



RESEARCH PAPER 04/85
25 NOVEMBER 2004

The Treaty Establishing a Constitution for Europe: Part II (The Charter of Fundamental Rights)

This Paper looks at Part II of the *Treaty Establishing a Constitution for Europe* (the “European Constitution”), which was agreed at the Intergovernmental Conference (IGC) on 18 June 2004 and published in its final, edited form on 13 October 2004.

Part II contains the Charter of Fundamental Rights, which was ‘proclaimed’ at the Nice IGC in December 2000.

This is one of a series of Library Papers that consider the European Constitution, comparing new articles with existing articles in the *Treaty Establishing the European Communities* (TEC) and the *Treaty on European Union* (TEU)

Vaughne Miller

INTERNATIONAL AFFAIRS AND DEFENCE SECTION

HOUSE OF COMMONS LIBRARY

Recent Library Research Papers include:

List of 15 most recent RPs

04/70	Income, Wealth & Inequality	15.09.04
04/71	The Defence White Paper	17.09.04
04/72	The Defence White Paper: Future Capabilities	17.09.04
04/73	The <i>Mental Capacity Bill</i> [Bill 120 of 2003-04]	05.10.04
04/74	Social Indicators [includes articles: Renewable Energy; Summer Olympic and Paralympic Games - Facts and Figures 1896 to 2004]	08.10.04
04/75	The Treaty Establishing a Constitution for Europe: Part III	08.10.04
04/76	Unemployment by constituency, September 2004	13.10.04
04/77	The Treaty Establishing a Constitution for Europe: Part IV and Protocols	21.10.04
04/78	The <i>School Transport Bill</i> [Bill 162 of 2003-04]	25.10.04
04/79	The <i>Gambling Bill</i> [Bill 163 of 2003-04]	28.10.04
04/80	Economic Indicators [includes article: The EU/US Airbus/ Boeing WTO Debate]	01.11.04
04/81	2004 US Presidential and Congressional election results	15.11.04
04/82	The collective responsibility of Ministers – an outline of the issues	15.11.04
04/83	Unemployment by Constituency, October 2004	17.11.04
04/84	Freedom of Information implementation	24.11.04

Research Papers are available as PDF files:

- *to members of the general public on the Parliamentary web site,
URL: <http://www.parliament.uk>*
- *within Parliament to users of the Parliamentary Intranet,
URL: <http://hcl1.hclibrary.parliament.uk>*

Library Research Papers are compiled for the benefit of Members of Parliament and their personal staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public. Any comments on Research Papers should be sent to the Research Publications Officer, Room 407, 1 Derby Gate, London, SW1A 2DG or e-mailed to PAPERS@parliament.uk

Summary of main points

- The outstanding elements of the *Treaty Establishing a Constitution for Europe* (the “European Constitution”) were agreed on 18 June 2004 and a consolidated provisional text was published on 25 June 2004. The final, edited text was published on 13 October 2004 as CIG 87/1/04 Rev 1 with Addendum 1 (Protocols and Annexes) and Addendum 2 (Declarations).
- The Treaty is divided into four parts, comprising in Part I general principles; Part II, the Charter of Fundamental Rights; Part III, detailed provisions on policies and procedures relating to Articles in Part I; and Part IV, General and Final Provisions. Protocols and Declarations are annexed to the Constitution.
- The Charter of Fundamental Rights of the European Union (“the Charter”) was drawn up in 2000 by a Convention of EU and Member State representatives, with contributions from a range of non-governmental bodies. There was a debate over its future legal status, with some Member States for and some (including the UK) against its formal incorporation into the EC Treaty.
- It was adopted in a “solemn proclamation” at the Nice IGC in December 2000 but not incorporated as a Treaty amendment.
- Another Convention, the Convention on the Future of Europe, included the Charter in its draft constitutional text in July 2003. The British Government accepted this, provided there were safeguards against an extension of EU competence in Charter areas.
- The Charter has been incorporated into the final text of the Constitution, forming Part II of the text.
- The Charter contains a range of civil, political, economic and social rights, divided into a Preamble and six titles on:
 - Dignity
 - Freedoms
 - Equality
 - Solidarity
 - Citizens’ rights
 - Justice
- The Charter rights are based on the rights recognised by the *European Convention on Human Rights* (ECHR), the constitutional traditions of the EU Member States, the Council of Europe’s *European Social Charter*, the *Community Charter of Fundamental Social Rights of Workers* and other international conventions to which Member States are parties.
- A Declaration is appended to the Constitution, to the effect that the “explanations” of Charter articles by the Praesidium of the Convention in 2000 should be used to interpret Charter rights.

CONTENTS

I	Introduction	7
II	The EU and Human Rights	8
III	The Human Rights Provisions in the Charter	12
	A. Preamble	12
	B. Title I – Dignity	14
	C. Title II– Freedoms	15
	D. Title III – Equality	17
	E. Title IV – Solidarity	18
	F. Title V – Citizens’ Rights	19
	G. Title VI - Justice	21
	H. General Provisions Governing the Interpretation and Application of the Charter	21
IV	Adjustments to the Charter	23
	A. Preamble and Article II-112	23
	B. Articles II-111 and II-112 (the “Horizontal Articles”) and Explanations	23
	C. Declaration 12 on the Explanations to the Charter	29
V	UK Views	31
	A. The Government	31
	B. The Conservatives	39
	C. Liberal Democrats	40
VI	Does the Charter Expand, Enhance or Confuse?	40

I Introduction

The Convention on the Future of Europe (the Convention) drew up a draft constitutional text, which was agreed on 18 July 2003. This was the basis for discussion at the Intergovernmental Conference (IGC), which opened in October 2003. The IGC reached agreement on the outstanding institutional issues on 18 June 2004.¹ The main Charter issue arose from the British Government's demand that the "explanations" of Charter articles be used as a guide to their interpretation, and that certain articles on its interpretation and application be amended. These demands were also met by June 2004.

A provisional consolidated version of the final text was published as IGC document CIG 86/04 on 25 June 2004.² The British Government published this as Command Paper 6289 on 19 July 2004. The text was edited by the Council of Ministers' legal and linguistic experts in the 20 official languages of the EU, in order to make it authentic within the meaning of Article IV-448 of the text itself. The edited text of the Treaty was published on 6 August 2004 as CIG 87/04³ with Addendums 1 and 2⁴ containing Protocols, Annexes and Declarations. A revised final text was published on the *Europa* website on 13 October 2004 as CIG/87/1/04 with revised Addendums 1 and 2.⁵

The formal title of the text is the *Treaty Establishing a Constitution for Europe* but it is referred to here as "the European Constitution" or "the Constitution". It repeals and replaces the current EC Treaties as amended by the Treaty of Nice in 2000, merging the

¹ For information on the IGC negotiations on the Constitution, see Standard Notes SN/IA/2803, 2838, 2469, 3091 and 3128 on the Library publications page.

² CIG 86/04 at <http://ue.eu.int/igcpdf/en/04/cg00/cg00086.en04.pdf>. This was based on the provisional consolidated version (CIG 50/03, 25 November 2003 at <http://ue.eu.int/igcpdf/en/03/cg00/cg00050.en03.pdf>), together with its corrigenda at http://ue.eu.int/cms3_applications/applications/igc/doc_register.asp?cmsid=576&num_page=3&lang=EN&content=DOC and http://ue.eu.int/cms3_applications/applications/igc/doc_register.asp?cmsid=576&num_page=4&lang=EN&content=DOC and Presidency documents CIG 81/04, 16 June 2004 at <http://ue.eu.int/igcpdf/en/04/cg00/cg00081.en04.pdf> and CIG 85/04, 18 June 2004, at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/81109.pdf. The Protocols were published in CIG 86/04 Addendum 1, at <http://ue.eu.int/igcpdf/en/04/cg00/cg00086-ad01.en04.pdf>, and the Declarations in CIG 86/04 Addendum 2, at <http://ue.eu.int/igcpdf/en/04/cg00/cg00086-ad02.en04.pdf>.

³ CIG 87/04, 6 August 2004 at <http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf>

⁴ CIG 87/04 ADD 1, 6 August 2004 at <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad01.en04.pdf> and CIG 87/04 ADD 2, 6 August 2004 at <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf>

⁵ *Europa* publishes the text in four parts with separate locations for the Protocols and Declarations, as follows http://europa.eu.int/constitution/download/part_I_EN.pdf, http://europa.eu.int/constitution/download/part_II_EN.pdf, http://europa.eu.int/constitution/download/part_III_EN.pdf, http://europa.eu.int/constitution/download/part_IV_EN.pdf, http://europa.eu.int/constitution/download/protocols_annexes_EN.pdf, and http://europa.eu.int/constitution/download/declarations_EN.pdf

main EC Treaty, the *Treaty Establishing the European Communities* (TEC), with the intergovernmental elements contained in the *Treaty on European Union* (TEU).

The Constitution was signed in Rome on 29 October 2004 and is now subject to ratification by all 25 Member States in accordance with their constitutional requirements before it can come into force. The final text of the Constitution will be published as a Command Paper in the UK following signature, and again if it is ratified, as part of the European Treaty Series.⁶

The Constitution is structured in four parts. Part I contains articles of general principle. Part II contains the Charter of Fundamental Rights, Part III the detailed provisions for Articles in Part I, and Part IV general and final provisions. One of the main technical adjustments agreed by the IGC and carried out by the Council experts was to renumber the four parts of the Constitution in a continuous numbering system, rather than numbering each part separately, as in the provisional final text. The Constitution contains 448 articles and is 349 pages long.⁷ The British Foreign Secretary, Jack Straw, who wanted a text that would fit into his pocket,⁸ now concedes that a “poacher’s pocket” will be needed.⁹

The Government has said that, once the Constitution is finalised and it has produced a Bill to give it effect in UK law, it will provide Explanatory Memorandums to Parliament on both the Treaty and the Bill. It will also then produce an analysis comparing the Treaty to its predecessors.¹⁰

II The EU and Human Rights

The *Charter of Fundamental Rights of the European Union* (“the Charter”), which was solemnly “proclaimed” at Nice in December 2000, has been incorporated, with a few adjustments, into the European Constitution. The text of the original Charter is contained in the Official Journal of the European Communities C series, No. 364, 18 December 2000 and can be accessed at http://www.europarl.eu.int/charter/pdf/text_en.pdf. The Charter is discussed in Library Research Paper 00/32, *Human Rights in the EU: the*

⁶ See HC Deb 20 July 2004 c26WS at http://pubs1.tso.parliament.uk/pa/cm200304/cmhansrd/cm040720/wmstext/40720m05.htm#40720m05.html_sbhd2

⁷ Together with the Protocols, Annexes and Declarations, the IGC version of the text has 852 pages

⁸ “A Constitution for Europe” *The Economist* 11 October 2002, at: <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=KArticle&aid=1034270166922>

⁹ *The Economist* 10 July 2004; see also British Embassy Berlin website, at <http://www.britischesbotschaft.de/en/news/items/040710.htm>

¹⁰ Letter from Denis MacShane to Chairman of Lords Select Committee on the European Union, 19 July 2004, Minutes of Evidence 22nd Report 2003-4 13 July 2004 at <http://pubs1.tso.parliament.uk/pa/ld200304/ldselect/lddeucom/137/137we07.htm>

Charter of Fundamental Rights, 30 March 2000, which can be accessed at <http://hcl1.hclibrary.parliament.uk/rp2000/rp00-032.pdf>.

This is not the only, or the first, recognition by EU Member States of human rights guarantees. The EC Treaties already contain provisions on equality between men and women and non-discrimination. They require Member States to respect the human rights guarantees contained in the *European Convention on Human Rights* (ECHR), other human rights instruments and their own constitutions.

In addition to ratifying or acceding to the ECHR and most of its Protocols, all 25 EU Member States are party to the following United Nations human rights treaties, and all have human rights guarantees in their national constitutions:¹¹

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Convention on the Rights of the Child (CRC)¹²

Member States are thus already obliged to respect a range of human rights, by virtue of having ratified these and other international human rights instruments. Several Charter provisions also duplicate or overlap with provisions presently contained in the EC Treaty.¹³

The Convention that drew up the Charter in 2000 wanted it to reinforce existing rights and to make them applicable, not only to Member States, but to the acts of the EU institutions themselves. At present, the Charter is not legally binding, is of uncertain political value and is not internally justiciable, because it is outside the remit of EC competence. The Convention on the Future of Europe, which in 2003 proposed that the Charter should be included in the text of the European Constitution, did not intend that it should supersede other human rights instruments or national practices, or make them redundant. The Convention Working Group on the Charter wanted it to complement other human rights instruments, the ECHR in particular, to protect EU citizens (both EU

¹¹ The UK achieved this by incorporating the *European Convention on Human Rights* into UK law in the *Human Rights Act 1998*.

¹² For details see the UNHCR website at <http://www.unhcr.ch/pdf/report.pdf>. Treaties ratified by the UK can be found on the FCO website at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1044360377428>

¹³ For example, Article II-81 of Constitution (Article 21 of Charter) and Articles 12 and 13 TEC (freedom from discrimination); and Article II-83 of Constitution (Article 23 of Charter) and Article 141 TEC (equality between men and women)

nationals and others residing in the territory of the EU) and guard against the abuse of power by the law-making bodies in the drawing up and implementation of EU law.¹⁴

In addition, there was general agreement within the Convention and the subsequent IGC that the EU should accede to the ECHR. Declaration 2 on Article I-9(2) of the Constitution (respect for the Charter of Rights) states:

The Conference agrees that the Union's accession to the European Convention on the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention.¹⁵

The relationship between the Charter and the ECHR and the implications of EU accession to the latter have given rise to concern about the duplication of rights, conflicting judgments and a possible lack of legal certainty. Although there is some duplication of rights in the two instruments, the Charter and the ECHR have different enforcement mechanisms and different jurisdictions. The rights set out in the Charter can only be applied in relation to EU law or action taken under the Constitution. The ECHR has a more general application and its own complaints mechanism through the European Court of Human Rights.

Article II-112 of the Constitution provides that, insofar as the 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 ECHR. This will help to avoid conflicting interpretations of the two texts. The ECJ will rule in cases of alleged breach of the Charter, including, presumably, in cases where the complaint would also be admissible under the ECHR. However, as some commentators have observed, there is still scope for duplication and confusion as to which would be the relevant Court.

Dr Vassilios Skouris, the President of the European Court of Justice (ECJ), considered the issues raised by multiple applications of human rights provisions:

Especially after the upcoming adoption of the Charter of Fundamental Rights of the European Union as a binding legal text, we will be faced with a situation where, as far as EU Member States are concerned, three systems of fundamental rights protection will be applicable: national constitutions, the European Convention on Human Rights and the Charter.

¹⁴ Working Group II final report CONV 354/02 22 October 2002 at <http://register.consilium.eu.int/pdf/en/02/cv00/00354en2.pdf>

¹⁵ <http://ue.eu.int/igcpdf/en/04/cg00/cg00087-ad02.en04.pdf>

[...] The introduction of a legally binding Bill of Rights for the EU is certainly a very important step forward towards increasing the democratic legitimacy of the EU and advancing European integration. However, the incorporation of the Charter into the forthcoming Constitutional Treaty will not literally introduce a third system of protection of fundamental rights in Europe. The EU is no stranger to the protection of fundamental rights therefore it would not be an exaggeration to suggest that a third system of protection already exists.

Nonetheless, this does not mean that the added value of a legally binding Charter will be limited. On the contrary, transparency, codification and legal certainty are of paramount importance in the field of fundamental rights protection and they cannot be effectively achieved without the introduction of a legally binding Bill of Rights.

These advantages outweigh all the potential problems. It is true that a multitude of sources of law with sometimes overlapping fields of application is certainly not efficient and can be the source of confusion for private individuals, lawyers and judges. The range of the protected rights and the level of protection can be different from one text to another. The risk of conflicting case-law between the Court of Justice on the one hand and national supreme courts and the European Court of Human Rights on the other is always present. But these problems are by no means novel and they will surely not be the result of the transformation of the Charter into a binding legal text.

Furthermore, the evolution of fundamental rights protection in the EU clearly demonstrates that such difficulties are not insurmountable and can be resolved in a variety of ways. Differences in the *rationae materiae* field of application of the Charter, of the ECHR and of national constitutions would normally be negligible due to the common long-standing tradition of human rights protection in Europe and to the overall harmonising effect of the ECHR. Conflicting case-law, especially between the ECJ, the ECHR, and national constitutional courts has been a rare and marginal occurrence and that risk can always be minimised by a close cooperation between those Courts.¹⁶

Dr Skouris concluded that any lack of efficiency and coherence resulting from the parallel application of three systems of human rights protection would “most probably be reduced by the accession of the EU to the ECHR”.¹⁷ However, he does not clarify this assumption.

¹⁶ “The Position of the European Court of Justice in the EU Legal Order and its Relationship with National Constitutional Courts”, international conference on “The Position of Constitutional Courts following Integration into the European Union”, organised by the Constitutional Court of Slovenia and the Venice Commission, 1 October 2004, at http://www.us-s.si/pceeu/index.php?flash=2&sv_path=589,633

¹⁷ Ibid

III The Human Rights Provisions in the Charter

The Charter contains a Preamble and six sections covering different kinds of rights and principles.

A. Preamble

The Preamble affirms the values to which the Union ascribes. It opens with a reference to the creation of an “ever closer union” (which was omitted from the general Preamble to the Constitution) and to the sharing of a “peaceful future based on common values”. The Preamble recalls the Union’s “spiritual and moral heritage”, its foundation on “the indivisible, universal values of human dignity, freedom, equality and solidarity ... the principles of democracy and the rule of law”, the importance of the individual, citizenship of the Union, and the creation of an area of freedom, security and justice. Many of these aspirations are also contained in the general Preamble to the Constitution.

Other bases for Union action are respect for “the diversity of the cultures and traditions” of the peoples of Europe, their national identities and the organisation of their public authorities at national, regional and local levels, the promotion of sustainable development, the right to free movement of persons, services, goods and capital, and freedom of establishment. Reference is made to the need to strengthen human rights in the light of social progress and scientific and technological development.

The Charter reaffirms, taking account of the principle of subsidiarity,¹⁸ the rights by which Member States are already bound by international human rights instruments, their own constitutional traditions and the case law of the ECJ and the European Court of Human Rights. At this point, the Constitution text diverges from the original Charter Preamble by adding:

In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

The explanations referred to here were submitted by the Praesidium of the Convention on 11 October 2000 to accompany the individual Charter articles.¹⁹ In a preliminary note the Praesidium insisted: “These explanations have been prepared at the instigation of the Praesidium. They have no legal value and are simply intended to clarify the provisions of the Charter”.²⁰ There is a question, therefore, as to whether the Preamble to Part II of the

¹⁸ See Research Paper 04/77, *The Treaty establishing a Constitution for Europe: Part IV and Protocols*, 21 October 2004, for information on subsidiarity in the Constitution.

¹⁹ CONVENT 49, CHARTE 4473/00, 11 October 2000 at http://www.europarl.eu.int/charter/pdf/04473_en.pdf

²⁰ http://www.europarl.eu.int/charter/pdf/04473_en.pdf

Constitution attributes a legal value to the explanations, which the Praesidium of the 2000 Convention had disclaimed. The UK Attorney General thought this description of the explanations was “a nonsense”; that they “were always an essential and authoritative guide to the underlying legal source of the provisions in the Charter”.²¹ Nevertheless, “pay due regard” remains ambiguous. The explanations were important in 2000 in helping to make it possible for some Member States to adopt the Charter. They set out the origin of each Charter right and the conditions and limits on those rights by the TEC, the ECHR and the case law of the courts.

The Preamble ends with a reminder that the Charter rights entail “responsibilities and duties with regard to other persons, to the human community and to future generations”, and then sets out the principles and rights.

The fact that the Charter distinguishes between rights and principles has been noted by commentators. The Attorney General, speaking at a conference on human rights in the EU, emphasised the importance of this distinction:

Article II-52(5) [now II-112(5)] indicates that some of the Charter provisions are not legal rights as such, but are principles, within the meaning of this new rule of interpretation which did not appear in the Nice version of the Charter. The distinction between rights and principles was a key factor in the Herzog Convention reaching agreement on the Charter, particularly in relation to the inclusion of social and economic rights which are not justiciable as such until implemented by detailed legislation. The distinction was achieved largely by drafting technique. The word “principle” sometimes appears in the wording of the provision, but frequently its special character must be inferred from other aspects of the drafting method. For example, the formula “the Union recognises and respects” is used to signal that a provision is a principle rather than a right. An example of this, in relation to social security benefits and social services, is at Article II-34. A similar message should be inferred from references to “national law and practices”, found especially in the “Solidarity” chapter of the Charter . The general effect is to underline a point which ought already to be clear from the substantive treaty law: the Charter does not create individually justiciable rights in these sensitive areas. If the Union is to impose rights in these areas it must be through recognised treaty procedures.

I was glad that the second Convention gave further attention to the distinction between rights and principles. In the language of Article II-51(1) while rights must be “respected”, principles must be “observed” - but they cannot be enforced like basic human rights. Nor, despite their aspirational character, is there any obligation to take legislative or executive action just because they are in the

²¹ Attorney General, Justice Conference on Human Rights in EU, “The Charter of Rights – a brake not an accelerator”, 25 June 2004 at <http://www.dca.gov.uk/hract/charterrights.htm>

Charter. Principles become significant for the courts only when acts implementing the principles are interpreted or reviewed.²²

However, it is not clear which are the principles and the explanations state that some provisions are both rights and principles. For example, Article 23 (equality between men and women), Article 33 (family and professional life) and Article 34 (social security and social assistance) of the original Charter (Articles II-???) contain elements of a right and of a principle. The explanation relating to Article 52 (II-112) sets out the rights that come from the ECHR, but does not make a clear distinction in order to identify those elements in the Charter which are to be regarded purely as principles and not to confer rights at all. (David Edward, 17.11.04)

The table below summarises the Charter rights and principles, and compares them with similar provisions under international treaties to which most of the EU-25 are party. This is not an exhaustive comparative account, but a guide to overlapping provisions. Some international treaty articles may not correspond entirely with Charter rights and vice versa. The European Parliament has commented on all the Charter Articles, giving references to European and international conventions and legislation in each area. This can be accessed at http://www.europarl.eu.int/compar/libe/elsj/charter/default_en.htm#2.

The following acronyms are used:

ECHR	European Convention on Human Rights
TEC	Treaty Establishing the European Communities
TEU	Treaty on European Union
COE	Council of Europe
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ESC	European Social Charter
ILO	International Labour Organisation

B. Title I – Dignity

Constitution Article	Subject matter	Similar existing provisions
II-61	Respect for human dignity	Article 10 ICCPR

²² Attorney General “The Charter of Rights – a brake not an accelerator” 25 June 2004

II-62	Right to life (prohibition of the death penalty)	Article 2, Article 1 of Protocol 6 and Article 1 of Protocol 13 ECHR, Article 6 ICCPR
II-63	Respect for physical and mental integrity, (with special provisions in medicine and biology, such as informed consent, no eugenic practices, no use of the human body for profit, no human reproductive cloning)	Article 152 TEC, Article 3 ECHR, Article 7 ICCPR
II-64	Prohibition of torture, inhuman or degrading treatment or punishment	Article 3 ECHR, Article 7 ICCPR
II-65	Prohibition of slavery or forced labour (including human trafficking)	Article 4 ECHR, Article 8 ICCPR

C. Title II– Freedoms

Constitution Article	Subject matter	Similar existing provisions
II-66	Right to liberty and security of person	Article 29 TEU, Article 5 ECHR, Article 9 ICCPR
II-67	Right to respect for family life, home and communications	Article 8 ECHR, Article 17 ICCPR
II-68	Right to protection of personal data, processing of it based on consent, right of access and independent control	EU Data Protection Directives, Article 8 ECHR, Article 17 ICCPR
II-69	Right to marry and found a family, in accordance with national laws	Article 12 ECHR, Article 23 ICCPR
II-70	Right to have, change and manifest freedom of thought, conscience and religion, including the right to conscientious objection, in accordance with national laws	Article 9 ECHR, Article 18 ICCPR

II-71	Right to freedom of expression (including freedom of the media)	Article 10 ECHR, Article 19 ICCPR
II-72	Freedom of peaceful assembly and association in political, trade union and civic matters. EU political parties express political will of Union citizens.	Article 11 ECHR, Article 21 ICCPR, ILO Convention 87
II-73	No constraint upon arts and scientific research, respect for academic freedom	Articles 10 and 11 ECHR, Article 15 ICESCR
II-74	Right to compulsory education and access to vocational training (free of charge where compulsory). Freedom to found educational establishments that respect religious, philosophical and pedagogical convictions in accordance with national laws.	Article 13 ICESCR Article 2 of Protocol 1 ECHR
II-75	Right to work, to pursue a freely chosen occupation, to seek employment; right of establishment and to provide services in any Member State. Right to same working conditions for legal third country nationals.	Article 6 ICESCR Articles 39 - 40 TEC Articles 1(2) and 19 ESC
II-76	Freedom to conduct a business, according to Union and national laws.	Articles 43 - 55 TEC
II-77	Right to own, use, dispose of and bequeath lawfully acquired possessions. Removal only in the public interest and with compensation. Protection of intellectual property.	Article 1 of Protocol 1 ECHR EC Directives on copyright protection
II-78	Right to asylum, respecting the 1951 Geneva Convention and 1967 Protocol	1951 Convention and Protocol
II-79	Prohibition of collective expulsion. No extradition to state where death penalty or torture might be imposed.	Protocol 7 ECHR, ²³ Article 4 of Protocol 4 ECHR, Article 3(1) UN Anti-Torture Convention Article 13 ICCPR

²³ The UK has not ratified this Protocol.

D. Title III – Equality

Constitution Article	Subject matter	Similar existing provisions
II-80	Equality before the law.	Articles 14, Article 26 ICCPR
II-81	No discrimination on any ground, especially nationality (and 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).	Article 14 and Article 1 of Protocol 12 ECHR, Articles 2 and 26 ICCPR, Article 2(2) ICESCR. Various UN anti-discrimination conventions
II-82	Respect for cultural, religious and linguistic diversity.	Articles 149 and 151 TEC, Article 27 ICCPR
II-83	Equality between men and women in employment, work and pay (but positive discrimination allowed).	Article 141 TEC, Article 3 ICCPR, Articles 3 and 7 ICESCR, various UN anti-discrimination conventions
II-84	Right of children to protection, care, free expression, action by public authorities in their best interest and access to both parents, unless against their interests.	UN Convention on the Rights of the Child, Article 24 ICCPR
II-85	Right of the elderly to dignity, independence and participation in social and cultural life.	Article 13 TEC, Article 23 ESC
II-86	Right of the disabled measures to ensure independence, social and occupational integration, participation in the community.	Article 15 ESC

E. Title IV – Solidarity

Constitution Article	Subject matter	Similar existing provisions
II-87	Right of workers to timely information and consultation under conditions provided by Union law and national laws and practices.	Articles 21 & 29 ESC, Articles 137 -138 TEC
II-88	Right of workers and employers to negotiate and conclude collective agreements, and to take collective action, including strike action, in accordance with Union law and national laws and practices.	Article 11 ECHR, Article 8(1) ICESCR, ILO Conventions 98, 135 & 154
II-89	Right of access to a free job placement service.	Article 1 ESC
II-90	Workers' right to protection against unfair dismissal.	Article 24 ESC, ILO Conventions 158 and 173, various EC Directives
II-91	Right to healthy, safe and dignified working conditions. Workers' right to limitation of maximum working hours, daily and weekly rest periods and annual paid leave.	Article 140 TEC, Articles 2, 3 & 26 ESC, Article 7 ICESCR, Directive 93/104/EC ("Working Time Directive")
II-92	Prohibition of child labour below minimum school-leaving age; protection of young people at work; protection from economic exploitation and dangerous work.	Article 7 ESC, Article 32 Convention on Rights of Child, Article 10(3) ICESCR, ILO Conventions 138 and 182
II-93	Legal, economic and social protection of the family with rights to paid maternity and parental leave.	Articles 8, 16 & 27 Article 10 ICESCR, ILO Conventions 156 and 175

II-94	Entitlement of all legal Union residents to social security benefits and social services protection for maternity, illness, industrial accidents, dependency or old age, loss of employment, according to Union and national laws. Right to social and housing assistance for the poor.	Article 12, 13, 30 & 31 ESC, Articles 9,10 & 11 ICESCR, ILO Conventions 102 and 183
II-95	Right to preventive health care and medical treatment. A high level of human health protection to be included in all Union policies and activities.	Article 152 TEC, Article 11 ESC, Articles 9, 10 & 12 ICESCR
II-96	Access to services of general economic interest.	Article 16 TEC
II-97	High level of environmental protection to be integrated into Union policies in accordance with the principle of sustainable development.	Articles 2, 6 & 174 TEC, UN and COE Conventions on climate change, biological diversity, protection of habitats
II-98	Union policies to ensure high level of consumer protection.	Article 153 TEC,

F. Title V – Citizens’ Rights

Constitution Article	Subject matter	Similar existing provisions
II-99	Right to vote and stand as candidate at EP elections.	Articles 19 & 190 TEC, Article 3 of Protocol 1 ECHR, Article 25 ICCPR
II-100	Right to vote and stand as candidate at municipal elections.	Article 19 TEC, Article 3 of Protocol 1 ECHR.

II-101	Right to good administration by Union institutions and bodies, including: right to be heard before possibly adverse action is taken; right of access to personal file (with exceptions for confidentiality reasons); obligation of the administration to justify its decisions. Union must make good any damage caused by its institutions or servants in the performance of their duties. Right to write to Union institutions in an official language and to be answered in that language.	Articles 21, 253 & 288 TEC, Rules of Procedure and codes of good administrative behaviour of EU institutions, Article 13 ECHR, Article 2 ICCPR
II-102	Right of access by legal Union resident to documents of the Union institutions, bodies, offices and agencies.	Article 255 TEC, Council Code of Conduct 1993
II-103	Right of legal Union resident to refer to the European Ombudsman maladministration by Union institutions, bodies etc (except the ECJ acting in its judicial role).	Articles 21 & 195 TEC, EP Rules of Procedure and Ombudsman Code of Good Administrative Behaviour
II-104	Right of legal Union resident to petition EP.	Articles 21 & 194 TEC, EP Rules of Procedure
II-105	Right of Union citizens and other legal residents to move freely in the Union.	Article 2 TEU, Articles 18, 62-63 TEC, Protocol 4 ECHR
II-106	Entitlement of Union citizens in the territory of a third country with no diplomatic representation to consular and diplomatic protection of any Member State on same conditions as the nationals of that Member State.	Article 20 TEC

G. Title VI - Justice

Constitution Article	Subject matter	Similar existing Provisions
II-107	Right to effective remedy if Union rights are breached, including fair and public hearing, within reasonable time by independent and impartial tribunal, with legal aid where appropriate.	Articles 6 & 13 ECHR, Article 14 ICCPR
II-108	The accused to be presumed innocent until proved guilty; respect for the rights of defence of the accused.	Article 6 ECHR, Article 14(2) ICCPR
II-109	Principle of legality and proportionality of criminal offences and penalties. No one to be held for offence that was not a criminal offence under national or international law when committed. No imposition of heavier penalty than that applicable at time offence was committed. Subsequent lighter penalty applicable. Penalties must be proportionate to the offence.	Article 5 TEU, Articles 5 & 220 TEC, Article 7(1) ECHR, Article 15(1) ICCPR
II-110	Right not to be tried or punished twice for the same criminal offence, or for which person already acquitted or already convicted.	Article 4(1) of Protocol 7 ECHR, Article 14(7) ICCPR

H. General Provisions Governing the Interpretation and Application of the Charter

Constitution Article	Subject matter	Similar existing Provisions

II-111	Field of Application: the Charter is applied to the Union institutions, bodies, offices and agencies, with due regard for subsidiarity and to Member States only when they are implementing Union law. The Charter “does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution”.	Article 46 TEU, Articles 5 & 7 TEC
II-112	Scope and interpretation: limitations on the Charter rights and freedoms must be legal. Subject to proportionality, limitations must be necessary, meet the Union’s objectives of general interest or protect the rights and freedoms of others. Where Charter rights correspond to ECHR rights, the meaning and scope of Charter rights will be the same as those of the ECHR. Union law may still provide better protection. Charter rights resulting from the constitutional traditions of Member States will be interpreted in harmony with those traditions. Charter principles may be implemented by legislative and executive acts of the Union institutions and Member States when they are implementing Union law under their respective powers. Full account will be taken of national laws and practices. The “explanations” ²⁴ for guidance in interpreting the Charter will be given “due regard” by EU and national courts.	Article 15 ECHR, Article 4 ICCPR, Article 4 ICESCR
II-113	The Charter will not restrict or adversely affect human rights recognised by Union and international law, including the ECHR and Member States’ constitutions.	Article 15 ECHR, Article 46 ICCPR, Article 24 ICESCR

²⁴ CHARTE 4473/00 CONVENT 4911 October 2000 at http://www.europarl.eu.int/charter/pdf/04473_en.pdf

II-114	The Charter does not imply any right to do anything aimed at destroying its rights and freedoms, or at limiting them more than is provided for.	Article 17 ECHR, Article 5 ICCPR, Article 5 ICESCR
---------------	---	--

IV Adjustments to the Charter

The adjustments made to the original Charter are contained in the Preamble to Part II of the Constitution and the “horizontal articles”,²⁵ Articles II-111 and II-112. In addition, a Declaration appended to the Constitution refers to the explanations of Charter articles as a means of guidance to their interpretation.

A. Preamble and Article II-112

The Convention on the Future of Europe established a Working Group (II) on the Charter. The Final Report of the Working Group (WG) recommended that the Charter be integrated into the Treaty.²⁶ It was incorporated with “drafting adjustments”, as recommended in the WG final report, which insisted that the adjustments should “not reflect modifications of substance”. The Convention added to the Preamble the condition that the Charter would be interpreted by the Union and Member State Courts “with due regard for the explanations prepared at the instigation of the Praesidium of the Convention”. The IGC added that the explanations had been “updated under the responsibility of the Praesidium of the European Convention”.

B. Articles II-111 and II-112 (the “Horizontal Articles”) and Explanations

The horizontal articles are Articles 51 and 52 of the original Charter, corresponding to Articles II-111 and II-112 of the Constitution. The limits on the enforceability of Charter rights set out in II-111 allowed the UK to agree to incorporation of the Charter in the Constitution. Four years earlier, these elements had also been important in securing UK agreement to the Charter as a political declaration.

In February 2003 the House of Lords European Union Committee published a report on the Charter. The Committee commented on the horizontal articles:

²⁵ These are the articles of general application, dealing with the limitation of the scope and application of the Charter (Articles 51 and 52). Vertical articles focus on particular rights.

²⁶ CONV 354/02, 22 October 2002 at <http://register.consilium.eu.int/pdf/en/02/cv00/00354en2.pdf>

It is clear that they provide the key to a resolution of some of the problems surrounding the Charter: most notably the avoidance of any “competence creep” from the Member States to the Union; the relationship between Charter rights and ECHR rights; the lack of homogeneity in the text of the Charter (the “rights”/“principles” question); and the relationship between the Charter and national constitutions.²⁷

However, the Committee concluded:

91. In our opinion, however, it is, in principle, unsatisfactory that the rights of the individual should, in effect, be curtailed by the horizontal clauses. Such an approach scarcely serves the interests of transparency or makes those rights more visible to the citizen. On the other hand, the horizontal clauses provide significant advantages for legal certainty as regards the definition of competences.

92. It is essential to ensure that the horizontal clauses are as clear and unambiguous as possible. The horizontal clauses have an important role to play in identifying both the content and scope of the Charter. What they say as regards, for example, the relationship between Charter rights and ECHR rights will be crucial in determining the overall acceptability of the Charter. The Government is right to be looking at the detail.²⁸

The 2003 IGC added a new paragraph 7 to Article 52 (Article II-112(7)), which states that the explanations “shall be given due regard by the courts of the Union and of the Member States”. However, the final text of Article II-112(7) does not refer to the “updated” explanations, possibly leaving scope for ambiguity.

The horizontal articles and their explanations are as follows:

Article II-111

Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution.
2. This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.

²⁷ Lords Select Committee on the European Union 6th Report 2002-3 3 February 2003 para. 90 at <http://www.publications.parliament.uk/pa/ld200203/ldselect/lducom/48/48.pdf>

²⁸ Ibid paras. 91 and 92

Explanation of Article 51

The aim of Article 51 is to determine the scope of the Charter. It seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity. This provision was drafted in keeping with Article 6(2) of the Treaty on European Union, which required the Union to respect fundamental rights, and with the mandate issued by Cologne European Council. The term "institutions" is enshrined in Part I of the Constitution. The expression "bodies, offices and agencies" is commonly used in the Constitution to refer to all the authorities set up by the Constitution or by secondary legislation (see, e.g., Articles I-50 or I-51 of the Constitution).

As regards the Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, ERT [1991] ECR I-2925); judgment of 18 December 1997 (C-309/96 Annibaldi [1997] ECR I-7493). The Court of Justice confirmed this case law in the following terms: "In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ..." (judgment of 13 April 2000, Case C-292/97, [2000] ECR 2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.

Paragraph 2, together with the second sentence of paragraph 1, confirms that the Charter may not have the effect of extending the competences and tasks which the other Parts of the Constitution confer on the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by Parts I and III of the Constitution. Consequently, an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter, may arise only within the limits of these same powers.

Paragraph 2 also confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the other Parts of the Constitution. The Court of Justice has already established this rule with respect to the fundamental rights recognised as part of Union law (judgment of 17 February 1998, C-249/96 Grant, 1998 ECR I-621, paragraph 45 of the grounds). In accordance with this rule, it goes without saying that the incorporation of the Charter into the Constitution cannot be understood as extending by itself the range of Member State action considered to be "implementation of Union law" (within the meaning of paragraph 1 and the above-mentioned case law).

Article II-112

Scope and interpretation of rights and principles

1. 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.
2. Rights recognised by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within the limits defined by these relevant Parts.
3. Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies 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.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States.

Explanation of Article 52

The purpose of Article 52 is to set the scope of the rights and principles of the Charter, and to lay down rules for their interpretation. Paragraph 1 deals with the arrangements for the limitation of rights. The wording is based on the case law of the Court of Justice: "... it is well established in the case law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights" (judgment of 13 April 2000, Case C-292/97, paragraph 45 of the grounds). The reference to general interests recognised by the Union covers both the objectives mentioned in Article I-2 of the Constitution and other interests protected by specific provisions of the Constitution such as Articles I-5(1), III-133(3), III-154 and III-436.

Paragraph 2 refers to rights which were already expressly guaranteed in the Treaty establishing the European Community and have been recognised in the Charter, and which are now found in other Parts of the Constitution (notably the rights derived from Union citizenship). It clarifies that such rights remain subject to the conditions and limits applicable to the Union law on which they are based,

and for which provision is now made in Parts I and III of the Constitution. The Charter does not alter the system of rights conferred by the EC Treaty and now taken over by Parts I and III of the Constitution.

Paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, insofar as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union.

The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.

The Charter does not affect the possibilities of Member States to avail themselves of Article 15 ECHR, allowing derogations from ECHR rights in the event of war or of other public dangers threatening the life of the nation, when they take action in the areas of national defence in the event of war and of the maintenance of law and order, in accordance with their responsibilities recognised in Articles I-5 (1), III-131, III-262 of the Constitution.

The list of rights which may at the present stage, without precluding developments in the law, legislation and the Treaties, be regarded as corresponding to rights in the ECHR within the meaning of the present paragraph is given hereafter. It does not include rights additional to those in the ECHR.

1. Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR:

- Article 2²⁹ corresponds to Article 2 of the ECHR
- Article 4³⁰ corresponds to Article 3 of the ECHR
- Article 5(1) and (2)³¹ correspond to Article 4 of the ECHR
- Article 6³² corresponds to Article 5 of the ECHR
- Article 7³³ corresponds to Article 8 of the ECHR
- Article 10(1)³⁴ corresponds to Article 9 of the ECHR
- Article 11³⁵ corresponds to Article 10 of the ECHR without prejudice to any restrictions which Union law may impose on Member States' right to introduce

²⁹ Article II-62 of the Constitution

³⁰ Article II-64 of the Constitution

³¹ Article II-65 of the Constitution

³² Article II-66 of the Constitution

³³ Article II-67 of the Constitution

³⁴ Article II-70 of the Constitution

the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR

- Article 17³⁶ corresponds to Article 1 of the Protocol to the ECHR
- Article 19(1)³⁷ corresponds to Article 4 of Protocol No 4
- Article 19(2)³⁸ corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights
- Article 48³⁹ corresponds to Article 6(2) and(3) of the ECHR
- Article 49(1) (with the exception of the last sentence) and (2)⁴⁰ correspond to Article 7 of the ECHR

2. Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider:

- Article 9⁴¹ covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation
- Article 12(1)⁴² corresponds to Article 11 of the ECHR, but its scope is extended to European Union level
- Article 14(1)⁴³ corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training
- Article 14(3)⁴⁴ corresponds to Article 2 of the Protocol to the ECHR as regards the rights of parents
- Article 47(2) and (3)⁴⁵ correspond to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation
- Article 50⁴⁶ corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States.
- Finally, citizens of the European Union may not be considered as aliens in the scope of the application of Union law, because of the prohibition of any discrimination on grounds of nationality. The limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to them in this context.

The rule of interpretation contained in paragraph 4 has been based on the wording of Article 6(2) of the Treaty on European Union (cf. now the wording of Article I-9(3) of the Constitution) and takes due account of the approach to common constitutional traditions followed by the Court of Justice (e.g., judgment of 13 December 1979, Case 44/79 Hauer [1979] ECR 3727; judgment of 18 May 1982, Case 155/79, AM&S, [1982] ECR 1575). Under that rule, rather than following a

³⁵ Article II-71 of the Constitution

³⁶ Article II-77 of the Constitution

³⁷ Article II-79 of the Constitution

³⁸ Article II-79 of the Constitution

³⁹ Article II-108 of the Constitution

⁴⁰ Article II-109 of the Constitution

⁴¹ Article II-69 of the Constitution

⁴² Article II-72 of the Constitution

⁴³ Article II-74 of the Constitution

⁴⁴ Article II-74 of the Constitution

⁴⁵ Article II-107 of the Constitution

⁴⁶ Article II-110 of the Constitution

rigid approach of "a lowest common denominator", the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.

Paragraph 5 clarifies the distinction between "rights" and "principles" set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51 (1)).⁴⁷ Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities. This is consistent both with case law of the Court of Justice (Cf. notably case law on the "precautionary principle" in Article 174(2) TEC (replaced by Article III-233 of the Constitution): judgment of the CFI of 11 September 2002, T-13/99, Pfizer vs. Council, with numerous references to earlier case law; and a series of judgments on Article 33 (ex-39) on the principles of agricultural law, e.g. judgment of the Court of Justice C- 265/85, Van den Berg, 1987 ECR 1155: scrutiny of the principle of market stabilisation and of reasonable expectations) and with the approach of the Member States' constitutional systems to "principles" particularly in the field of social law. For illustration, examples for principles recognised in the Charter include e.g. Articles 25, 26 and 37.⁴⁸ In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34.⁴⁹

Paragraph 6 refers to the various Articles in the Charter which, in the spirit of subsidiarity, make reference to national laws and practices.⁵⁰

C. Declaration 12 on the Explanations to the Charter

The IGC agreed to add a "Declaration for incorporation in the Final Act concerning the explanations relating to the Charter of Fundamental Rights". A Presidency proposal of 12 June 2004 contained three options for a declaration on the Charter, as follows:

Option 1

5th paragraph of the Preamble

This Charter reaffirms, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the

⁴⁷ Article II-111 of the Constitution

⁴⁸ Articles II-85, II-86 and II-97 of the Constitution

⁴⁹ Articles II-83, II-93 and II-94 of the Constitution

⁵⁰ Title VII: General Provisions Governing the Interpretation and Application of the Charter, CIG 97/04 ADD 2 REV 1, 13 October 2004 at http://europa.eu.int/constitution/download/declarations_EN.pdf

Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Declaration for incorporation in the Final Act concerning the explanations relating to the Charter of Fundamental Rights

The Conference takes note of the explanations relating to the Charter of Fundamental Rights prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention, as set out below.

[reproduction of the explanations contained in CONV 828/1/03 REV 1 of 31 July 2003, which will be published in the "C" series of the Official Journal of the European Union.]

Option 2

As Option 1, plus

**Article II-52: Scope and interpretation of rights and principles
(New paragraph 7)**

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

Option 3

As Option 1, plus

**Article II-52: Scope and interpretation of rights and principles
(New paragraph 7)**

7. This Charter shall be interpreted with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.⁵¹

None of the three options was adopted in its entirety and the Constitution contains an amalgam of the three. The Constitution contains the text of Option 1 in the Preamble. The Charter Article II-112 on scope and interpretation of rights includes the Option 2 new paragraph 7, but the explanations “**shall** be given due regard”, instead of the less emphatic “should be given due regard” in the draft text. The Declaration appended to the final text of the Constitution includes elements from Options 1 and 3, with further modifications, as follows:

Declaration concerning the explanations relating to the Charter of Fundamental Rights

⁵¹ CIG 80/04, 12 June 2004 at <http://ue.eu.int/igcpdf/en/04/cg00/cg00080.en04.pdf>

The Conference takes note of the explanations relating to the Charter of Fundamental Rights prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention, as set out below.

These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52 1)⁵² and of further developments of Union law. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.⁵³

According to the Declaration, the IGC only “takes note” of the original explanations and the update.

V UK Views

A. The Government

The British Government has supported human rights guarantees in the EU. In June 1999 the Prime Minister stated that the Government welcomed a German initiative which “should make the fundamental rights which already exist and are applicable at Union level more visible to the Union’s citizens”.⁵⁴ Mr Blair later said that the Charter that was to be drawn up by the Convention would be a “document which sets out in a more accessible form the many rights which citizens already enjoy at European level”⁵⁵ and “should make it easier for EU citizens to know the civil and political rights they already enjoy under the Treaties, including those covered by Article 6.2 of the Treaty on European Union”.⁵⁶ However, he also suggested initially that this Charter “should take the form of a political statement, rather than a legal text to be incorporated into the Treaties”.⁵⁷ The Government wanted a “non-justiciable Charter which makes existing rights more visible”, he said, and continued:

Where those rights are justiciable elsewhere, the relevant source instruments (for example, the European Convention on Human Rights or the EU/EC Treaties) will continue to be interpreted in the usual way by the appropriate institutions (for

⁵² Articles II-111 and II-112 of the Constitution

⁵³ *ibid*

⁵⁴ HC Deb, 28 June 1999, c20W

⁵⁵ HC Deb, 5 July 1999, c363W

⁵⁶ HC Deb, 4 November 1999, c486-7W

⁵⁷ HC Deb, 30 November 1999, c81W

example, the European Court of Human Rights or the European Court of Justice).⁵⁸

The Charter, the Government believed, should make existing rights clearer and more accessible to help “deepen and strengthen the culture of rights and responsibilities at all levels across the EU”,⁵⁹ identifying and complementing existing legal instruments on fundamental rights.

By 2002 the Government had decided that incorporation might be acceptable, but with certain conditions. Peter Hain, the Government representative at the Convention on the Future of Europe, told the Convention Plenary on 3 October 2002 that incorporation of the Charter was acceptable for the UK, as long as it remained within the boundaries of EC/EU competence. He welcomed the

... real progress on the adjustments necessary to change the Charter from a political text to a legal text, with which everyone, including the British government can work. We are approaching this matter to try to incorporate it into the Treaties. I wish to stress that it is not just a difficult political issue, but also a technical one.⁶⁰

He emphasised the need for the Charter to be based on, and to be harmonious with, the constitutional traditions of the Member States, indicating that the lack of a written constitution in the UK could be problematic if the horizontal articles were not strong enough.

Mr Blair told an audience in Cardiff in November 2002:

On the Charter of Rights, I repeat our clear view that though we welcome, of course a declaration of basic rights common to all European citizens and have ourselves incorporated the European Convention on Human Rights directly into British law, we cannot support a form of treaty incorporation that would enlarge EU competence over national legislation. There cannot be new legal rights given by such a means, especially in areas such as industrial law where we have long and difficult memories of the battles fought to get British law in proper order.⁶¹

Also in November 2002 Peter Hain told the European Scrutiny Committee about the adoption by the Convention Working Group of UK proposals to strengthen the horizontal articles in the Charter:

⁵⁸ HC Deb 24 January 2000 c3W

⁵⁹ HC Deb 1 February 2000 c541W

⁶⁰ 3 October 2002 at: http://www.europarl.eu.int/europe2004/textes/verbatim_021003.htm

⁶¹ Tony Blair, speech in Cardiff, “A clear course for Europe”, 28 November 2002, FCO website at: <http://www.pm.gov.uk/output/page6709.asp>

[So] the working group unanimously came up with a proposition which was, essentially, British ideas to strengthen the horizontal articles in the Charter that, effectively, in simple terms, stopped it reaching down into our domestic courts and changing our domestic law. That position was endorsed almost unanimously in the plenary. So I do not think that can be unpicked. We still have to see exactly how that might, as it were, come out on the night in terms of its full incorporation into the new constitution, which would have to be the case. We would need to be absolutely clear that, for example, you could not change our strike laws, you could not change our employment laws and you could not enable an individual citizen who felt they were not getting the housing opportunity they wanted from their local authority to take that local council to court and, ultimately, to the European Court of Justice under the Charter because that is not a role for Europe, that is a matter for national decision-making and, ultimately, for local authorities. We could have had a situation, if the Charter had simply been incorporated wholesale and unamended into the treaties, which would have been a matter of national veto for us. We are still very far from being certain that our concerns in that respect have been fully accommodated, but we have got a major part of the way and a significant change of stance by other European countries and their parliamentarians. So we are in a much more encouraging position than we were.⁶²

The Lords EU Committee agreed with the Government on the need for authoritative clarification of the Charter rights:

94. We agree that if the Charter is to be incorporated into the Treaty there is a need for an authoritative commentary or “interpretation”. This would be helpful not only in identifying the origin of particular articles but also in determining their legal status. The commentary should be published and be readily available to the citizen and the courts.⁶³

The Government’s views on the role of the Charter in the Constitution are set out in White Papers in 2003 and 2004 on the IGC and the Constitution respectively. In the first of these, the Government pointed to areas where the ECHR lacked an authority that the Charter would provide:

[...] the ECHR does not directly control the European Union’s institutions. And the ECHR is confined to civil and political rights – it does not cover the voting and other special rights, such as on freedom of movement, to which people are entitled as EU citizens. In any case, there has been no catalogue of rights which applies to the European Union institutions.⁶⁴

⁶² Minutes of Evidence to ESC 20 November 2002 16 December 2002 HC 103-I at: <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/103-i/2112002.htm>

⁶³ Lords EU Committee 6th Report 2002-3 para. 94 at <http://www.publications.parliament.uk/pa/ld200203/ldselect/ldcom/48/48.pdf>

⁶⁴ Cm 5934 p.39

The Government believes that its concerns have been met by the safeguards secured through the horizontal articles, **II-111–II-114**, the Preamble reference to the explanations and the reinforcement of this in the Declaration. The Foreign Secretary wrote to the Foreign Affairs Committee (FAC) on 26 February 2004:

The draft EU Constitutional Treaty makes clear, in Article II-51 [now Article II-111], that the Charter "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union or modify powers and tasks defined in other parts of the Constitution." It therefore does not give any new powers to the EU. The Member States are affected only when they are implementing Union law. So where Member States are dealing with non-EU matters the Charter has no legal application.

I do not see that new remedies need arise from the Charter. The Official Explanation to Charter Article 47 (Right to an effective remedy and to a fair trial) says: "The inclusion of this precedent in the Charter has not been intended to change the appeal system laid down by the Treaties, and particularly the rules relating to admissibility for direct actions before the Court of Justice of the European Union. Member States will remain the prime guardians of their peoples' rights".

Additionally, significant amendments to the general provisions of the Charter, and to the Official Explanations— and to the legal status of the latter— have been proposed to help define the meaning and scope of the Charter.

Most of the Charter is now firmly based on existing agreed rights and freedoms. Where it is not, we are looking at guiding principles, or law in harmony with the constitutional traditions of all the Member States. That is the point of the revised Charter Articles 52(4), 52(5) and 52(6) and the revised Explanations.

Charter Article II-52(5) is aimed at clarifying the difference between legally enforceable rights and the more aspirational principles which are to be found mainly, but not solely, in the so-called Solidarity Chapter of the Charter. It does this by clarifying that some Charter provisions are not the same as the classic civil and political rights; they are designed to guide the actions of the Union institutions, and of the Member States only when implementing Union law.

We also have the new provision in Article II-52(4) about Charter provisions which draw upon the common constitutional traditions of the Member States. This new horizontal indicates that not all the contents of the Charter are necessarily to be regarded as reflecting the common constitutional traditions. It also introduces the test of "harmony" to be used in interpreting rights based on the common constitutional traditions.

New Article II-52(6) fits in with the subsidiarity principle, already to be found in the Charter by emphasising the weight to be given to "national laws and practices".

The package of changes proposed by the Convention updated and improved the technical Explanations; and the draft text states that the Courts should have due regard to these. But as we have long said, we will make a final decision on incorporation of the Charter only in the light of the overall picture at the IGC.

Regrettably, the legal advice which we have received on the Charter is confidential, as it continues to inform our negotiating strategy.⁶⁵

Mr Straw told the FAC in May 2004:

If the Treaty is agreed it [the Charter] will appear in the Treaty. That is not a problem. We agreed the Charter of Rights in any event. The issue has always been its legal status, and it is for that reason that there were negotiated in the Convention what were called Horizontal Articles, which were Articles 251 and 252. Its effect was to make absolutely clear—and I quote from Article 251-2: "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers or tasks defined in other Parts of the Constitution." It also makes clear that the provisions of the Charter contain principles, which are very general, and not just rights, and that they shall be "judicially cognisable only in the interpretation of such acts of the Union and in ruling on their legality." There is then the issue of the explanations. There were explanations prepared at the instigation of the Praesidium of the Convention, which drafted the Charter, and the Preamble of Part II says that, "The Charter will be interpreted by the courts of the Union Member States with due regard to the explanations . . ." We carry on looking at this carefully to ensure that we pin this down but there is already a very, very significant amount of protection here. May I give you one last example, which is about the rights of collective bargaining and action? This is Article II-28. which says that, "Workers and employers, or their respective organisations, have . . ." and it adopts the "right to negotiate and conclude collective agreements at appropriate levels and, in cases of conflict of interest, to take collective action to defend their interests, including strike action." But this is subject to very important saving, where the dots were, "in accordance with Union law and national laws and practices". So this does not add to any of the rights which people currently have, either under domestic law or, for example, under the ILO Convention or various Articles of the European Convention of Human Rights.

There was a question as to whether the Charter would extend the right to strike, to which Mr Straw gave a categorical assurance that it would not, and continued:

Neither does it detract from the right to strike. The point is, it leaves the right to strikes within the purview of domestic parliaments—that is exactly where it should be. That is why there is this very important wording in II-28, people have these rights, "in accordance with Union law and national laws and practices", not just national laws but national laws and practices.⁶⁶

⁶⁵ FAC Minutes of Evidence 26 February 2004 at <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmcaff/1233/3102818.htm>

⁶⁶ FAC May 2004 at <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmcaff/631/4052505.htm>

Following the final agreement on the text of the Constitution, the Government expressed its satisfaction with the provisions on the Charter in a letter to the House of Lords EU Committee:

HMG is satisfied with this result. The Charter is a showcase of existing fundamental rights, freedoms and principles which the EU must recognise. But before agreeing to incorporate the Charter in the Treaty and given it legal force, we insisted on greater legal clarity; and on ensuring the Charter would not extend the powers of the EU. These have been achieved.⁶⁷

The Attorney General was critical of those who thought the Charter would “mint new rights”:

The Charter is a consolidation of existing rights, freedoms and principles which limit the scope of the EU institutions. It makes clear that the EU must respect the fundamental liberties of our citizens whenever it acts. It is not a mine for new human rights in this country. Interest groups or lawyers who may, from a cursory reading or from lurid press coverage, see the Charter as a new platform to mount challenges against action taken by the UK Parliament or Government will, I believe, be sadly disappointed, which is why it is appropriate to throw some cold water to dampen their enthusiasm.⁶⁸

The September 2004 White Paper reflects the Government’s confidence that the Charter will not result in the EU gaining additional powers:

85. [...] the Government was content to agree that the EU should become bound directly by the ECHR and that the Constitution should require all EU institutions and bodies to recognise the Charter, subject to its special rules of interpretation and application. The package will ensure that citizens’ basic rights and liberties are fully in legal view at EU level, without disturbing the primary responsibilities of the Member States, or the ECHR. The Charter creates no new powers for the EU, nor does it alter any of the EU’s existing powers. It will apply to Member States only when they are implementing EU law.⁶⁹

In a Written Ministerial statement on 9 September 2004 Mr Straw set out the Government’s views on the Charter’s incorporation into the Constitution and the

⁶⁷ Letter from Denis MacShane 30 June 2004, Lords EU Committee 22nd Report 13 July 2004 at <http://pubs1.tso.parliament.uk/pa/ld200304/ldselect/ldeucom/137/137we06.htm>

⁶⁸ Attorney General, Justice Conference on Human Rights in EU “The Charter of Rights – a brake not an accelerator” 25 June 2004 at <http://www.dca.gov.uk/hract/charterrights.htm>

⁶⁹ Cm 6309 p.36 at http://www.fco.gov.uk/Files/kfile/White%20Paper_Treaty%20establishing%20a%20Constitution%20for%20Europe.pdf

importance of the Charter language in **Articles II-111 - 112** in guaranteeing respect for Member States' traditions.⁷⁰

Changes to the European Union charter of fundamental rights, which make it suitable for incorporation into the treaties.

The EU charter was agreed at Nice in 2000 as a political declaration, not as treaty law. At the same time, the European Council agreed that

"in accordance with the Cologne conclusions, the question of the charter's force would be considered later"—

[...] Her Majesty's Government made it clear that we could not agree to incorporation of the charter into the treaties without further legal clarification of its meaning and application. In the White Paper "A Constitutional Treaty for the EU", Cm 5934 of September 2003, Her Majesty's Government said we would make a final decision on incorporation of the charter into the constitutional treaty only in the light of the overall picture at the IGC.

The charter, including its original preamble, and its own special rules of application and interpretation, is now part II of the constitutional treaty, and is introduced by article I-7(1) of the treaty. Article I-7 deals with fundamental rights generally. Besides introducing the charter, article I-7(1) acknowledges the distinction made in the charter between rights and principles. Human rights and other fundamental rights guaranteed by the European Convention on Human Rights (ECHR) and in the constitutional traditions common to all the member states remain general principles of EU law (see article I-7(3)) and insofar as the charter affirms such rights, they will be interpreted in accordance with the ECHR. Article I-7(2) enables the Union to accede to the ECHR in its own right.

Significant amendments have been made to articles II-51 [II-111] and II-52 [II-112] in title VII of the charter, now entitled "General Provisions Governing the Interpretation and Application of the Charter". The charter applies to the Union—its institutions, agencies and bodies—and, though only when they are implementing Union law, to the member states. Paragraph (1) of article II-51 [II-111] has been further clarified to show that the charter does not entail any extension of the Union's competences or any extension of the scope of its application for member states. Paragraph (2) of article II-51 also confirms that the charter does not have the effect of extending the scope of application of Union law beyond the powers of the Union as established in the other parts of the constitutional treaty.

Article II-52 [II-112] deals with interpretation, and significantly improves the original charter provisions. It indicates that there are four sources for the content of the charter's rights, freedoms and principles: provisions of EU law, the ECHR, the constitutional traditions common to the member states and national law. Under article II-52(2) [II-112(2)], charter articles based on existing EU law are to be read subject to the conditions and limits set out in the constitutional treaty; that is, they are effectively subordinated to their legal base in other parts of the constitution. Under article II-52(3), rights in the charter that correspond to rights in the ECHR have the same meaning and scope as given by the jurisprudence of the Strasbourg Court. Article I-7(2) [I-9(2)] on EU accession to the ECHR will help ensure consistency of jurisprudence as between the European Court of Human Rights and the European Court of Justice.

⁷⁰ The earlier Constitution numbering system is used in this statement. Articles II-51 and II-52 should read Articles II-111 and II-112. Article I-7(2) should read Article I-9(2)

Under article II-52(4), those charter provisions which draw upon the common constitutional traditions of the member states must be interpreted "in harmony" with such traditions.

Article II-52(6) emphasises the respect to be given to "national laws and practices", as referred to in the charter provisions.

Article II-52(5) is aimed at clarifying the distinction the charter makes between legally enforceable rights on the one hand, and the principles, of an aspirational nature, on the other hand, which are to be found mainly in the solidarity title of the charter. Principles are designed to guide the actions of the Union institutions, and of the member states when implementing Union law. The Union must observe principles by virtue of article II-51(1) when deciding whether to exercise its competences; but there is no obligation to legislate, and the charter itself generates no additional powers to do so. Principles apply within the limitations set out in article II-51(2).

Finally, a further new horizontal article, article II-52(7), has been added to the constitutional treaty. Article II-52(7) requires the charter to be interpreted with due regard to the official explanations, which address the legal bases for each of the charter's provisions. The explanations have been updated and strengthened and are the subject of a special declaration by the member states which ensures that they are published with the new treaty. The official explanations constitute an authoritative guide to the legal meaning of the charter's provisions and will help ensure that the charter is not misinterpreted.

Whether incorporation of the European Union charter of fundamental rights into the treaties will increase the powers of the European Union

Incorporation of the European Union charter of fundamental rights into the treaties will not increase the powers of the European Union. The charter of fundamental rights must be read as a whole, including the general provisions governing the interpretation and application of the charter, as set out in articles II-51 to 53 of the charter. Article II-51(2) provides that the charter does not extend the scope of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined by the other parts of the constitutional treaty.

The benefits to the United Kingdom of the European Union charter of fundamental rights

Although fundamental rights, freedoms and principles are guaranteed by the Governments of the member states in accordance with national law, there was no statement of rights, etc. binding the European Union. The charter sets out such a statement for the Union. Following incorporation of the charter, the institutions, bodies and agencies of the Union will be bound to recognise those rights, etc. in exercising any of their powers. The charter should help ensure that citizens' basic rights and liberties are protected at EU level, as they are in their own countries.

The effect of Article II-28[II-88] of the charter of fundamental rights upon the laws governing industrial relations in the United Kingdom

In practice, article II-28 [II-88] of the charter of fundamental rights will have no effect upon the laws governing industrial relations in the United Kingdom. Article II-28 states that workers and employers enjoy rights of collective bargaining and action

"in accordance with Union law and national laws and practices".

There is no Union law in this area, nor could there be in future. EU action on pay, the right of association, the right to strike and the right to impose lock-outs is specifically excluded—see article III-104(6) [III-210] of the constitutional treaty. Charter article II-52(6) provides that full account should be taken of national laws and practices as specified

in the charter. As with all the charter provisions, and by virtue of article II-52(7), it is important to read article II-28 alongside the official explanation, which in this instance points out that

"The modalities and limits for the exercise of collective action, including strike action, come under national laws and practices".

The United Kingdom's laws governing industrial relations maintain a balance between workers' rights to pursue legitimate trade disputes and employers' rights to conduct their businesses without undue disruption from illegitimate strike action. Article II-28 will not alter that balance.⁷¹

B. The Conservatives

The Conservatives are opposed to the inclusion of the Charter in any future EU treaty. The Conservative Party manifesto for the EP elections in June 2004 stated:

As part of the EU Constitution, the so-called Charter of Fundamental Rights will give the European Court of Justice large powers to interfere with our employment practices, replacing them with the kind of industrial relations we see in France and damaging further the hard-won flexibility that has let British business succeed on the world stage.⁷²

and

The Charter of Fundamental Rights will mean that European judges in Luxembourg will impose rules to restrict business freedom, moving Britain to the kind of stagnant business environment too many continental countries suffer from.⁷³

In a speech in June 2004 the Leader of the Opposition, Michael Howard, said that the "rights under the Charter would put the clock back in Britain by making trade unions more powerful and giving them new rights".⁷⁴ He continued:

It would be up to the European Court to determine exactly what these rights mean in practice. But if past experience is anything to go by, they will lead to yet more burdens on business - burdens British politicians would be powerless to stop.

There may well be a case for some of these rights. You don't have to argue for a free for all to be opposed to more regulation at the European level.⁷⁵

⁷¹ HC Deb 9 September 2004 cc 133–136WS at http://pubs1.tso.parliament.uk/pa/cm200304/cmhansrd/cm040909/wmstext/40909m02.htm#40909m02.html_sbhd2

⁷² *Putting Britain First Putting Britain First*, The Conservative European Manifesto, at <http://www.conservatives.com/tile.do?def=policy.listing.page>

⁷³ Ibid

⁷⁴ "If you stand up for what you believe in you can get things done in Europe" 7 June 2004 at http://www.conservatives.com/tile.do?def=news.story.page&obj_id=105437&speeches=1

⁷⁵ Ibid

According to the Shadow Foreign Secretary, Michael Ancram, the “ways in which human liberties are protected through the ECHR and our national courts are adequate. We therefore believe there is no need for further protection”.⁷⁶ He continued:

In particular, the incorporation of a legally binding charter of fundamental rights into a new treaty would lead to a vast increase in the power of the European Union over the member states and of European judges over the political process.⁷⁷

In a pamphlet entitled *The True Paper: The Truth about the European Constitution* Mr Ancram wrote that “The Charter goes beyond what is accepted as a ‘fundamental right’”⁷⁸ and he questioned the legitimacy of various Charter rights.

C. Liberal Democrats

The Liberal Democrats firmly support incorporation of the Charter into a constitutional text, “as that is the clearest way of ensuring that citizens understand their relationship with those who govern them, at whatever level”.⁷⁹

The Liberal Democrat leader, Charles Kennedy, said in March 2003 that the Charter “should be at the heart of a new European constitution. That way we would enhance the rights of our citizens by curbing the excessive power of the British state”.⁸⁰ The Charter was promoted in the Liberal Democrat 2004 EP Election Manifesto.⁸¹ However, the belief that incorporation would have constitutional implications was one of the reasons for Liberal Democrat support for a referendum on ratification of the Constitution.⁸²

VI Does the Charter Expand, Enhance or Confuse?

There is disagreement among politicians, academics and lawyers over the question of whether, or to what extent, the Charter will extend EU competence. Although the British Government appears to be confident that it will not, it is impossible to say with any certainty at this stage whether national laws will be affected by the Charter. Opinion is also divided over the approach the ECJ might take in interpreting the Charter. The explanations are to be given “due regard” by the courts of the Union and the Member States under Article II-112(7) of the Constitution, but this Article also states that they

⁷⁶ HC Deb 2 December 2002 c 688

⁷⁷ Ibid

⁷⁸ www.michaelancram.com/TruePaper.pdf

⁷⁹ Michael Moore, HC Deb 2 December 2002 c 695

⁸⁰ Speech on “Internationalism and Liberal Democracy” Chatham House 20 March 2003 at <http://www.charleskennedy.org.uk/frame.htm?http://www.charleskennedy.org.uk/speech200303.htm>

⁸¹ <http://www.libdems.org.uk/documents/policies/Manifestos/2004EuroManifesto-small.pdf>

⁸² See Menzies Campbell, HC Deb 30 March 2004 c1512

were “drawn up as a way of providing guidance in the interpretation” of Charter rights. Declaration 12 on the explanations relating to the Charter states that “Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter”.⁸³

It is not clear whether, in the event of a legal challenge, the explanations will be granted a sufficient status to alter the application of the Charter itself. They could not be used in a way that would overrule the Charter text itself. It is crucial to the Government’s arguments that the explanations have an authoritative status, but the Constitution text does not confirm that this. The explanations are granted greater weight than *travaux préparatoires*,⁸⁴ given the specific references to them as an aid to interpretation of the Charter, but the extent to which they can be relied upon in the way the Government envisages is not yet clear.

In November 2004 the European Scrutiny Committee took evidence from Professor Sir David Edward, a former ECJ Judge. David Heathcoat-Amory asked:

What weight do you attach to those words “due regard”? What do they add to the fact that explanations exist anyway? Will they mandate the Court to pay particular attention or can they be ignored in certain cases?⁸⁵

Professor Edward thought this meant

first of all, you shall look at them, and you shall look at them seriously but you are not bound by them if your interpretation of the principal text in a given situation leads you to a different conclusion.⁸⁶

Mr Heathcoat-Amory asked whether, as a limit on the expansion of the powers of the Court, Mr Edward would not put very much weight on “due regard”. Professor Edward replied:

⁸³ http://europa.eu.int/constitution/download/declarations_EN.pdf

⁸⁴ These are the record of negotiations before a treaty is concluded, such as the minutes of meetings, committees or working groups of the conference which drew up the treaty. As a general principle of international law, the *travaux* can be resorted to as a supplementary means of interpretation, if the terms of a treaty are obscure, ambiguous or lead to “manifestly absurd or unreasonable” results. See the *Vienna Convention on the Law of Treaties*, Articles 31(4) and 32 at <http://www.un.org/law/ilc/texts/treaties.htm>. The *travaux préparatoires* of the *International Covenant on Civil and Political Rights* were examined in the case of *R v Secretary of State for the Home Department, ex p Mullen* [2002] 1 WLR 1857 and [2004] UKHL 18, but Lord Bingham concluded that the *travaux* disclosed no consensus of opinion on the interpretation of “miscarriage of justice” and that little assistance was gained from the jurisprudence of the UN Human Rights Committee. See <http://www.parliament.the-stationery-office.co.uk/pa/ld200304/ldjudgmt/jd040429/mullen-1.htm>

⁸⁵ European Scrutiny Committee uncorrected evidence, HC 1064-ii, 17 November 2004 at

<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmeuleg/uc1064-ii/uc106402.htm>

⁸⁶ Ibid

No, I do not say that you do not pay attention to it, but let me give you an example. Explanations distinguish at the end between rights and principles. They enumerate certain rights and say "These are rights" and then they say "There are also principles, for example" but they do not say exhaustively which of the provisions of the Charter are rights and which are principles. Clearly the court would there pay due regard to the terms of the explanation in saying, "Well, this gives certain examples of principles, this is like the ones they have identified as principles"⁸⁷

The House of Lords EU Committee had commented in February 2003 on the future status of the Charter:

98. We do not believe that the Charter is intended to change the scope of application of Community law (including the protection of fundamental rights as general principles of Community law). The explanatory notes prepared by the Praesidium of the Charter Convention make this clear. The wording of Article 51 (1) of the Charter is based on the ECJ's judgment in *Karlsson*: "the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules".⁸⁸ **The Charter's impact on Member States' freedom of action is therefore circumscribed. It is not intended to fetter the powers of Member States outside the field of Community/Union law to pursue whatever policies they choose. A statement to that effect could usefully be included in the revised explanatory notes.**

99. The greater concern is the broader one, flowing from the wide scope and content of the Charter, as compared, say, to the ECHR. The risk is that the rights, principles and aspirations set out in the Charter will in practice impinge on national policy and practice and limit the freedom of action of Member States even in areas that remain clearly within their competence. It may prove difficult for a Member State to resist pressure to change and to align itself with the Charter where the latter appears to give the citizen/individual greater rights or privileges than the existing domestic regime. Where competences are mixed and even where the Union only has a complementary/supporting competence (eg public health, education), the "higher" Union standard will inevitably exert pressure on national governments. This is likely to be so particularly in the areas of employment and social policy. Some pressure is already present by virtue of the very existence of the Charter. That pressure would inevitably become greater if the Charter were to be incorporated into a constitutional Treaty for Europe. **It is doubtful whether the horizontal clauses or the commentary can provide comfort here, but no doubt the Government will be considering the possibility of further strengthening the horizontal clauses and commentary.**⁸⁹

⁸⁷ European Scrutiny Committee uncorrected evidence HC 1064-ii 17 November 2004

⁸⁸ Case C-292/97 [2000] ECR I- 2737 at para 37

⁸⁹ Lords Select Committee on the European Union 6th Report *The Future Status of the EU Charter of Fundamental Rights* 3 February 2003 paras. 98-99 at <http://www.publications.parliament.uk/pa/ld200203/ldselect/lducom/48/48.pdf>

Statewatch, a group comprising lawyers, academics, journalists, researchers and community activists, that monitors civil liberties in the EU, thought that incorporating the Charter into the Constitution would be helpful in providing “a precise list of rights protected in EC law” and therefore a greater degree of legal certainty with regard to human rights protection.⁹⁰

Although this would not lead to perfect legal certainty, as the rights would still be open to interpretation and it is possible that the list of rights in the Charter would not be exhaustive [...], it would lead to more certainty than present. After all, rights are always subject to some interpretation, so perfect legal certainty is not attainable.⁹¹

Statewatch also commented on EC competence in human rights issues and the horizontal articles in the Charter:

10. Much has been made of issues of EU competence in discussions of the Charter and of accession to the ECHR. Unfortunately, a large percentage of the commentators in the Convention seem unfamiliar with the case law of the Court of Justice on this issue. It is clear from this case law that human rights only apply as part of the general principles of EC law where as regards the validity and interpretation of EC law, its implementation by Member States and Member States' derogations from the market freedoms in EC law (and it might be argued that the principles also apply when Member States derogate from other EC law rules). The Court of Justice has on a number of occasions refused to rule on human rights issues in cases where there is no link with EC Treaty rules or EC legislation (see particularly Cases 12/86 Demirel [1986] ECR 3719; C-159/90 Grogan [1991] ECR I-4685; C-144/95 Maurin [1996] ECR I-2909; C-299/95 Kremzow [1997] ECR I-2629; C-291/96 Grado and Bashir [1997] ECR I-5531; C-309/96 Annibaldi [1997] ECR I-7493). If the interpretation of Article 51(2) of the Charter follows this case law, as the drafters of the Charter apparently intended it to do, there appear to be no grounds to fear that the Charter will impinge upon Member States' competences. In particular, there are no grounds for the fears about specific issues outlined by UK government representatives (see the table attached to working document 4 of Baroness Scotland and the comments of Peter Hain before the House of Commons (para. 53 of testimony on 16 July 2002)).⁹²

In June 2003 Baroness Scotland, then Parliamentary Secretary in the Lord Chancellor's Department, told the Lords EU Committee that “our European partners were able to agree to elevate the legal status of those explanations”.⁹³ She continued:

⁹⁰ Statewatch submission to House of Lords EU Committee October 2002 at <http://www.statewatch.org/docbin/evidence/charterfunrights.htm>

⁹¹ Ibid

⁹² Ibid

⁹³ HL Deb 20 June 2003 c 1116 at <http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds03/text/30620-07.htm>

It is now much clearer, as a matter of law, that the charter in large part reflects existing rights in the ECHR and Community law. Where it does reflect them, it can mean no more than do those provisions. Where the charter goes beyond them, Title VII and the explanations help us determine how the courts are to treat charter provisions; for instance, as principles rather than rights, or in harmony with the common constitutional traditions of the member states.

A report on the draft constitution in the political journal, *Prospect*, also thought the Charter was sufficiently explicit about limiting its application:

... the draft constitution sets clear limits to the charter's application. Thus the charter could not be used to strike down purely national laws. And many of the economic and social rights in the charter—including the right to strike—are hedged with the proviso that they apply only “in accordance with union law and national laws and practice.” The draft also includes a clause that makes it clear the charter gives no new lawmaking powers to the EU.⁹⁴

Comparing the Charter with the US Bill of Rights, two American commentators believe that an expansion of powers is almost inevitable:

Comparative constitutional history suggests that, despite its own proclamations to the contrary, the Charter may well alter substantially the respective powers of the EU and its member nations. Like the Charter, the Bill of Rights appended to the United States Constitution was initially intended to apply only to the federal government, not to member states.⁹⁵ Over time, however, and precisely because the requirements of the Bill of Rights were deemed to be “fundamental to the American scheme of justice,” constitutional provisions that were initially drafted to apply only to the federal government became generally applicable to all government entities, federal or state.⁹⁶ The Charter could similarly – and quickly – become fundamental to (and therefore widely applicable throughout) a European scheme of justice.

Accordingly, there is a real possibility that the Charter's incorporation in the EU Constitution will (1) expand EU power and (2) alter (perhaps in unforeseen ways)

⁹⁴ *Prospect* (undated) at <http://www.prospect-magazine.co.uk/HtmlPages/Constitution.pdf>

⁹⁵ Author's Note 23: See, e.g., *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243 (1833) (U.S. Constitution's requirement that private property cannot be taken without just compensation applies only to federal government, not state governments).

⁹⁶ Author's Note 24: *Duncan v. Louisiana*, 391 U.S. 145 (1968). As a technical matter, the Bill of Rights has been made applicable to the states through the 14th Amendment to the U.S. constitution. *Id.* Nevertheless, the drafters of the 14th Amendment did not intend (nor has the U.S. Supreme Court ever held that they intended) to make the states subject to the Bill of Rights by adopting the 14th amendment. See, e.g., *The Slaughterhouse Cases*, 83 U.S. 36 (1873) (the 14th Amendment does not subject the states to the constraints of the Bill of Rights). Rather, the Bill of Rights has been imposed on the states – not because the drafters of the 14th Amendment intended that result – but because the human rights set out in the first ten amendments to the U.S. constitution are so “fundamental to the American scheme of justice” that it is unjust to allow the states to ignore them. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

the sovereign status of member nations.⁹⁷

Considering the Charter, the ECHR and the constitutional human rights guarantees in a selection of Member States, Wilkins and Reed conclude:

This comparison suggests that the Charter will almost certainly broaden EU control over a significant range of social policies. As a result, and over time, member states may be required to submit to a more expansive EU will in human rights, social services and other areas.⁹⁸

Professor Brian Bercusson, of Kings College, London, considers in detail the status of the explanations:

The following are a number of arguments, using textual and systematic (and historical) approaches to interpretation, on the potential effect of the IGC's amendments to the EU Charter inserted at the behest of the UK government.

This analysis proceeds with awareness of the intentions of the UK government which promoted the amendments of 18 June 2004, but also of those governments which resisted and watered down those amendments.

1. The additional sentence added to the Preamble by the Praesidium of the Convention on the Future of Europe was quite strong: "...the Charter will be interpreted... with due regard for the explanations...". In comparison, the new Article II-52(7) added by the IGC seems weaker: "The explanations... providing guidance in the interpretation... shall be given due regard...". So "will be interpreted" becomes "shall be given due regard". Article II-52(7) takes precedence over the Preamble.

2. The IGC's Working Party of Legal Experts recommended the explanations be published only in the "C" section of the Official Journal (CIG 51/03, 25 November 2003, paragraph 7): "...since the text explicitly states that *'the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter'*, it would be legally inconceivable for the text of such explanations not to be available to those courts and to Union citizens; it is therefore suggested that the explanations be made universally accessible by ensuring that they are published in the 'C' series of the Official Journal of the European Union". This proposal reflects the suggestion "drafted on the responsibility of the Chairman of the Working Party" (the Legal Adviser to the IGC, Mr. Jean-Claude Piris, Director-General of the Council Legal Service),

⁹⁷ "The Impact of the European Charter of Fundamental Rights And the Proposed EU Constitution On the Domestic Policies of EU Member States" Richard G. Wilkins and Marya Reed, Brigham Young University at <http://www.spuc.org.uk/papers/EUCharterandConstitution.pdf>

⁹⁸ Author's Note 28: A comparison of the Charter with the terms of the ECHR makes this point quite readily: the Charter deals with numerous new human rights not mentioned in the ECHR. Section III D, below. The interaction of the Charter with the ECHR, furthermore, will become a point of some debate, inasmuch as Article I-7(2) of the proposed EU Constitution states that the EU "shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms." Article I-7(3) then states that the ECHR forms part of the "general principles of the Union's law."

referred to in the text of the Draft Treaty published "following editorial and legal adjustments by the Working Party of IGC Legal Experts" (CIG 50/03, 25 November 2003, page 1). The "C" series, of course, includes non-binding documents.

It should be noted that in the Working Party this amendment was 'supported by the great majority of delegations (with the German, Austrian, Belgian, Luxembourg and French delegations opposing it, because they feel it raises issues of political desirability)...' (CIG 50/03, 25 November 2003, p. 68, footnote 1).

3. The Preamble refers to "updated" explanations, but Article II-52(7) does not.

4. The IGC's "Declaration for incorporation in the Final Act concerning the explanations relating to the Charter of Fundamental Rights" says only that the IGC "takes note of the explanations".

5. There are no amendments to the substantive text of the Charter rights, only to the Preamble, to the title of the "horizontal" Article II-52, and a new Article II-52(7).

6. The amended Preamble and new Article II-52(7) refer only to "explanations". They do not change the rights in the Charter.

7. These amendments address interpretation questions only. They cannot change the substance of the rights in, or text of, the Charter. For example, the change (already in the draft of 18 July 2003) in the heading of Title VII (the section of the Charter on "horizontal" provisions), from "Scope" to "General provisions governing the interpretation and application of the Charter", and, more specifically after 18 June 2004, also to "horizontal" Article II-52 (from "Scope of guaranteed rights" to "Scope and interpretation of rights and principles") cannot transform "rights" into "principles".

8. It will be necessary to review the "updated" explanations, but, for example, the original "explanation" to Article II-52 (on the EU's website) does not reflect its new title. It begins: "The purpose of Article 52 is to set the scope of the rights guaranteed". It says nothing about interpretation.

9. For example, the often quoted "explanation" to Article 28 (as cited by Tony Blair in his statement to the House of Commons of the UK Parliament on 21 June 2004) states, not as an interpretation but as a prescription, that "national laws and practices" impose substantive limits to the rights declared in the Charter. I argue against this for an "interpretation" of the words "national laws and practices" in Article 28 which does not limit the rights in that Article.

10. The "explanations" have been repeatedly characterised, not least by those who drafted them, and as stated on the EU's website (see my paper, page 25), as of "no legal value". They were not published in the Official Journal alongside the Charter (OJ C 364/21 of 18.12.2000), only on the EU's website.

11. Their legal value has been upgraded at most to the level of "due regard" and "providing guidance". At this point, there are important questions about the transparency and legitimacy of the process which produced the 'explanations'. They were produced by the Praesidium of the Convention which drafted the Charter, but without the participation or approval of the Convention. They were given prominence in the Preamble of the Charter by the Praesidium of the Convention on the Future of Europe, again without the participation or approval of that Convention.

12. The Charter has been cited repeatedly before the EU courts (over 50 cases); it would be worthwhile looking again at these cases to see if the explanations were

ever referred to, and, if so, how. Is there likely to be a radical change in interpretation as a result of the IGC's amendments of 18 June 2004?⁹⁹

Some commentators have looked at specific policy areas that might be affected by the Charter. In 2000 the Confederation of British Industry (CBI) was wary of incorporation because of possible problems for employers and for industry generally.¹⁰⁰ Recent reports suggest that the CBI has given the European Constitution a cautious welcome, but thinks there is a serious risk of the ECJ overriding UK law when ruling on labour disputes, which could destabilise UK industrial relations.¹⁰¹

Martin Howe QC, an expert in European law, has written about the Charter's possible influence on UK asylum policy:

The Government has taken measures to remove social security benefits from asylum seekers in certain circumstances, mainly if they fail to apply for asylum promptly on arrival in the UK. A series of legal challenges have been launched against these measures. Once the EU Charter comes in, these challenges would become much easier, because denial of benefit could be characterised as loss of dignity contrary to Art II-1 of the Charter, as discrimination contrary to Art II-21, and as a breach of Art II-34 on social security and social assistance. EU law will apply directly to this aspect of policy because the present Government chose to opt-in to the Directive on minimum standards for reception of asylum seekers.¹⁰²

VII Further Reading

- John Morijn, *Judicial Reference to the EU Fundamental Rights Charter: First experiences and possible prospects*, 2002, at http://europa.eu.int/futurum/documents/other/oth000602_en.pdf
- Gráinne de Búrca, "Fundamental Rights and Citizenship", in Bruno de Witte (ed.), *Reflections on the Constitutional Treaty for Europe*, EUI, Robert Schuman Centre, 2003
- Bruno de Witte, "The Legal Status of the Charter: Vital Question or Non-Issue?" *Maastricht Journal of European and Comparative Law* 81, 2001
- Neil Walker, "The Charter of Fundamental Rights of the EU: Legal, Symbolic and Constitutional Implications", in P.A. Zervakis and P.J. Cullen (eds.), *The Post-Nice Process: towards a European Constitution?* 2002

⁹⁹ *The small print: legal effects of the EU Charter* at <http://www.tuc.org.uk/international/tuc-8562-f0.cfm>

¹⁰⁰ CHARTE 4298/00, 25 May 2000 at http://www.europarl.eu.int/charter/civil/pdf/con170_en.pdf

¹⁰¹ European industrial relations observatory on-line, 1 June 2004, Mark Hall at <http://www.eiro.eurofound.eu.int/2004/05/feature/uk0405104f.html>

¹⁰² Opinion on UK Asylum Policy and the EU Constitution, 19 May 2004

- Final Report of Working Group II on incorporation of the Charter and accession to the ECHR, CONV 354/02, 22 October 2002 at <http://register.consilium.eu.int/pdf/en/02/cv00/00354en2.pdf>
- Christopher McCrudden, *The Future of the EU Charter of Fundamental Rights*, NYU School of Law, Jean Monnet Center, 2001, at http://www.jeanmonnetprogram.org/papers/01/013001-03.html#P117_37464
- Brian Bercusson, (ed.) *EU Labour Law and the EU Charter of Fundamental Rights* (summary version), European Trade Union Institute, 2002, at <http://www.etuc.org/ETUI/Publications/Books/labour%20law%20short/EuropeanLabourLawShort.pdf>
- Brian Bercusson, “The trade union movement and the European constitution”, August 2004, at <http://www.tuc.org.uk/international/tuc-8562-f0.pdf>

- Portuguese Government views on the Charter, European Industrial Relations Observatory on-line at <http://www.eiro.eurofound.eu.int/2000/12/inbrief/pt0012126n.html>.
- House of Lords Select Committee on the European Union 6th Report 3 February 2003, 2002-03, *The Future Status of the EU Charter of Fundamental Rights*, at <http://www.publications.parliament.uk/pa/ld200203/ldselect/ldcom/48/48.pdf>