

A CHARTER OF RIGHTS, FREEDOMS AND PRINCIPLES

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At the Nice European Summit in December 2000, the three organs of the Union – the Council (acting for the Member States), the Commission and the European Parliament – solemnly proclaimed the EU Charter of Fundamental Rights. This first comprehensive statement in the human rights field was the result of a hectic 9 month negotiating programme in which I was privileged to participate as the UK Government representative. In this article, I would like to recount something of the history of those negotiations and some personal reflections on the Charter to which we helped give birth.¹

My paper draws its title from the final sentence of the Charter's preamble: "The Union therefore recognizes the rights, freedoms and principles set out hereafter." These words, and the Conclusions of the June 1999 Cologne European Council, which set up the work of the Charter, are the best basis for considering the nature of the European Union's new Charter of fundamental rights. Reaction to the Charter has been a heady mixture of misunderstanding, hostility and unrealistic expectations. I would like to start therefore with the historical background to the Charter and its place in the historical development of the European Union since it helps me to put it in its proper context.

* H.M. Attorney General. The speech on which this article is based was delivered in February 2001, before the author's appointment as Attorney General. The opinions are therefore purely personal to the author. The speech was given at University College London. I want particularly to thank Prof. Jeffrey Jowell, Dean of the Faculty of Law at University College who proposed this event, for giving me this opportunity. I was especially pleased that Lord Hope of Craighead presided at this event. Under his Chairmanship the House of Lords EU Scrutiny Committee made the most perceptive Parliamentary report on the work of the Charter I have seen.

1. See also, in general, "Editorial comment – The EU Charter of Fundamental Rights still under discussion", 38 CML Rev., 1–6; Lenaerts and De Smijter, "A 'bill of rights' for the European Union", 38 CML Rev., 273–300. On a more particular point see in this *Review*, Liisberg, "Does the EU Charter of fundamental rights threaten the supremacy of Community law?", 1171–1199.

1. The historical background

The period after the Second World War saw the emergence of the great building blocks for the protection of human rights which had been so profoundly violated in the immediately preceding years: the creation of the United Nations, whose Charter is explicitly founded on the reaffirmation of “faith in fundamental human rights and in the dignity and worth of the human person”; the beginnings of a global system of international human rights law of which the Universal Declaration of Human Rights followed later by the two binding United Nations Covenants are the best known, but by no means the only, examples; and the protection of human rights at the regional level. In Europe, the Council of Europe, and its proud jewel, the European Convention of Human Rights, put into practice a vigorous and imaginative judicial system for the protection of the fundamental rights of individuals against the power of the State.

Yet, despite these events which were happening at the very time of the birth of the European Communities, the founding treaties made no mention of fundamental rights. This was no doubt because the focus of the Treaties was economic integration and it would not have seemed that the Treaties would be operating in areas or by methods which were inherently likely to violate human rights. That at least was the approach reflected in the early decisions of the European Court of Justice. For example, in the *Stork* and *Geitling* cases,² the ECJ rejected an argument that decisions of the Coal and Steel Community High Authority should have respected provisions of the German Basic Law, the *Grundgesetz*.

But as the competence and the law-making of the Communities grew, so did the demand for an explicit recognition of people affected by the Communities’ laws. The Communities were not, it should be recalled, parties to the ECHR, unlike Member States who in due course were all to become parties. So the Communities were not directly bound by the ECHR’s provisions. However, did not the powers of the Community’s legislators and administrators need to be constrained by respect for fundamental rights in the same way as legislators and administrators of Member States were constrained?

The Court of Justice was the first to develop this idea. Thus, in *Stauder*³ in 1969 the Court promised it would protect “the fundamental rights enshrined in the general principles of community laws” when confronted with an apparent conflict between a social welfare scheme and a right to privacy. Discovery of this concept of “fundamental rights” to be recognized as part of “the general

2. Case 1/58 *Stork v. High Authority* [1959] ECR 17 and Joined cases 16 and 17/59 *Geitling v. High Authority* [1959] ECR 17.

3. Case 29/69 *Stauder v. City of Ulm*, [1969] ECR 419.

principles of community law” did not, however, solve the problem of identification of those rights. The need to catalogue those rights was heightened by the tussle between the Luxembourg Court and the German Federal Constitutional Court in 1970 in what became known as the Solange cases. Told by the ECJ that it was not entitled to adjudicate on the validity of Community acts even if they contravened the German Basic Law, the German Constitutional Court conceded the supplanting of its own jurisdiction “*Solange*” i.e. as long as certain conditions were met, including rights protection in the European Communities based on a catalogue of rights.

The identification of such a catalogue of rights was not however, straightforward. In the *Solange* case⁴ the Luxembourg judges had described these fundamental rights as general principles “inspired” by the constitutional traditions of the Member States. This was, however, an imprecise concept only partly mitigated by the increasing reliance, since the 1974 decision in *Nold*, on international human rights treaties, especially the ECHR, to provide the content to these rights.

It was not, however until 1986 that any direct reference was made to the notion of protecting fundamental rights in the Treaties themselves: a preambular reference was made in the Single European Act. Then, at Maastricht in 1992, there was included for the first time in the Treaty an explicit recognition of the concept of fundamental rights and an obligation on the Union institutions to respect those fundamental rights guaranteed by the ECHR and deriving from the constitutional traditions common to Member States. This is now Article 6(2) of the Treaty on European Union. Reference was also made in Articles 6(1) and 7 to the possibility of sanctions on Member States who persistently failed to respect fundamental rights. This power was much discussed, but not invoked, when Jorg Haider’s party came to power in Austria. There are important differences between the two sets of provisions. I do not believe the Charter really reaches this area of Union protection of human rights and I will not refer to it again.

The ECHR continued to play a special part in the ECJ’s approach to fundamental rights protection to such an extent that in the *Bosphorus*⁵ case, Advocate General Jacobs was able to say that:

“... For practical purposes the Convention can be regarded as Community law and can be invoked as such both in this court and in national courts where Community laws are in issue...”

The identification of other fundamental rights was not, however, so easy. Apart from the reference to the ECHR, the Treaty did not set out a clear catalogue

4. *Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle fuer Getreide und Futtermittel* [1974] 2 CMLR 540.

5. Case C-84/95, [1996] ECR I-3953.

of what were the fundamental freedoms which the Union institutions are to respect. This left it vague and unclear for the citizen what were the rights he or she should expect to be respected at the Union level and uncertainty in what were the rights the ECJ was expected to enforce. This lack of visibility of rights was the subject of European Parliament initiatives, and was also picked up in the Vienna Declaration made at the Vienna European Council in December 1998 which set out a programme on human rights protection in “an effort to make the EU’s human rights policies more consistent and more transparent”.

That is the background against which the decision of the European Council at Cologne, which set in train the Charter project, is to be viewed. The Member States decided to draw up a declaration of existing rights enjoyed by EU citizens concluding that “. . . at the present stage of the development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident.” The express purpose was to consolidate fundamental rights acceptable at European level and make “their overriding importance and relevance more visible to the Union’s citizens.” That emphasis on increasing the visibility of existing rights phrase is repeated in the Preamble to the Charter: “To that end it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological development by making those rights more visible in a Charter”.

The purpose of the Charter, as conceived, was therefore to make the *existing* rights which the Union ought to respect more visible. To my mind, that was for two reasons. First, the purpose was to deepen and strengthen the culture of rights and responsibilities in the EU. Bringing together into a single document endorsed by the Member States and Community institutions a proclamation of existing rights will have a powerful effect in reinforcing in the minds of administrators, governments and legislators the rights that citizens possess and the need to respect them. The second purpose was to remedy this lack of clarity in the protection of human rights by declaring clearly which were the rights, freedoms and principles which the Union is to respect. There is, however, it will readily be seen, some tension between the two objectives, which lies at the heart of some of the drafting difficulties encountered.

2. Scope of the Charter

From that description of the purpose of the Charter, three key elements about the scope and status of the Charter become clear.

First, the principal addressees of the Charter are the European Union institutions when acting in the sphere of their competences and not the Member

States when acting in areas within national competence. This appears clearly from the opening words of Article 51 of the Charter. "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity . . ." It is the EU institutions who legislate at the Union level. The purpose of the Charter is to show the limits on the powers which the Union has when exercising the competences provided under the Treaties. It is the EU institutions which are not already clearly bound, unlike Member States, to respect a clear catalogue of fundamental rights set out in the European Convention or in a national constitution. It is for them, therefore, that the Charter is intended. Member States are not the addressees except to the limited extent that they are acting in the implementation of Community or Union law. When they are acting in this capacity they are really acting as the agents of the Community to implement the law passed and so naturally will be subject to the same constraints. This is clear from the second part of Article 51 which says the provisions of the Charter are addressed to Member States ". . . only when they are implementing Union law." But in the areas of national competence, the Charter is not intended to affect Member States. In those areas the protection of fundamental freedoms for the citizen will be the existing structure of national law and constitutions and important international obligations like the European Convention on Human Rights.⁶ This is critical. For example, without this understanding each State would otherwise have had to insist on the Charter simply mirroring its own national constitution, as it could accept neither greater nor lesser obligations in its own national dealings with its people.

So the Charter will not impose on Member States any obligation when they are acting within their areas of national competence. Still less will it enable the European Court of Justice to rule on acts taken within purely national competence by Member States. This will be important, for example, in many of the areas which relate to the social and economic field to which I will turn later.

There is nothing new in this concept that a Member State when, implementing Community rules, such as a Directive, is subject to the same requirements flowing from the protection of fundamental rights in the Community legal order. The ECJ has on a number of occasions made this clear, e.g. in *Wachauf*.⁷

Before moving on, I should, however, mention one important point. A number of commentators, and not least the EU Select Committee of the House of Lords, chaired by Lord Hope, questioned whether there was not a better route to achieve the aim of the Charter. Whilst sympathizing with the

6. In the United Kingdom, that particularly means the Human Rights Act which came into force across the country on 2 October 2000.

7. Case 5/88, [1989] ECR, 2609.

objective of strengthening the constraints on the EU institutions' actions, they suggested instead that the EU should become a direct party to the ECHR. The EU Committee's Report in May 2000 therefore concluded:

“Accession of the EU to the ECHR, enabling the Strasbourg Court to act as an external final authority in the field of human rights, would go a long way in guaranteeing a firm and consistent foundation for fundamental rights in the Union.”⁸

The arguments in favour of that course were, as one would expect, powerfully marshalled. There are others, notably the Strasbourg Court itself and the Council of Europe, who share that view. There is perhaps a particular concern by the latter not to be marginalized as the pre-eminent human rights court in Europe by the powerful Luxembourg Court. But there are undoubtedly good reasons to distrust a duality of final court of appeal on the same topic and some cases, e.g. the *EMESA* decision,⁹ show that surprising differences of interpretation can result.

There were at least two powerful reasons, however, why accession by the EU to the ECHR was not a substitute for the Charter. First, accession by the EU to the ECHR would require treaty changes both to the EU Treaties (which the ECJ had already ruled did not give competence to the EU to accede) and to the ECHR itself, which is only open for signature by States. Achievement of those changes not only would require solution of some important technical problems (e.g. would the EU also have its own judge on the court like all other ECHR members) but also a political will to make those changes. It was, however, apparent in our negotiations that certain Member States were implacably opposed to accession. Second, accession would not of itself have achieved the visibility of human rights required of the Charter. Nor would it have met the demands from many for a catalogue of rights going beyond the classic civil and political rights in the ECHR.

I turn to the second key element. The Charter is not an exercise in extending the competence of the European Union. The purpose of the Charter is not to give Brussels new powers or tasks but rather to limit those powers by making clear the restrictions on what they do – emphasizing that they cannot trample on fundamental rights of citizens in doing so. The Charter makes this clear also in Article 51(2): “This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.” This is an important limitation which has often not been understood in public comment on the Charter. It is the answer both to those who fear, and

8. 8th report of the Select Committee on the EU, Session 1999–2000, “EU Charter of Fundamental Rights”, p. 39.

9. Case C-17/98, *Emesa Sugar v. Aruba*, [2000] ECR I-665.

to those who would welcome, the Charter as a way of taking more powers to Brussels and away from national Governments. That is not what it will do. What is now for national governments to decide will be the same after the Charter is agreed as it was before. The Charter will not change that position.

I should answer here an objection which has been raised by some commentators, usually journalistic or political. How, they ask, can this be so when so many of the fundamental rights touch on areas beyond the Union's competence? This is a reasonable question to raise but often misses the point. In some areas there are competences which may one day be exercised e.g. in asylum policy. More significantly, the Charter has to deal with the risk of touching fundamental rights by a side wind when an EU institution is exercising competence in another area. To illustrate the point, let me take an example. Article 10(1) enshrines the right to freedom of thought, conscience and religion. This does not mean the EU Commission is now to be the guardian of religious freedom in Member States; it has no competence to do so. Nor does it impose a new obligation on Member States, all of whom are already bound by the same obligation through adherence to the ECHR. But if, for example, the EU is considering legislation on slaughterhouses, under the competence it does have in agricultural matters, it cannot simply ignore the rituals of various religions in the area of animal slaughter. To ignore those issues would be to deny respect to religious freedom.

The third key element is that the exercise was not about minting new rights but rather an exercise in increasing the visibility of existing rights. The Cologne Conclusions were not a mandate to create new rights. There is an established procedure for creating new rights at EU level through Directives and other legislative processes in which each of the institutions plays its role as do, where appropriate, the Social Partners. That view ultimately prevailed in the Charter drafting body, although not without some opposition. Despite the innovative structure of that body (to which I turn in a moment), the working methods necessarily adopted for the body, the very short period of time we were given to work and the enormous breadth of the project, would have made it impossible to engage in the detailed process of work necessary where genuinely new rights were being crafted. Our task of identifying and describing existing fundamental rights was difficult enough.

Many non-governmental organizations, however, made contributions and sought inclusions plainly with the understanding that we *were* in the business of making new rights. The end result will probably have disappointed them. But only because it had not been clearly explained what the aim of the exercise was. For my part, I would have liked to see clearer explanations of this at an earlier stage so that expectations were not raised and then dashed.

3. The process

Before turning to the Charter's contents I should say a few words about the process. We were a unique body in EU negotiations; neither committee of experts nor IGC. Each Member State had a Government representative; some were Government Ministers, such as the Finnish Chancellor of Justice; some distinguished politicians, such as Jean Luc Dehaene of Belgium and our Chairman, former German Head of State and President of the Constitutional Court, Roman Herzog; some, such as me, volunteered lawyers. The Commission was represented by Justice and Internal Affairs Commissioner, Antonio Vitorino. The EP had a 16 person delegation. Each National Parliament was also invited to send 2 delegates – Lord Bowness represented the House of Lords. This was, I believe, to forestall opposition by National Parliaments, such as the Danish Parliament's rejection of Maastricht. To this 62 there were added alternates, who often spoke, observers and specific submissions by civil society, NGOs and applicant countries.

The end result was a body which was strong on legitimacy, transparency and openness (proceedings were almost all in public and drafts, written observations and amendments were available on the website). Civil society was also invited to make representations and over 300 written submissions were received. There was also a day when NGOs made oral presentations to the Charter body.

It was also very lengthy. Having been warned to expect 5 or 6 meetings in Brussels, in the end I had 29 separate negotiating meetings (including 46 days out of the country), as well as countless meetings in Whitehall, with ministers and with interested UK groups. Debate was often unfocused and observations had to be limited in time which sometimes prevented doing proper justice to a topic.

Because (rightly) we had to work to produce a consensus, the process of agreement was a difficult one in which an inner core, who named themselves the Praesidium, had considerable power.

The body renamed itself "the Convention", perhaps to evoke historical precedent or perhaps simply to avoid Francophone members the embarrassment of having to wear a badge saying "enceinte", the official French name for the "Body".

Some suggest this is a model for future European negotiations. Personally I very much doubt it.

4. Contents of the Charter

The Charter has 6 chapters, labelled Dignity, Freedoms, Equality, Solidarity, Citizens' Rights and Justice. They were, however, crafted from three baskets of rights evident from the mandate of the Charter body: classic civil and political rights in the ECHR, citizenship rights deriving from the EU and EC Treaties, and social and economic rights. Negotiating the contents of the Charter was a long and difficult process, particularly in relation to the first and third categories. Difficulties arose both from differences in legal traditions as well as political points of view. The end result is inevitably something of a compromise.

The Charter is wide in its coverage. Whereas the first section of the ECHR (i.e. the European Convention excluding the provisions relating solely to the setting up of the Court) consists of 24 articles of which 14 are substantive, the Charter has 54 of which 50 are substantive. The difference is indicative of the wider coverage. The Charter covers the traditional and classic rights and freedoms: right to life and liberty, freedom of thought and expression and association, privacy and family life, equality, fair trial etc. It includes economic freedoms to seek employment, to conduct a business and to property. It refers to the four freedoms on which the Union is built.

It covers, though with a light touch, some areas where law and thought has developed since the ECHR was drafted. Thus it covers: bioethics; rights of children; rights of persons with disabilities; and environmental concerns. These are not, however, *new* rights. They are all to be found already in the case law and the common constitutional traditions of Member States. Often they are also found in international agreements. Thus, fundamental rights in the bioethics field are found reflected in the Council of Europe instrument, the Convention on Human Rights and Biomedicine; children's rights in the New York Convention on Rights of the Child and environmental issues in the Aarhus Convention.

The Charter includes citizenship rights deriving from the EU and EC Treaties themselves: participation in elections, access to documents, to the ombudsman and the right to petition, the right of freedom of movement and residence etc. The most controversial area in which the Charter extends coverage is the field of social and economic rights.

Certain of those elements deserve some special mention.

4.1. *Relationship with the ECHR*

It follows from my previous observations that the Charter was not intended to replace the European Convention on Human Rights. That Convention, the most important element in the protection of human rights in Europe,

both within and outside the European Union, will continue in existence and continue to apply day in and day out to the rights of many millions of people. The Charter has to contain the ECHR rights, the classic civil and political freedoms, but it will not be a substitute for them. I regard that as a very important consideration not only because of the importance that the ECHR has in the national legal order of the Member States of the European Union but also because of its importance as a unifying force for human rights throughout the whole of Europe. It would have been wrong, I believe, to have given second class status to the Strasbourg machinery. As Lord Russell-Johnston, President of the Parliamentary Assembly of the Council of Europe has written: in that event “the Court of Human Rights would become the court for the ‘rest of Europe’, perceived by many as downgraded and weakened, with its authority and respect for its decisions inevitably undermined”.

A major topic of debate within the Convention was how to reflect the relationship with the ECHR. My consistent position was that the relationship of the Charter with the ECHR in the field in which the ECHR operated should be very close. The Charter should not be a rewrite of the Convention which would continue to apply in material courts. I argued against the risk of creating an apparently competing version of human rights. That applied, to my mind, as much to the interpretation of those rights, now underpinned by 50 years of Strasbourg case law, as it did to the expression of those rights. Legal certainty in this field above all should be preserved.

The aim therefore was to prevent the Charter being inconsistent with the ECHR in the areas which the ECHR covers. Others shared the view that the Charter should not appear to create a parallel and competing system of human rights protection. As the President of the European Court of Human Rights noted in a speech on 7 March 2000: “. . . the Court’s main concern in the context of this discussion is to avoid a situation in which there are alternative, competing and potentially conflicting systems of human rights protection both within the Union and in the greater Europe. The duplication of protection systems runs the risk of weakening the overall protection offered and undermining legal certainty in this field.”

This view was by no means, however, universally held in the Charter body. Many argued that the ECHR, 50 years old, was out of date both in language and content. In my view that was a poor argument, underestimating the dynamic nature of the ECHR. As the case law of the Strasbourg court shows, it is a “living document” which is developed all the time by the Strasbourg court in the light of contemporary standards and to deal with modern issues. So that court has dealt, for example, with issues of environmental protection, of non-traditional families and their right to respect, and of sexual orientation in public and private life. Moreover, there are grave dangers in attempting to express the same idea in different words. At least to a British lawyer, where a

draftsman deliberately chose different words from another available text, the presumption is that he intended thereby a different meaning.

The contrary arguments were, however, pressed with considerable vigour. Some colleagues were not persuaded that the Strasbourg language was appropriate. Some believed we had not been given the job of just repeating existing phrases. The vehemence of the objections, however, suggested that underlying at least some was a wish to take the judging of EU issues away from Strasbourg. The debate therefore proved particularly long and surprisingly controversial, leading at one point, to a boisterous session in which the only vote ever taken in the Convention was pressed.

In the end, the argument that the rights should be expressed to be the same as ECHR rights was accepted. The method of achieving this, which allowed some modernity of language in the substantive articles, was by the use of a general clause, one of the so-called horizontal articles. Thus, whilst leaving the Union the right to legislate for more extensive rights in the future – a right all Members States have – Article 52(3) provides in its first sentence that

“Insofar as this Charter contains rights which correspond to rights guaranteed by [the ECHR] the meaning and scope of those rights shall be the same as those laid down by the said Convention.”

The Charter Preamble also makes an express reference to the jurisprudence of Strasbourg. Further to help identify which are the corresponding provisions, there is a Commentary by the Praesidium. That Commentary is a diluted version of a proposal I pressed for: a Charter in two parts, a Part A containing a clear declaration of rights and a Part B which provided a more detailed definition particularly by reference across to the existing source of law. This was an attempt to resolve the tension between visibility of the rights and legal precision.

The Commentary makes it clear which rights are the same as in the ECHR. 12 articles, or part articles, are listed as having the same meaning and scope as an identified corresponding ECHR article. A further 5 are listed as having the same meaning but an extended scope e.g. Articles 47(2) and (3) which relates to fair trial provisions relevant to proceedings concerning Community acts, exclude the limitation in the ECHR of application only to civil or criminal proceedings in accordance with existing Community law.¹⁰ Another example is Article 9 – the right to marry and to found a family – which is not expressly limited, as is Article 12 of the ECHR, to marriage between men and women. As the Commentary makes clear, however, this change of wording is to cover cases in which *national* legislation permits non-traditional family arrange-

10. See e.g. Case 294/83, “*Les Verts*” v. *European Parliament*, [1989] ECR 1339.

ments, but the Charter does not impose the granting of the status of marriage to unions between people of the same sex.¹¹

4.2. *Social and economic rights*

The other area of the greatest difficulty in the Convention was the proper treatment of social and economic rights. The Cologne Conclusions required that “in drawing up such a Charter account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Art. 136 EC) insofar as they do not merely establish objectives for action by the Union.” Agreement on the correct interpretation of this masterpiece of committee drafting proved, unsurprisingly, elusive.

As Lord Lester of Herne Hill has pointed out, the stance one takes on the justiciability of socio-economic rights depends to a large extent on one’s theory and understanding of democracy. It is to be doubted that judges have any mandate or special expertise to determine how national resources should be allocated between different priorities. These are decisions to be made by governments chosen through the ballot box. A great difficulty, for example, of providing in a legal text for a “right to housing”, without clear legislative guidance as to what level of housing would be adequate, who is to provide it, and under what conditions, is that it would appear to leave all these matters to be defined by a judge.

So there are important differences in this area from the classic civil and political rights. First, social and economic rights are usually not justiciable individually in the same way as other rights. Rather, they inform policy making by the legislator. Secondly, these are “rights” which are recognized and given effect to in different ways in the Member States whose competence this primarily is. National governments will therefore decide, in accordance with national priorities how to implement these principles and, especially, how to apply available resources to them. Moreover, at the very least to include such rights would raise expectations that the Charter was giving rights which the EU, the principal addressee, was in no position to deliver, having neither the competence nor the budget.

Others, however, had greater ambitions for the Charter. The debate was long and difficult. The ultimate solution to this problem emerged as a recognition of these differences through a new concept: that these “rights” essentially take the form of principles, which, whilst common to Member States, are implemented differently in their national laws and practices; and that the principles only

11. See in the meantime the judgment, and A.G.’s Opinion, in Joined cases C-122 & 125/99 *P. D. v. Council*, judgment of 31 May 2001, nyr.

give rise to rights to the extent that they are implemented by national law or, in those areas where there is such competence, by Community law. This important development is reflected in the preambular sentence quoted at the start of this paper.

Expressing these provisions therefore as *principles* tied to national law or (where it exists) Community law provides the possibility of identifying these important areas as ones where the Union institutions, where they do act within their fields of competence, should not act to violate those principles. It does not, however, provide any mandate to the Union institutions themselves to try to implement those rights, outside their own competence, or to impose on Member States some obligation to recognize the principle differently from how it currently does under national law.

This approach is reflected not only in the reference to “principles” but also in the particular drafting technique often, if not invariably used, when dealing in this area.

First, the Charter not infrequently uses an expression which captures the concept of non-interference by the Union with a right accorded by national law: so, for example, Article 34 says “the Union recognizes and respects the entitlement to social security benefits and social services. . .”. This does not mean it is for the Union to legislate in this area. Nor does this impose any requirement of Member States. It means that the Union should not violate this principle by a side wind in some other legislation within its competence.

Second, there is a frequent reference to “national law and practice” which is particularly found when dealing with socio-economic rights, such as workers rights and social security. This reinforces the notion that the Charter is not interfering with national legislation in these sensitive fields. It emphasizes the need to respect national differences and that it is not for the Union to impose rights in this area except through recognized treaty procedures. This was a reference which was (rightly) reported at the time, extremely important to the UK and for which we had to fight very hard.

Important too in this field was the need to recognize a balance between different rights and, in particular, economic freedoms and enterprise. The Charter therefore both explicitly mentions the freedoms of movement of persons, goods, services and capital and freedom of establishment and recognizes, unusually, in Article 16 specifically a freedom to conduct a business as a fundamental right.

In this area also the Commentary should always be consulted to understand the intent of the draft. In a number of areas, for example, specific reference is made to the terms of existing EC Directives, such as those on working time and maternity leave.

4.3. *Treaty rights*

The area of citizenship rights derived from the Treaties produced less controversy. Here the position accepted in the Charter is that the Convention has no ability to amend the Treaties and that, therefore, the Charter is a catalogue of those rights which are fundamental but that, as the text provides, those rights: “shall be exercised under the conditions and within the limits defined by [the EU and EC Treaties]”. The one exception is the innovative summary, culled from ECJ case law, in Article 41 of a right to good administration from EU bodies.

4.4. *Horizontal articles*

Chapter VII contains general provisions. They are the so-called “Horizontal Articles”. I have already referred to some of them, e.g. on the scope of the Charter and the effect on the EU’s competence, and on the relationship with the ECHR. They are a key point. They define the scope of the Charter and must always be borne in mind. They also include the permissible limitations to rights. None, or at least very few, of these rights is absolute. There is a balance which must be struck between competing rights. And with other important objectives: public order, public morals, national security but also the aims of economic activity, high employment and environmental protection. The provisions recognize the need for that balance. What the Charter will not allow, however, is the EU to fall below the existing standards of human rights protection. This minimum protection is guaranteed by Article 52(1). So the Charter is no licence, for example to suspend fundamental civil and political rights; in this area only the narrow limitations permitted by the strict terms of the ECHR would be allowed.

5. Status of the Charter

The status of the document has been much debated. It was proclaimed as a political non-binding declaration. But there have, of course, been calls to make it legally binding and to integrate it in the EU and EC Treaties.

The clear position repeatedly taken by the UK Government, as by others, was that achievement of the Charter’s purpose was best attained through a strong and clear political declaration rather than through a legally binding text. The issue was however not one for the Convention to decide. The mandate made it clear that it was for the Member States to decide “whether, and if so how, to integrate the Charter into the Treaties”. At Nice the political declaration route was chosen. Some believe that debate is not over.

My own view is that the political declaration route was the right approach. There are two reasons for that. First, it is easier in a political declaration to show a clear statement of values which people can understand without the qualifications and exceptions necessary in a written law. The second reason is that in the end I believe the Charter lacks the precision of language necessary to allow it legal force. President Herzog wanted us to draft so that the Charter could be integrated into the Treaties if that was subsequently decided. In this respect I believe we have not succeeded. Even with the helpful commentary produced by the Presidium, the Charter will lack the precision necessary for a law. So whilst it should be acceptable and valuable as a political statement, my own view is that this text is not suitable for incorporation into the Treaties whether directly or by cross-reference.

This does not mean that the Charter will not be a document to which the ECJ may choose to refer when considering the lawfulness of acts of the EU institutions or the implementation of EC law by Member States. It is already entitled to track the acts of the institutions under First Pillar activities for violation of the fundamental rights which are to be found in the ECHR or in the common constitutional traditions of the Member States (Article 6(2) EC). The Charter will be a useful guiding resource. How useful a guide is yet to be seen.¹² There is no exact parallel with existing precedent. The closest case is perhaps that of the Social Charter. Although reference has been made to the Social Charter in a very few cases in EC jurisprudence,¹³ there is little evidence that it provided inspiration for the ECJ's decisions.

It will, I believe, be important also that, to the extent that the Court does look at the Charter, it recalls that it must be interpreted not as a text intended to be legally binding but as a broad political declaration of rights and freedoms and widely drawn principles.

But in any event as a political declaration the Charter cannot extend the jurisdiction of the Court nor create new rights of complaint. No case can, as such, be based on the Charter. Nor will it entitle the Court to strike down a Community act for alleged violation of a fundamental right if satisfied that, whatever the Charter might on one interpretation suggest, the alleged right is not part of the common constitutional traditions of the Member States.

12. So far, examples are the A.G.'s Opinion of 8 Feb. 2001 in Case C-173/99, *BECTU*, and judgment of the Court in that Case, of 26 June 2001, nyr, and *D. v. Council*, cited *supra* note 11.

13. See e.g. Case C-84/94, *UK v. Commission*, [1996] ECR I-5755 and Case C-67/96, *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751.

6. Conclusion

The Charter, therefore, is neither embryo constitution nor new law of binding rights. It does, however, help to put human rights at the heart of Europe, seen perhaps too often as a cold place concerned more with economic integration and red tape than individual liberties and the rights of men and women.

The Charter proclaimed by the European Council, Commission and Parliament at Nice will help to make fundamental rights, freedoms and principles more visible. In the end the strong and clear political declaration represents the best way to enhance visibility while preserving legal certainty. The bottom line is that Brussels must respect fundamental rights as Member States are required to do. The Charter will not impose new obligations on Member States. It will not create new rights. It will not create a parallel system to the European Convention on Human Rights. But it will reinforce and strengthen a commitment to human rights.

In short, for the first time the peoples of Europe have a clear and valuable statement of the rights, freedoms and principles which the Union's institutions should respect. I am glad to have been allowed to be a part of this process.