right falls to be considered. Thus, Article II-67 of the Charter provides:

“Everyone has the right to respect to his or her private and family life, home and communications.”

This language is strikingly similar to that of Article 8(1) of the ECHR. But Article II-67 of the Charter contains no provision equivalent to Article 8(2) of the ECHR, which provides:

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Nevertheless, it is clear from the provisions of Title VII of the Charter that some kind of balancing exercise is also required. As already observed, Article II-112(3) provides that the “meaning and scope” of rights equivalent to those contained in the ECHR shall be the same. Article II-112(1) addresses the question of the possibility of balancing the exercise of Charter rights more generally:

“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

Scope of application

The Charter contains rights which are apparently concerned with subject matter which lies far beyond the EU’s competences. Thus, Article II-69 protects the “right to marry and found a family”. As yet at least, there is no Community Marriage Directive, seeking to harmonise the practices of the

Member States. This raises the question whether the Charter might be said to somehow extend the competences of the EU. Article 111(2) provides, however:

“This Charter does not extend the scope of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in other parts of the Constitution.”

Whilst that might be thought to be an unambiguous answer, it remains to be seen whether the ECJ, in interpreting the Charter is willing to take such a narrow view. In *C-117/01 KB v NHS Pensions Agency*, 10 June 2003, a case which arose out of the refusal to award a widower’s pension to a transsexual partner, the applicant complained that as she could not legally marry her transsexual partner, the preconditions of access to the benefit could not be met, and that that this amounted to sex discrimination, contrary to the Community principle of equal pay. The claim was upheld. Mr Advocate General Ruiz-Jabardo Colomer observed:

“It is true that the Community does not have any powers in this sphere but, if the United Kingdom rules are found to infringe a fundamental right, such a circumstance cannot easily be ignored.”

The Charter also seeks to make clear that it is of no application to wholly internal situations. Article 111(1) provides that its provisions are addressed to the institutions, bodies and agencies of the Union, and to the Member States “only when they are implementing Community law”. Whilst there is scope for argument as to precisely what this means, it suggests that where Member States act in a field which is outside the scope of Community law, the Charter will have no role to play.

Tim Ward is a barrister at Monckton Chambers. Marie Demetriou is a barrister at Brick Court Chambers.