The EU Charter of Fundamental Rights: What Practical Effects?

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Brief Synopsis

Although the EU Treaties did not make specific provision for the protection of human rights the European Court of Justice (ECJ) has been busy developing protection for fundamental rights in its jurisprudence since at least 1969. Basing itself primarily on the constitutional traditions common to the Member States and the European Convention on Human Rights (ECHR), the Court has identified a wide range of fundamental rights protected under EU law. These are unwritten rights and are recognised on a case by case basis in much the same way that the Irish Courts have been recognising unwritten personal rights in Irish law since the mid 1960s.

Not only can the citizen enforce these rights against the Union institutions, but so also in appropriate circumstances can he or she enforce them in the Irish courts against the State. Indeed, in some situations the citizen will be able to secure a higher level of protection for his or her rights under EU law than would otherwise be the case under the Constitution. It must be remembered in this context that EU law will take precedence even over the provisions of the Irish Constitution.

While these developments gave substantive protection to human rights they lacked the transparency normally associated with a bill of rights. The concept of an EU Charter of Fundamental Rights was devised primarily to remedy this by giving greater visibility to the protection of human rights in the EU and, as a consequence, to facilitate the further deepening and expansion of the EU as a political entity and ultimately to smooth the adoption of a European Constitution.

One of the most striking features of the Charter is the exceptionally broad scope and innovative character of the rights covered. Although supposedly based on the common constitutional traditions of the Member States, other EU sources and the ECHR the contents of the Charter would appear to go beyond all of them to include a wide range of rights which are typically relevant to the economic, civil, political, social, cultural and moral concerns of the citizen in the EU today. The distinctive drafting style employed has produced a Charter which is comprehensive, visible, intelligible, topical and dynamic. It is hardly going too far to claim that the Charter represents a quantum leap in the formulation of rights which are worthy of legal protection at national and international level.

The EU postponed a decision on whether to give the Charter full legal status when it was proclaimed at the Nice summit in December 2000. In practice, however, it would appear that the ECJ is treating it as a positive statement of fundamental rights which are protected under EU law. This means that the citizen can enforce it against the EU institutions and, in appropriate cases, against the State. Presumably this situation will soon be formally regularised with the adoption of the European Constitution containing the Charter as an integral part. It does not follow, however, that the ECHR is or will be redundant. Quite the contrary. There is still a vital role for the ECHR to ensure that both the Union and Member States respect the basic standards enshrined in the Convention in

both EU and non EU matters. Significantly, there is specific provision in the draft European Constitution requiring the EU to seek accession to the ECHR.

Draft - Not for Publication

Introduction

It is necessary to understand the history and context of human rights protection in the EU in order to appreciate what practical effects the Charter of Fundamental Rights will have. Accordingly, I will begin by sketching out how human rights have been afforded protection through EU law prior to the adoption of the charter. In doing so I will put particular emphasis on those aspects which are essential to an understanding of the contents and impact of the charter today and in the future. I will then outline the thinking behind the charter concept and the process adopted for its drafting and introduction. This will be followed by an outline of the contents of the charter and consideration of the primary issues surrounding its application in practice.

The Development of Human Rights Protection in the EU

The Treaty of Rome, as originally adopted in 1957, did not contain anything resembling a bill of rights. Indeed, nowhere in the text is there any reference to human rights. That is not to say that the Treaty had no impact at all on rights. It did in fact contain some provisions which provided a basis for the protection of what we would recognise as basic human rights today. The most obvious example is the provision guaranteeing equal pay for equal work for male and female workers (Art.141EC) It was also possible, however, to find human rights values lurking within the economic freedoms which constituted such a vital part of the foundations of the common market, as it was at that time. The provisions on the free movement of workers, for example, provided the right to travel and move residence from one state to another, the right to travel within another state and the right not to be discriminated against on the grounds of nationality, at least in certain circumstances.

Perhaps we did not immediately recognise or classify these provisions as fundamental rights because they operated within a supranational entity that was created, at least ostensibly, to promote economic activity. Inclusion of Treaty provisions giving overt positive protection to a wide range of civil and political rights would have given the new creation the aura of a political entity encompassing European citizenship. Such a quantum leap in European cooperation was hardly a feasible option at that time. National sovereignty was still largely an immutable concept. The protection for human rights was primarily a matter for state law and inter-governmental agreements such as the European Convention on Human Rights.

Given the sweeping competences of the new Community in economic and social matters, coupled with the unprecedented executive, legislative and judicial powers enjoyed by the supranational institutions of the Community, it was always inevitable that human rights issues would arise in practice. Individual citizens who felt that their basic human rights

were being infringed by the direct effect of Community legislation or by State action pursuant to Community obligations would seek a remedy.

A citizen may feel, for example that his or her:

- property rights were infringed by a CAP legislative provision or decision;
- liberty, privacy and family rights were infringed by a competition investigation;
- right to fair procedures was infringed by a decision denying him or her a residence permit;
- freedom of expression was denied by a legislative or executive restriction on the free movement of goods;
- freedom of association was denied by legislation prohibiting anti-competitive practices;
- right to equal treatment was denied by the operation of CAP schemes for the granting of subsidies;
- franchise rights were denied by legislation on elections to the European Parliament;
- and so on.

The vital question was how should such situations be handled. Who should determine whether there was a breach of human rights and what standards should be applied in making this determination? If, for example, it was accepted that a citizen's fundamental rights as guaranteed by national law were infringed by Community action, would he or she have a right to a remedy before the national courts? The European Court of Justice was quick to recognise that if such an eventuality was permitted it would have fatal consequences for the uniformity of Community law and ultimately, the cohesion and future development of the whole Community concept. Accordingly, it held its line that Community law (whether based in a Treaty provision or secondary legislation) always took precedence over national law, even where the latter consisted of a fundamental rights provision entrenched in a national constitution. It also recognised, however, that some powerful Member States (in particular, Germany) would not accept a situation where the fundamental rights of the citizen, as guaranteed by national basic law, would not be protected in Community matters. The compromise was to recognise and enforce fundamental rights as an integral part of the general principles of Community law.

In *Stauder v Stadt Ulm* [1969] ECR 419 the ECJ declared that it would protect human rights as an integral part of the general principles of Community law, despite the fact that they were neither specifically mentioned nor prescribed in the Treaties or secondary legislation. As will be seen later, locating human rights in the general principles of Community laws has a number of important consequences not just for the rights themselves, but also for our understanding of the Charter.

In *Nold v Commission* [1974] ECR 491, the Court declared that international human rights treaties on which Member States collaborated, or to which they were signatories, also supplied guidelines which should be followed within the framework of Community law. In effect, this meant that the human rights prescribed in Treaties, such as the ECHR,

to which the States were parties would be considered part of the general principles of Community law and as such would be applied within the framework of Community law.

Although the EU is not a party to the ECHR (and cannot sign up in the absence of appropriate Treaty amendments and changes to the Convention itself - [1996] ECR I-1759) it is now well established that the rights enshrined in the ECHR form part of the general principles of Community law. In its case the ECJ has specifically confirmed that the rights protected by the ECHR form part of Community law - eg. *Hauer v Land Rheinland-Pfalz* [1979] ECR 321; *Johnston v Chief Constable of the RUC* [1986] ECR 1651; *ERT* [1991] ECR I-2925; *Connolly v Commission* [2001] ECR I-1611; *Roquettes Freres* [2002] ECR I-9011; *Schmidberger* 12 June 2003). In *Bosphorus* [1996] ECR I-3953, for example, Advocate General Jacobs confidently asserted:

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

Status of human rights as general principles of Community law

By classifying human rights as part of the general principles of Community law the Court has elevated them to the status of Treaty provisions. Accordingly, they could provide a basis upon which to challenge the validity of Community legislation and executive action, as well as the legislation and executive action of Member States within the scope of Community matters (an issue to which I will return later).

Recognition on a case by case basis

Prior to the Charter there was no prescribed list or bill of rights in Union law. They are dependent on being recognised and declared by the Court of Justice on a case by case basis. This, of course, injected a large measure of uncertainty into their definition and scope.

Writing in 2001 Lanaerts and De Smijter offered the following catalogue of individual rights which have been specifically recognised by the ECJ: the principle of equal treatment (more specifically between men and women); the right to a fair hearing and to effective judicial control; the principle that provisions of criminal law may not have retroactive effect; the right to respect for private life, family life, the home and correspondence; (in particular respect for a person's physical integrity, the right to keep one's state of health private, medical confidentiality and the right to inviolability of one's home); the freedom to manifest one's religion; freedom of expression; freedom of association; the right to property; freedom to carry on an economic activity; and the right of everyone lawfully within the territory of a State to freedom of movement therein.

To these might be added: protection against arbitrary or disproportionate intervention on one's affairs (*Hoechst* [1989] ECR 2859 - Competition investigation involving a search of business premises); right not to be compelled to make an admission of a breach of a Treaty provision which it was incumbent on the Commission to prove (*Orkem* [1989] ECR 3283).

Application

Identifying the sources, status and content of human rights which will be protected within the Community legal order does not fully answer the question about their effect in practice. Will, for example, citizens be able to rely on Community law and machinery to challenge the actions of their States on the grounds that they breach rights protected by the ECHR? The answer will depend very much on the circumstances. Human rights which form part of the general principles of Community law can be used to challenge the validity of Community legislation or the actions of the Community institutions. The citizen will also be able to challenge State action, but only where that State action concerns Community matters; such as, for example, where the State is purportedly acting in compliance with a Community obligation or acting in a matter which comes within the Community domain.

Examples of enforcing human rights against the State in EC law include:

- *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609 – a tenant farmer applied for compensation for abandoning milk production under a CAP milk market regime scheme. Under national rules implementing the Community scheme the consent of the lessor was necessary. Despite the fact that the lessor in this case had never engaged in milk production or contributed to the tenant's investment he refused to consent. The tenant therefore would be deprived of the fruits of his labour without compensation. The ECJ ruled that Community rules which had that effect would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements were also binding on the Member States when they implement Community law, the Member States must as far as possible apply those rules in accordance with these requirements. The Court concluded that the Community rules left the Member State with sufficient discretion to apply them in a manner which did not breach the tenant's fundamental rights. It was the Member State, therefore, which was in breach of those rights.
- *ERT* [1991] ECR I-2925 - when a Member State seeks to rely on the public policy, public security or public health derogations from the freedom of establishment and freedom to provide services provisions (national system of exclusive television rights) its justification must be compatible with the general principles of Community law and fundamental rights in particular (freedom of expression - Art.10 ECHR). In other words they can be challenged on the grounds of a breach of fundamental rights under Community law.
- *Familiapress v Bauer Verlag* [1997] ECR I-3689 - similar concept applied to Member State's reliance on mandatory or overriding requirements to justify national rules liable to obstruct the free movement of goods.

A more unusual example is the State relying on fundamental rights in its defence to a claim also based on Community law. In *Schmidberger* (12 June 2003), for example, the Austrian authorities had authorised an environmental protest which had the effect of disrupting traffic for a time using the Brenner Pass to travel between Germany and Italy. A haulage business sued for compensation on the ground that the disruption constituted a breach of Austria's obligations under the Treaty provisions on the free movement of goods. Austria claimed that its actions were necessary in order to protect the freedoms of

expression and assembly. The ECJ ruled (distinguishing its decision in *Commission v France* [1997] ECR I-6959) that the protection of such freedoms could amount to a justifiable restriction on the free movement of goods.

The citizen will not, however, be able to use human rights as part of the general principles of Community law to challenge the validity of State action in matters which are reserved to the State. See, for example, *Kremzow v Austrian State* [1997] ECR I-2629 – dealing with the effect of ECHR in national proceedings arising out of the conviction of an Austrian national for murder and unlawful possession of firearms. Not covered by free movement of persons. See also, *Grogan* [1991] ECR I-4685. In such cases the citizen will have to rely on domestic law or the provisions and machinery of international human rights treaties, as appropriate. This is a major constraint on the potential of Community law and machinery to remedy a breach of human rights. It is a subject to which I will return later in the specific context of the Charter.

Another significant constraint is the fact that the ECJ does not enforce human rights in a vacuum. The interpretation which it will give to a right which it recognises as being part of the general principles of Community law will be coloured by the Community context in which it appears. Just as national courts and the European Court of Human Rights will take broader public interest issues into account when interpreting the scope and application of a right in the circumstances of an individual case, so does the ECJ take the broader Community interest into account. This can have a significant constraining effect on the impact of human rights in Community law. It often happens, for example, that the rights of the individual must be curtailed in order to implement a policy or scheme which promotes the economic and social goals of the Community. In such a case it is unlikely that the ECJ will uphold a human rights objection unless there is something about the scheme or policy which unnecessarily discriminates against or imposes a disproportionate burden on the individual concerned.

A useful illustration is provided by *Konstantinidis* [1993] ECR I-1191 – a Greek national working in Germany as a self employed masseur objected to the way in which his name was translated into Roman characters in the register of marriages in the German town of Altensteig. In his opinion AG Jacobs made a bold attempt to uphold the worker's claim on the basis that he was entitled to be treated not just on the same basis as a German national but also in accordance with a common code of fundamental values, such as those enshrined in the ECHR. The ECJ, however, refused to grant such sweeping protection. Instead it ruled that the German rules would only be incompatible with Community law if they caused the Greek worker such a degree of inconvenience so as to interfere with his freedom to exercise his right of establishment. The rules in this case did not go that far.

See also, *Hauer* [1979] ECR 3727; *Bosphorus* [1996] ECR I-3953.

Endorsement of judicial activism

The ECJ's bold initiative in promoting the protection of human rights within the Community was endorsed by the other Community institutions, and ultimately was enshrined in the Treaties.

In 1977 the Parliament, Commission and Council issued a joint declaration stressing the prime importance they attached to the protection of fundamental rights and to the ECHR in particular. Followed in 1978 by Heads of Government. Also note the Preamble to the SEA in 1986.

The Treaty on European Union which entered into force in 1993 was the first to incorporate specific provisions on the protection of human rights within the body of Union Treaties. Most notably it endorsed much of the work of the ECJ in this area by stipulating that "the Union shall respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law" (Art.6(2)). Note also that Art.6(1) of the Treaty states that "the Union is founded on the principles of liberty, democracy and respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." Art. 7 goes on to make provision for the Council to take action in the event of an actual or threatened breach of the principles set out on Art.6(1).

The need for a Charter

The judicial and Treaty developments did not dispense with the need for the promulgation of a Charter of Fundamental Rights. Indeed, key aspects of these developments merely served to emphasise the desirability of a Charter which would, *inter alia*, provide a clear and comprehensive catalogue of positive rights protected by Union law, confer high visibility on those rights and clarify issues such as: who the rights could be enforced against; whether they imposed positive obligations on the Union institutions; the circumstances in which they could be enforced; and the relationship with the ECHR machinery.

The Parliament was first out of the traps with its adoption of a catalogue of human rights by way of a declaration in 1989. Although this document was not legally binding it was cited in *Grogan* [1991] ECR I-4685. In its draft constitution for the EU drawn up in 1994 the Parliament included a revised version of its earlier declaration. This was followed by the European Council's 1998 Vienna declaration in which it set out a programme on human rights protections in order to make the Union's human rights policies more consistent and more transparent. It was not until the Cologne summit in 1999, however, that the Union finally committed itself to the promulgation of a Charter.

A drafting body composed of representatives from Member State governments, the Commission, the European Parliament and national Parliaments (together with observers from the ECJ, the ECHR and Council of Europe) was appointed with the task of drafting the Charter. The Council's intention at the time was that the Charter should be a consolidation of those fundamental rights currently applicable at Union level. By bringing them together and expressing them in a clear and coherent catalogue it was envisaged that they would become much more visible to the citizen. Indeed, there was at least an implicit assumption that the promulgation of a Charter of Rights was an essential ingredient in the further expansion and deepening of the Union as a political entity and the associated adoption of a European constitution. It was not anticipated, at least by the

Council and the Commission, that the Charter would have legally binding Treaty status. Equally, it was not intended as a substitute or replacement for the ECHR.

The Charter was approved by the EU Council and solemnly proclaimed at Nice in December 2000. The question of its legal status was left to a future time. It would not for the moment have formal Treaty status.

The Charter structure and content

The Charter is broken up into 7 titles which are preceded by a Preamble. The seven titles are headed: 1. Dignity; 2. Freedoms; 3. Equality; 4. Solidarity; 5. Citizen's Rights; 6. Justice; and 7. General Provisions Governing the Interpretation and Application of the Charter. Each of the first 6 titles are further broken up into separate articles protecting specific rights.

Dignity contains 5 articles. Some of these cover very familiar provisions such as the right to life and prohibitions against torture and slavery. Others, namely human dignity and the right to the integrity of the person are less familiar. The latter includes specific provisions prohibiting eugenic practices, cloning and making the human body and its parts a source of financial gain.

Freedoms contains 14 articles spanning a range of familiar civil, political, economic and social rights. These include: rights to: liberty, privacy, marry, education, property and asylum; as well as freedom of: thought, conscience, religion, expression and assembly. Interestingly, an expanded version of some of the major economic freedoms from the Treaty of Rome are also included, namely freedom to choose an occupation and freedom to conduct a business. A novel inclusion is the freedom of the arts and sciences.

Equality contains 7 articles. These guarantee equality before the law and outlaw discrimination across a very broad spectrum of classifications. They also require the Union to respect cultural and linguistic diversity. There are specific provisions promoting equality between men and women, as well as the rights of the child, the rights of the elderly and the rights of the disabled.

Solidarity contains 12 articles. The first 8 of these make relatively detailed provision on the rights of workers and the unemployed. An unexpected inclusion is that which states: "The family shall enjoy legal, economic and social protection" (Article 33(1)). The remaining 4 articles can be classified broadly as social rights which read more as aspirations than rights. These span: health care, access to services of general economic interest, environmental protection and consumer protection. The article on access to services of general economic interest reads:

> "The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Constitution in order to promote the social and territorial cohesion of the Union." (Article 36).

Citizens' Rights contains 8 articles. Broadly these span citizenship rights concerning elections and dealings with the administration of the State and the Union, although they also include freedom of movement and of residence within a State. An interesting inclusion is a right to good administration, which is further defined. Also worth noting is the fact that some of the rights specifically extend to legal persons. These are: the right of access to documents (Article 42), the right to petition the European Parliament (Article 44) and the right to refer complaints of maladministration to the European Ombudsman (Article 43).

Justice contains 4 articles. As the title heading suggests these are concerned with the administration of justice. Interestingly, given that the Union does not yet have a criminal code or distinct criminal procedure, 3 of the 4 are concerned with criminal justice. These guarantee the presumption of innocence and the rights of the defence of anyone charged with a criminal offence, require proportionality in sentencing and prohibit retroactive criminal laws and double jeopardy. The fourth guarantees the right to an effective remedy and a fair trial for anyone whose rights and freedoms under Union law have been violated. This includes a right to be advised, defended and represented, as well as a right to legal aid.

The seventh title contains 4 articles which make general provision for the interpretation and application of the Charter. These include provisions on: the addressees of the Charter rights; permissible limitations on the scope and application of the rights; the relationship between the Charter rights and similar provisions elsewhere in the Treaties; the interpretation of Charter rights which are identical to rights protected by the ECHR or the constitutional traditions common to the Member States; the status of provisions in the Charter which consist only of principles; the impact of rights provisions in Union law, international law and national constitutional law which provide a higher level of protection than the Charter; and the application of the Charter to activities aimed at destroying rights and freedoms recognised by the Charter.

These provisions will play a vital role in the interpretation and application of the Charter rights in practice. They too, however, contain provisions which present some difficult interpretation challenges. It is not my intention to go through each of the provisions in Title VII with a view to offering a detailed interpretation of what they might mean for the Charter rights. Instead I will focus my discussion on some aspects of the scope and status of the Charter rights themselves, drawing selectively on provisions of Title VII to the extent that they will shed light on these aspects.

Drafting style

One of the most striking features of the Charter is the style in which the individual rights are drafted. Virtually all are presented in absolute terms, with no qualifications or exceptions. The freedom of expression, for example, reads:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." (Article 11)

Unlike the equivalent provisions in the European Convention on Human Rights and the Irish Constitution there are no qualifications permitting restrictions in the interests of public morality or public order etc. The only real exception is the protection of the right to property which specifically acknowledges that the use of property may be regulated by law insofar as is necessary for the general interest and that a person may be deprived of his or her possessions in the public interest (Article 17). It is also worth noting the protection of equality between men and women which acknowledges that it shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex (Article 23).

The statement of the rights in bald and absolute terms has the advantage of enhancing their visibility and accessibility to the ordinary citizen which, of course, was a key objective in framing the Charter in the first place. It cannot have been intended, however, that the rights would be interpreted and applied in such absolute terms. Indeed, there are factors which will ensure that they will be balanced against other objectives and interests in their applications in individual cases. Most of these are outlined below under the headings of: "scope", "interpretation" and "addressees". In addition there is a provision (Article 52(1)) which clearly implies that the rights and freedoms prescribed in the Charter may be lawfully qualified.

Article 52(1) reads:

> "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."

Clearly limitations may be permitted only if their objective is to protect the general interests of the Union or the rights and freedoms of others. That, however, leaves the Union institutions with a very broad power to introduce and maintain schemes to promote Union objectives such as financial solidarity in the CAP, fair competition and the unity of the market even though they may involve significant restrictions on the rights and freedoms of the individual. As noted earlier the ECJ has rejected human rights challenges to Community measures on the basis that the measures in question were necessary to promote the general interests of the Community. The Union's freedom of action (and that of Member States) is further enhanced by the limitation in favour of restrictive measures aimed at protecting the rights and freedoms of others.

Nevertheless, it is worth noting that Article 52(1) imposes strict criteria on any measures which would limit the exercise of the rights and freedoms recognised by the Charter. The measures must be provided for by law and respect the essence of the rights and freedoms recognised by the Charter. The first part of this does not present any difficulty. The same cannot be said for the second part. Presumably the intention is that any limitations should aim to strike a balance between their objectives and the rights and freedoms in the Charter. In particular, they should not be framed in terms which effectively deprives the rights and freedoms in question of any substantive value. In addition the limitations must be proportionate to their objectives; in other words they must go no further than is

necessary to satisfy their objectives. This is consistent with the current jurisprudence of the Court. Finally, the limitations must also be necessary and must genuinely meet the objectives of general interest to the Union or the need to protect the rights and freedoms of others.

As indicated above, the Charter contains a number of provisions which are framed more in the style of aspirations rather than concrete rights and freedoms. These are found primarily, but not exclusively, in Title IV under the heading of Solidarity. It is likely that these provisions are classed as principles, as distinct from rights or freedoms. The Preamble to the Charter refers to "rights, freedoms and principles".

Significantly, the Charter draws a distinction between rights and freedoms on the one hand and principles on the other. Article 51, for example, stipulates that the Union and the Member States shall *respect* the rights and *observe* the principles. Article 52 makes provision for limitation on the exercise of the rights and freedoms - with the clear implication that these rights and freedoms are enforceable (within permissible limits) by citizens. There is no comparable provision for principles. However, Article 52 does make special provision for principles - in terms which clearly suggest that they are not meant to be directly effective:

> "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."

So the principles set targets which the Union and Member States may wish to achieve by legislative and executive actions. When they act with a view to achieving those targets the resultant legislation and decisions will be reviewable against the standards set in the principles. To that extent, therefore, the principles probably go further than the directive principles of social policy in the Irish Constitution.

Scope

Another striking feature of the Charter is the broad scope of the rights covered, coupled with the innovative character of some of them. It is meant to be no more than a consolidating catalogue of the rights which already form part of the general principles of Community law. The drafters of the Charter quite correctly did not confine themselves to the specific rights which have already been recognised in the jurisprudence of the ECJ. Instead they undertook the much more ambitious task of trying to catalogue all the rights contained in the international human rights treaties to which the Member States are parties together with other unwritten rights which form part of the common constitutional traditions of the Member States.

The result is a catalogue of rights which, in terms of the scope of the specific rights covered, surely far exceeds any single compilation in national or international law. In effect it brings together in one place rights and freedoms which were otherwise scattered across a wide range of disparate sources. This aspect of the Convention is enhanced by the fact that the drafters did not simply copy the wording of these pre-existing rights from

their original sources. Instead they reformulated and re-structured them as appropriate in order to produce a coherent code of rights, including many innovative rights, which are topically relevant to the economic, civil, political, social, cultural and moral concerns of the citizen in the European Union today. Indeed, there is more than a suspicion that in some areas they adopted a creative approach - see, for example, the right to the integrity of the person (Article 3). Their approach to the scope of the subject matter, together with the distinctive drafting style adopted (as outlined above), has resulted in a Charter which is comprehensive, visible, intelligible, topical and dynamic. I am sure it is not going too far to claim that this Charter represents a quantum leap in the formulation of rights which are worthy of legal protection at national and international levels.

Despite these qualities, it would appear that the rights in the Charter do not include all the rights contained within the *acquis communautaire* of the Union. Laenerts and De Smijter acknowledge that all of the rights enumerated in the Charter are either listed in the EC Treaty or belong to the Member States common constitutional traditions. However, they go on to assert that not all fundamental rights contained in the Treaty (eg. the economic freedoms) or belonging to the Member States' common constitutional traditions are reflected in the Charter (eg. the right of everyone lawfully on the territory of a State to have freedom of movement therein as recognised in *Rutili* - although I think this is actually included). Accordingly, they submit that the Charter contains only an impressive sample of the total range of rights whose respect is guaranteed by the ECJ, but less than the full range embraced by Article 6(2) TEU.

The scope of the rights is also constrained by the context in which they will be interpreted. This is already apparent from parts of the discussion above under "Drafting" and will be pursued further below under "Addressees" and "Interpretation".

Addressees

Article 51 of the Charter clearly identifies the addressees of the Charter as the Union and the Member States. The Union presents no difficulty in this context. The net effect is that the Union as a whole, together with each of its institutions, bodies and agencies are bound by the terms of the Charter. This means that their legislative, judicial and executive acts should be consistent with the Charter. If the Charter has legal effect it should also mean that the acts of the Institutions etc. can be judicially reviewed by the ECJ for compatibility. Those that are found to be in breach of the Charter will be declared void to the extent of the incompatibility. This much is clear from the jurisprudence of the ECJ on the protection of human rights in EU law.

It is arguable that the Charter will impose an obligation on the Union not just to avoid breaching the rights, but also to take positive action in order to promote them. Laenerts and Desomer suggest that there is already evidence of this happening in Commission proposals for legislative measures on: minimum standards for the reception of applicants for asylum in Member States (OJ C 2001/213E/286); the status of third country nationals who are long-term residents in the EU (OJ C 2001/240E/192; the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national (OJ C

2001/304E/192); and the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (OJ C 2001/32/307/5).

It is important to note, however, that the Charter does not confer any new powers or tasks on the Union (Article 51(2)). It is not easy to determine in the abstract what the full ramifications of this provision might be. At the very least, however, it must mean that the Charter does not empower or oblige the Union to act in order to promote human rights in matters beyond its existing competences. This would appear to render some provisions of the Charter purely aspirational. Article 14, for example, states that everyone has the right to education, and goes on to say that this right includes the possibility to receive free compulsory education. Outside of the Charter the Union does not have any power to provide or to legislate for the provision of free compulsory education. Article 51(2) makes clear that Article 14 is not be interpreted as conferring such a power.

More difficult problems arise in the application of the Charter to Member States. Article 51 states that the provisions of the Charter are addressed to Member States only when they are implementing Union law. It automatically follows that the Charter is not and cannot be considered as a substitute for the ECHR. It cannot be used by the citizen to challenge state actions in matters which have nothing to do with Union law. So, for example, the Article 2 protection for the right to life cannot be used to challenge the failure of the State to take sufficient precautions to prevent a citizen being shot dead by a police officer in the course of a domestic security operation. Such law enforcement matters are within the exclusive domain of the State. If the citizen cannot find a remedy in domestic law he or she can only resort to the ECHR or the ICCPR or some appropriate international treaty to which the State is a party. The Charter is not an option.

By contrast if the State breaches the liberty, privacy and property rights of the citizen in the course of an investigation into anti-competitive practices contrary to Article 82EC then the citizen should be able to seek a remedy by relying on Articles 6 and 7 of the Charter. Moreover, he or she should be able to rely on these provisions before the national courts as well as the ECJ.

Unfortunately, these relatively straightforward examples do not tell the full story. It will not always be so easy to determine when the State is implementing EU law. The simple examples arise when the State is enforcing pure EU law within its jurisdiction or when it is enacting laws or rules giving effect to pure EU obligations. Similarly, if the State acts in order to implement policies which have been decided at EU level it is easy to accept that it will be bound by the Charter. The most obvious example concerns agriculture as that is almost entirely governed by EU law. There are many other areas, however, in which the EU is the major, but not exclusive policy-maker. These include matters such as: labour law; social welfare law; asylum law; company law; competition law; environmental law; financial services law; etc. When a Member State acts in these areas it will not always be obvious whether it is acting in a matter which brings it within the scope of the Charter provisions.

To complicate matters further the EU is rapidly expanding its competence in areas such as policing and criminal law which traditionally were the sole preserve of Member States. These also happen to be areas which feature prominently in claims of human rights violations. The uncertainty which surrounds the scope of EU competence in these areas inevitably obscures the extent to which the Charter will apply to State action. It is by no means clear, for example, whether the Charter will apply to give a remedy to a citizen who feels that his or her liberty, privacy or property rights have been infringed as a result of a police investigation involving cooperation among police forces in several Member States and which results in an arrest, an entry, search and seizure and the exchange of evidence seized.

Typically, fundamental human rights will be used by the citizen to protect himself or herself against the State or the EU, as the case may be. There are circumstances, however, in which the rights are enforceable on a horizontal plane. This is as true in the EU context as it is in the State context. The guarantee of equal pay for equal work, for example, has been enforced as much in the private sector as in the public sector. It can be expected, therefore, that in appropriate case the Charter provisions can be enforced between private parties as well as by one party against the EU or State. Indeed, it is noteworthy that the preamble to the Charter states not only that the Union recognises the rights, freedoms and principles stated therein, but also that enjoyment of the rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

Interpretation

Some aspects of interpretation have already been touched on above - eg. the interpretation of the aspirational principles; the implied limits on several rights which are stated in absolute terms; and the restrictions consequent on the identity of the addressees of the rights and on the context in which the rights are applicable. In addition to these, there are a number of specific provisions in the Charter itself which impinge directly on interpretation.

The interpretation of the rights in the Charter is inevitably affected by the fact that the Charter is supposed to be a consolidation of rights existing elsewhere, including in the Treaties themselves and international human rights treaties such as the ECHR. To what extent is the interpretation of the rights in the Charter constrained by the wording of their equivalent provisions elsewhere and by the interpretation of those rights elsewhere by competent organs other than the ECJ.

Article 52(2) states that those Charter rights for which provision is made in the Treaties (or draft European Constitution) shall be exercised under the conditions and within those limits defined by the Treaties (or draft Constitution as the case may be). This is a hugely important provision as it can result not only in significant restrictions being imposed on some of the Charter rights, but also in some tricky complications in their application . Consider the following illustration which is borrowed directly from Laenerts and De Smijter:

Article 21(1) of the Charter prohibits discrimination on a wide number of grounds:

> "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

However, Article 13EC also addresses discrimination, but on a narrower number of grounds. Moreover, it does not prohibit discrimination on these narrower grounds *per se*. Instead it only authorises the Council to take action against such discrimination. Accordingly its provisions are not directly effective, except to the extent that the Council has acted. It follows from Article 52(2) of the Charter that the prohibition is absolute for those grounds that are not specified in Article 13EC. Moreover, since Article 13EC is not directly effective it would seem that the Charter prohibition also applies absolutely to those grounds that are specified in Article 13EC, apart from any on which the Council has acted. As it happens the Council has acted on race and ethnic origin (Directive 2000/43/EC). It follows that the Charter prohibition on discrimination on the grounds of race and ethnic origin must be exercised in accordance with Article 13EC and the Council Directive. By contrast the prohibition on discrimination on the other grounds mentioned in Article 13EC is absolute, although that will change for any of those grounds which are the subject of Council action in the future. For those grounds that are not mentioned in Article 13EC but are contained in Article 21(1) of the Charter the prohibition will always be absolute - unless they are affected by the implied limitations flowing from Article 52(1) of the Charter (see above under 'Drafting Style').

Article 52(3) of the Charter deals with the overlap between rights in the Charter and those in the ECHR. In effect it states that rights in the Charter which correspond to rights in the Convention must be interpreted in line with the rights in the Convention. In other words the jurisprudence of the European Court of Human Rights on the interpretation of such rights should be followed. However, Article 52(3) also makes clear that Union law can provide more extensive protection to those rights. The ECHR, therefore is to be considered a statement of minimum standards. Where is it apparent that the Charter (or other provisions of Union law) intend to provide a higher standard in any instance then that higher standard should be given effect.

Article 52(4) addresses the relationship between the Charter rights and rights which flow from the constitutional traditions common to the Member States. It states that the former should be interpreted in harmony with the latter. In one sense this adds nothing to the interpretation of the Charter rights as they are supposed to be nothing more than a codification of rights which are an integral part of the constitutional traditions common to the Member States. However, the act of codification gives the rights a separate existence which at least raises the possibility that they could be interpreted in a manner which would depart in some respects from what would otherwise have been the case if they remained unwritten. Presumably, Article 52(4) guards against that possibility.

It is also worth noting the provisions of Article 53 of the Charter in this context. It stipulates that nothing in the Charter shall be interpreted as restricting or adversely affecting rights and freedoms as recognised by Union law, international law, international agreements to which the Union and/or States are parties (including the ECHR) and Member State's Constitutions. This would appear to mean that the Charter should be considered as setting a minimum standard of rights which will be protected in the Union. It does not preclude a higher standard being set by any of these other sources. By the same token where a higher standard is set by any of these other sources in circumstances which form part of the general principles of Union law then those higher standards should be given precedence by the ECJ and the courts of Member States when enforcing Union law.

Legal status

When the Charter was solemnly proclaimed at Nice in December 2000 its legal status was left in something of a legal limbo by the decision to postpone a decision on its legal status. In effect this meant that it did not have the status of the Union Treaties. It does not necessarily follow, however, that the Charter has no legal effect.

It must be remembered that the Charter is meant to be a statement of the rights recognised in the constitutional traditions common to the Member States, and specifically including the ECHR, the EU and Council of Europe Social Charters and the case law of the ECJ and the European Court of Human Rights. In other words it already forms part of pre-existing law and legal principle as developed by the ECJ. The only difference (or addition) is that the legal principles are now clearly expressed in one document and in a form and detail which they had previously lacked.

It would seem reasonable to suppose, therefore, that the ECJ will treat the Charter as a statement of positive law and apply it directly when interpreting Treaty provisions and secondary legislation, and when dealing with claims that Union legislation or actions breach the Charter provisions. Equally, it can be argued that domestic courts should treat the Charter as a statement of positive, binding law in appropriate cases where it is dealing with matters which are subject to Union law or which concern the implementation of Union law by the State. This should mean that the domestic courts have jurisdiction to grant a remedy where the State has breached the rights and freedoms set out in the Charter in a matter involving its implementation or non-implementation of Union law. It is worth recalling, however, that a national court cannot strike down a Union measure as invalid.

All the signs are that the Charter will be considered by the ECJ as a statement of positive law with the same status as the general principles of law recognised by the constitutional tradition common to the Member States.

To date several Advocates General, when giving their opinions in cases before the ECJ, have referred to the Charter in terms which suggests that it is legally binding:

- AG Tizzano in *BECTU* [2001] ECR I-4881 - concluding that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right.
- AG Leger in *Hautala* [2002] 1 CMLR 151 - The nature of the rights set down in the Charter precludes it from being regarded as a mere list of purely moral principles without any consequences. It is natural for the rules of positive Community law to benefit, for the purposes of their interpretation, from the position of the values with which they correspond in the hierarchy of common values.

However, I have not yet found any reference in a judgment of the ECJ clarifying the status of the Charter. The Court of First Instance (CFI) has not been so reticent about using the Charter.

- *Max-Mobil* (30 Jan. 02) - The CFI referred to Art.41(1) of the Charter (right of every person to have his affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union) as a stepping stone to conclude that the Commission obligation to undertake a diligent and impartial examination of complaints must apply, as a matter of principle, without distinction in the context of Arts.81, 82, 86, 87 and 88 EC.
- *Jégo-Quéré* (3 May 02) - The CFI mentioned Art.47 of the Charter (right of individuals to an effective remedy before a court of law) in additional support of a redefinition of the concept of "individual concern" under Art.230(4)EC. According to CFI this concept should no longer be interpreted in a way that limits the right of individuals to challenge Community regulations to wholly exceptional cases. It will be enough if the measure affects the person's legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so affected, are of no relevance in this regard.

Draft European Constitution

The draft European Constitution incorporates the Charter as an integral part of the Constitution. Undoubtedly this will confirm the Charter rights and freedoms as constitutional law of the Union. However, as currently drafted it does not totally dispel all doubts over the exact status of those rights and freedoms.

Article 7(3) of the Constitution states that fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. It does not make a similar unequivocal statement with respect to the Charter. It can be argued of course, that such a statement is unnecessary as the Charter is already included (albeit as Part II) in the Constitution. If that was sufficient, however, then there should be no need for Art.7(3).

Article 7(1) of the Constitution states that the Union (does not specifically include the Member States) shall respect the rights, freedoms and principles set out in the Charter. Nowhere, however, does it state unequivocally that any legislation or executive action in breach of the rights and freedoms is null and void, or that a citizen is guaranteed a remedy for a breach of any of the rights and freedoms. It is, of course, arguable that all of

this can be deduced for other provisions, such as: Art.8(2) - citizens shall enjoy the rights and be subject to the duties provided for in the Constitution; Art.51(1) of the Charter which states that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law … It might have been better, however, if less room had been left for argument.