The Charter of Fundamental Rights of the European Union

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Introduction

Those who are following developments in Europe are no doubt aware that the year 2000 was dominated by two important events. The first was the Intergovernmental Conference resulting in the Treaty of Nice. The second was the adoption of the EU Charter of Fundamental Rights. It is only this second topic which I intend to address today, leaving aside the Treaty of Nice. In my talk, I propose to cover the following issues:

1. the origins and drafting of the Charter;
2. the need for the Charter;
3. the contents of the Charter;
4. the relationship between the Charter and the EU/EC Treaties on the one hand, and between the Charter and the European Convention on Human Rights (ECHR) on the other;
5. possible problems arising from the application of the Charter; and
6. the status of the Charter in EU law.

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1 This is a revised and updated version of a paper presented at a Conference organised by the Law Faculty of the Portuguese Catholic University in Lisbon on 4 May 2001. The theme of the Conference was the EU Charter of Fundamental rights.

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At the end, I shall attempt to assess the overall significance of the Charter, looking at both the positive and the negative sides.

1. The origins and drafting of the Charter

In the first half of 1999, the German Government made it clear that it was their intention to give priority to the creation of an EU Charter of Fundamental Rights during the course of their Presidency. Accordingly, in June 1999, the Cologne European Council adopted a decision to establish a Charter of Fundamental Rights «in order to make their overriding importance and relevance more visible to the Union’s citizens».

The drafting of the Charter did not follow the traditional Inter-governmental procedure, but was done in an entirely novel way, never before used in EU law. It was entrusted to a body named, rather confusingly, the «Convention», the composition, working method and practical arrangements of which were agreed at the Tampere European Council in October 1999. This body consisted of fifteen representatives of the Heads of State or Government of the Member States, one representative of the President of the Commission, sixteen members of the European Parliament, thirty members of national Parliaments (two from each Member State) – altogether sixty-two members. Its President, Roman Herzog, was elected by the body itself. Perhaps strangely, the European Court of Justice was not represented on the body but two of its members, together with two representatives of the Council of Europe (including one from the European Court of Human Rights) acted as observers.

The drafting was done by a five-member drafting committee composed of the President and a representative of the European Parliament, of the national Parliaments, of the President of the European Council and of the Commission. The drafting process involved extensive consultations throughout the year 2000 not only with members of the Convention but also with groups and individuals representing a broad spectrum of society. Hearings held by the body and documents submitted at such hearings were in principle made public. Therefore, the drafting of the Charter was done

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3 Bull. EU 6-1999, p. 35.
entirely distinct from the Intergovernmental Conference which drafted the Treaty of Nice.\(^5\)

The final draft was prepared in a remarkably short time. It was adopted by the Convention by consensus at its 7\(^{th}\) meeting at the beginning of October 2000, and was unanimously approved by the European Council at its informal meeting in Biarritz in October 2000.\(^6\) The Charter was officially «proclaimed» jointly by the Council, the European Parliament and the Commission on 7 December 2000 on the occasion of the Nice European Council.\(^7\) Its legal status and future will be considered below.\(^8\)

2. The need for the Charter

It is well known that although European Union law is a codified legal system, human rights themselves have never been codified and fully and directly integrated into this system. Exactly half a century after the signing of the first European Treaty,\(^9\) human rights are still protected within the European Union only indirectly as more or less vaguely defined general principles of law, which are to be interpreted on a case-by-case basis in a rather haphazard manner by the European Court of Justice (ECJ), as and when relevant cases come before it. Although in

\(^5\) For further details, see de Burca, «The Drafting of the European Union Charter of Fundamental Rights» (2001) 26 EL Rev. 126.


\(^7\) Bull. EU 12-2000, p. 33. The text of the Charter is published ibid. at p. 171 and at OJ 2000 C364/1.


\(^9\) Treaty establishing the European Coal and Steel Community, signed on 18 April 1951.
protecting human rights the ECJ relies heavily on the ECHR, the Convention is formally not binding on the EU and EC since the Union and the Community have never acceded to it. To use the terminology of the ECJ, it only supplies «inspirations» and «guidelines», which the Court is free to follow and interpret in its own way. It is widely felt that at the beginning of the 21st Century, the citizen has every right to expect more of a Community or Union based on the rule of law than mere «inspirations» and «guidelines»; that he is entitled to see his fundamental rights set out in black and white and in terms that he may enforce in a court of law.

In principle, there are three main ways in which this could be achieved. First, by the accession of the EU and/or the EC to the ECHR. I do not intend to deal with this any further, partly because this is not our topic today, and partly because accession has been ruled out, for the time being, by Opinion 2/94 of the ECJ10 on the grounds that the Community lacks the requisite competence. (In brackets, it could be noted that this is not an insurmountable difficulty since the Member States can, in theory, always amend the Treaties to confer the necessary competence on the Union or the Community. It is another question whether they would want to do this.) Suffice it to say that this solution would have about as many disadvantages and difficulties as advantages.11

The second solution would be exactly the opposite: instead of accession to the Convention, all the substantive provisions of the Convention (i.e. Articles 1-18) could be incorporated word for word in the EU and EC Treaties, and the ECJ’s jurisdiction extended to them.12 This would have the main advantage of creating a single, uniform system of substantive human rights for the whole of Europe, binding on the European Union/Community, its Member States and non-member countries alike. The Convention would be fully and directly integrated into the Community legal order and the rights and freedoms protected by it would become directly enforceable under Community law as any

12As suggested by Toth, see note 9 above. See also Toth, «Human Rights as General Principles of Law, in the Past and in the Future» in Bernitz and Nergelius (eds.), General Principles of European Community Law (Kluwer) 2000, p. 73.
other provision of the EC Treaty, subject to the same remedies and procedures.

The third solution is the drawing up of a separate catalogue of fundamental rights specifically designed for the requirements of the EU and EC. This idea has been put forward several times since the 1970's, and this is, of course, the one that has been accepted by the Member States, resulting in the EU Charter of Fundamental Rights.

3. The contents of the Charter

When one looks at the text of the Charter, the first thing that strikes one is its extremely broad scope. The Charter has no less than fifty substantive Articles, each covering at least one, and many covering several, rights and freedoms. The range of these rights is also extremely wide. They encompass, in terms of the traditional categories, not only civil and political rights, but also economic, social and cultural rights. Many «new» rights are included, such as rights relating to biomedicine (Article 3); protection of personal data (Article 8); freedom of the arts and sciences (Article 13); rights of the child, of the elderly and of persons with disabilities (Articles 24-26); rights relating to health care, environmental and consumer protection (Articles 35-38); right of access to documents (Article 42); etc. All the rights are divided into six broad categories, each of which is covered by a separate Chapter. These are as follows:

I. Dignity
II. Freedoms
III. Equality
IV. Solidarity
V. Citizens’ rights
VI. Justice

There is no time today to examine each of these rights separately, but I shall deal with some of them later on, particularly with those which

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may give rise to difficulties or problems in their interpretation and application.

The provenance of the rights covered is also extremely varied. The Charter has derived these rights from no less than seven different sources. These are as follows:

1. the constitutional traditions and international obligations common to the Member States;
2. the EU and EC Treaties, including secondary legislation;
3. the European Convention on Human Rights;
4. the European Social Charter;
5. the Community Charter of the Fundamental Social Rights of Workers;
6. the case-law of the European Court of Justice;
7. the case-law of the European Court of Human Rights.

The most important of these has undoubtedly been the ECHR. There are no less than 16 Articles in the Charter which are based on corresponding Articles of the ECHR and its Protocols. This makes up almost one-third of all the substantive Articles of the Charter. In some cases, the Charter has adopted provisions from the Convention word for word; in other cases there may be some variations in the wording. However, in most cases (11 Articles) both the meaning and the scope of the rights and freedoms incorporated in the Charter are the same as those contained in the Convention; and in five cases the meaning of the rights in the Charter is the same as in the Convention, although their scope in the Charter is wider.14 Some provisions of the Charter are based on the case-law of the European Court of Human Rights (ECtHR).15 This means that all the substantive Articles of the main Convention (Articles 2-12) as well as Articles 1 and 2 of Protocol No. 1; Article 4 of Protocol No. 4 and Article 4 of Protocol No. 7 have been incorporated, in one form or another, in the Charter.16

14 See the Explanation attached to Article 52 of the Charter.
15 In particular, on the Airey v. Ireland, Ser. A, No. 32; 2 EHRR 305 and the Soering v. United Kingdom, Ser. A, No. 161; 11 EHRR 439 cases.
16 In substance, the same is true of Article 1 of Protocol No. 6.

Given this multiplicity of sources of the rights protected, one major problem for the drafters of the Charter has obviously been to ensure the necessary consistency between the Charter and the other instruments from which the rights were derived, mainly the EU and EC Treaties and the ECHR. This has been achieved by the so-called «horizontal provisions» (Articles 51-54).

Article 51(1) defines the scope of the Charter. The Charter applies to the institutions and other bodies of the EU and to the Member States, but to the latter only when they are implementing or acting within the scope of EU law. This latter proviso follows from the established case-law of the ECJ. Subject to this proviso, both the institutions and the Member States are obliged to respect, observe and promote the rights and freedoms set out in the Charter. Article 51(2) makes it clear that the Charter does not establish any new power or task for the Community or the Union, or modify the powers and tasks defined by the Treaties. It cannot therefore extend the competences which the Treaties confer on the Community and the Union.

Article 52(2) and (3) define the relationship between the Charter and the Community Treaties, and between the Charter and the ECHR, respectively. Thus, according to Article 52(2),

«Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.»

This is a principle which is repeated in many Articles of the Charter. Consequently, the Charter does not alter the system of rights conferred by the Treaties.

Article 52(3) provides:

«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

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the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.»

This Article is intended to ensure the necessary consistency between the Charter and the Convention by providing that the meaning and the scope of the rights which are contained in both instruments shall be identical. The term «meaning and scope» includes authorised limitations on the rights with the result that the limitations (or exceptions/derogations) which may legitimately be imposed on the rights set out in the Charter may not exceed those permitted by the ECHR. Therefore, as a matter of drafting, the limitations on the various rights which have their origin in the Convention are not spelt out in the Charter since Community law must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR.

Article 52(3) is reinforced by Article 53, which provides that nothing in the Charter shall restrict or adversely affect human rights and fundamental freedoms as recognised, among others, by the ECHR. This provision is intended to maintain the level of protection currently afforded by the European Convention. Therefore, the level of protection afforded by the Charter may not, under any circumstances, be lower than that guaranteed by the ECHR, with the result that the limitations may not fall below the level provided for in the ECHR. Thus, the ECHR is recognised as a minimum standard for the interpretation and application of the Charter.

It must be added that the «meaning and scope» of the guaranteed rights are determined not only by the text of the Convention but also by the case-law of the ECtHR. That case-law has, over the years, not only defined but continually increased the level of protection afforded by the Convention.18 and is therefore part of that minimum standard which must be applied. Therefore, in interpreting and applying the Charter, the past and future case-law of the ECtHR must also be taken into account.

It thus seems that, theoretically at least, all of these provisions are capable of ensuring the necessary consistency between the Charter and the ECHR and will thus achieve the successful incorporation of the Convention rights and freedoms into EU law. If that is so, what problems can arise from the application of the Charter?

18 See the cases cited at note 13 above.
5. Possible problems arising from the application of the Charter

In discussing this point, it is appropriate to make a distinction between two situations. The first concerns the relationship between the Charter and the ECHR. The second concerns the relationship between the Charter and the EC and EU Treaties. The following discussion is based on the assumption that the Charter will enter into force at some future date. Clearly, if it remains a non-binding text, it can create no legal problems of interpretation and application.

(a) The Charter and the ECHR

As regards the European Convention, in the first place there is a very real possibility, even likelihood, that, once it has come into force, the Charter will achieve more than the mere incorporation of the Convention rights into EU law, namely, that it will replace the Convention by establishing a new minimum standard applicable only in the EU and its Member States. This would mean creating a dual (or parallel) system of human rights protection in Europe, one for the EU and one for other (non-member) States, each using different standards; a splitting up of the present single set of rights. This would not only undermine the authority of the Convention but would negate the universality of human rights, which is their very essence, indeed the whole philosophical basis of their protection. Thus, the Charter would contradict its own lofty ideals as set out in its Preamble, which speaks of «common values» shared by the «peoples of Europe» (not only by those of the European Union), and which emphasises the «indivisible, universal» nature of human rights. How can these principles be reconciled with the co-existence of two different systems in Europe?

Secondly, as we have just seen, the application of the Charter rights adopted from the Convention presupposes the prior determination of the exact level of protection of those rights by the ECtHR, that being the minimum level of protection. But what happens if the ECJ is called upon to decide issues that have not been previously decided by the Strasbourg Court? This situation has already led to discrepancies/divergences in the case-law of the two Courts,¹⁹ and there is a very strong risk that the

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¹⁹ Contrast the decision of the ECJ in Cases 46/87 and 227/88 Hoechst v. Commission [1989] ECR 2859 paras. 17-18 with the decision of the ECtHR in Niemietz v. Germany, Ser. A, No. 251-B; 16 EHRR 97 para. 31 concerning the interpretation of
decisions of the ECJ may be at variance with later decisions of the ECtHR. The reason is simply that both Courts use the teleological method of interpretation: The ECJ will interpret the Charter in the context of the EU, having regard to the objectives of the European Treaties, while the ECtHR will interpret the Convention in accordance with the objectives of the Convention itself. Thus, the Charter is bound to take on a dynamic of its own, which is likely to affect the harmonious and consistent interpretation of fundamental rights. This would have extremely serious consequences for the Member States since they will be bound both by the Charter, as interpreted by the ECJ, when implementing EU law, and by the Convention, as interpreted by the ECtHR, in all cases. Therefore, conflicting interpretation of the same rights would put the Member States in an impossible situation, since they would be obliged to apply contradictory judgments.

The third problem is closely related to this. According to Article 51, the provisions of the Charter will be binding on the Member States only when they are implementing EU law or act within the scope of EU law. In other cases, they will be bound by the Convention. This follows from the established case-law of the ECJ. The first problem here is that deciding whether a matter falls within the scope of EU law or of national law is by no means simple, given that in many instances there is no clear-cut boundary line between the two, and that with the progress of integration (not to mention the application of the principle of subsidiarity, to which the Charter expressly refers) the precise scope of Community law is subject to constant change and re-interpretation. In fact, this question is creating more and more difficulties both for the national courts and the ECJ, as the growing number of cases show (particularly where a case concerns compensation for damage arising from the application of national measures implementing Community rules).21

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20 See note 15 above.
A second problem could arise in criminal proceedings where some procedural or other irregularities are committed by national authorities involving a breach of the European Convention (most likely Article 5 or 6) and the corresponding provisions of the Charter (Articles 6 or 47-48). If the criminal proceedings are brought in implementation of an EU obligation, the ECJ will have jurisdiction to deal with the case under a reference for a preliminary ruling (e.g. the accused relies on the Charter in defence); if the proceedings are not brought in implementation of EU law, then the case must go to the ECtHR. Thus, it is quite possible that simultaneous parallel proceedings are brought before the two Courts in cases involving identical factual situations and an alleged infringement of identical provisions. How can it then be ensured that the two Courts give identical rulings if the cases raise new issues on which there are no precedents? Of course, the ECJ could suspend proceedings until the ECtHR decides the case; but would the case be admissible before the ECtHR under Article 35(2)(b) of the Convention, which provides that the Court shall not deal with an individual application which is substantially the same as a matter that has already been submitted to «another procedure of international investigation or settlement», a term which has been interpreted as encompassing the ECJ?

One final point which may be raised is this. If and when the Charter is fully integrated into the Treaties, its provisions will be interpreted by the ECJ in the same way as those of the EC Treaty. Thus, there is nothing to prevent the Court from establishing that some of the provisions of the Charter can produce direct effect, both vertical and horizontal, if the relevant conditions are met. Individuals may thus rely on certain of the rights guaranteed by the Charter not only against the Member States but also against other individuals. It is true that according to Article 51 the provisions of the Charter are addressed to the institutions and to the Member States (when the latter are implementing EU law). However, the provisions of the EC Treaty were originally also assumed to be addressed to the institutions and the Member States, yet this did not prevent the Court from holding that some of those provisions could create rights and obligations between individuals.23

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22 E.g. pursuant to Article 280 (2) ECT (countering fraud); Article 194 (1) Euratom (illegal disclosure of classified Euratom information); Article 27 of the ECJ’s Statute (violation of an oath by a witness or expert, i.e. perjury).

23 E.g. Article 12 in conjunction with Articles 39-42 or Articles 49-55 (prohibition of discrimination on grounds of nationality in respect of employed persons and persons
There would seem to be nothing to prevent the Court from interpreting at least some of the provisions of the Charter in the same way. This is in fact inevitable, as some of the provisions referred to above have been incorporated in the Charter, so they must be interpreted in the same way as under the Treaties. Primary candidates for creating horizontal direct effect would be Articles 7 and 8 of the Charter. Article 7 provides: «Everyone has the right to respect for his or her private and family life, home and communications.» Article 8(1) provides: «Everyone has the right to the protection of personal data concerning him or her.» The wording of these provisions is clear and precise, and they impose an unconditional obligation in respect of everyone, whether State authorities or private individuals. Everyone is obliged to respect private and family life, home and communications and the protection of personal data. It is true that the corresponding provisions of the ECHR only protect individuals against interference by State authorities (since individuals can only bring legal proceedings before the ECtHR against a Contracting State). However, Article 52(3) expressly stipulates that the Charter shall not prevent Union law from providing more extensive protection than the ECHR. It is certain that endowing the above-mentioned Articles with horizontal direct effect would provide more extensive protection, particularly against interference in private life by the media and by private bodies which collect personal data. This would be a great improvement on the Convention. On the other hand, it would contribute to creating a dual system of human rights protection in Europe, as explained above, since in non-member States such a possibility would not exist.

(b) The Charter and the EC/EU Treaties

Problems may also arise from the fact that the Charter contains rights which are already protected by the EC and EU Treaties. While the incorporation of the European Convention serves an extremely useful and valid purpose, namely, to give Treaty basis to the protection of rights which today

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<td>25</td>
<td>Compare Article 12 ECT and Article 21 (2) of the Charter; Articles 39, 43 and 49-50 ECT and Article 15 (2) of the Charter; Article 141 ECT and Article 23 of the Charter.</td>
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are only guaranteed through the concept of general principles of law, it is questionable whether there is a need to pick and choose certain rights already adequately guaranteed by the EC/EU Treaties, and to elevate them to the status of «fundamental rights» by including them in the Charter. By classifying many rights derived from the provisions of Community law (sometimes even secondary law) as «fundamental», there is the danger that the special importance and status attached to the concept of fundamental rights will be undermined. If every (or almost every) right guaranteed by or under the Treaties is «fundamental», what is the difference between «ordinary» and «fundamental» rights?

An example is Article 15(2) of the Charter, which provides that «Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.» Since these three freedoms are already guaranteed by Articles 39, 43 and 49-50 of the EC Treaty, why duplicate them in the Charter? Such duplication has only a purely symbolic value, since the inclusion of these rights in the Charter adds nothing to their protection in practice. This is because, as has been pointed out earlier, under Article 52(2) rights in the Charter which are based on the Treaties must be exercised «under the conditions and within the limits» defined by the Treaties. All the existing limitations continue to apply, no matter that these rights are now classified as «fundamental». In addition to this general clause, many individual Articles of the Charter specifically provide that the right or freedom in question may be exercised only «in the cases and under the conditions provided for by Community law» or «in accordance with Community law».

A second major criticism may be that some of the rights protected by the Charter are explicitly restricted to citizens of the European Union. These include the three basic freedoms: to work, to exercise the right of establishment and to provide services in any Member State (Article 15(2)); the right to vote and stand in European Parliamentary and municipal elections (Articles 39-40); freedom of movement and residence in any Member State (Article 45); the right to diplomatic and consular protection in third countries (Article 46). These so-called «citizens’ rights» were lifted from Part Two of the EC Treaty. It is in principle totally unacceptable to link protection of human rights to the

26 See e.g. Articles 16, 27, 28, 30, 34, 36 etc.
status of citizenship. This negates the very essence of human rights, which pertain to every individual as a human being, irrespective of citizenship or nationality. Moreover, all of these rights are already enshrined in the EC Treaty; why duplicate them in the Charter? Their protection is certainly not enhanced in this way. This may be contrasted with the ECHR, which obliges the Contracting Parties to «secure to everyone within their jurisdiction» the rights and freedoms set out in the Convention (Article 1).

The third problem raises the question of the enforceability (or justiciability) of some of the rights protected by the Charter. This applies mainly to economic, social and cultural rights, which are notoriously difficult to enforce judicially. If the Convention becomes a legally binding instrument, all the rights in it should, in principle, be capable of enforcement. But how can any court enforce, for example, «the rights of the elderly to lead a life of dignity and independence» (Article 25), or a «high level of environmental (and consumer) protection» (Articles 37-38), and many of the rights set out in Chapters III and IV of the Charter?

6. The status of the Charter in EU law

We have now arrived at what is perhaps the most crucial issue at the present time: what is, or what is to be, the status of the Charter in EU law? The original decision adopted by the Cologne European Council stated that once the Charter has been «solemnly proclaimed» by the European Parliament, the Council and the Commission, it will then be considered whether and, if so, how the Charter should be integrated into the Treaties. However, this question was left open by the Nice European Council. The Presidency conclusions simply stated that «the European Council would like to see the Charter disseminated as widely as possible amongst the Union’s citizens», and added that «the question of the Charter’s force will be considered later». Declaration No. 23 on the future of the Union, annexed to the Nice Treaty, indicated that the European Council, at its meeting in Laeken/Brussels in December 2001, would address, amongst

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27 See note 1 above.
29 OJ 2001 C80/1 at p. 85.
other questions, the status of the Charter in accordance with the Cologne conclusions. However, the Laeken Declaration of 15 December 2001\textsuperscript{30} devoted only one, rather vague, sentence to this subject, merely saying that at the forthcoming Intergovernmental Conference in 2004 «Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights».\textsuperscript{31}

Dealing with the simplification and reorganisation of the existing Treaties, the Declaration contains an equally vague allusion to the possibility that fundamental rights might be included in a «constititutional text» which might be adopted «in the long run».\textsuperscript{32}

The reason for these totally non-committal statements, of course, is that the Member States themselves are completely divided on the subject. Some, like Germany, would like to see the Charter fully integrated into the Treaties, while others, in particular the United Kingdom, are opposed to giving the Charter binding force, thus keeping it a merely non-binding political declaration.\textsuperscript{33}

Whatever the ultimate solution, what is done cannot be undone: the Charter does exist and its provisions express the unanimous views of the Member States and the Community institutions as to what constitute fundamental rights which they are to respect, observe and promote. It is almost certain that, even if not made formally binding, the Charter will serve as a text on which the ECJ will rely in interpreting fundamental rights, just as it has relied on the ECHR even although it is not legally binding on the Community and the Union. Already in his Opinion in Case C-173/99 BECTU, Advocate-General Tizzano supported his argument that the right to paid annual leave is a fundamental right by relying, amongst other instruments, on the Charter (Article 31(2)). He said:

\textsuperscript{30} http://www.eu2001.be/VE ADV PRESS
\textsuperscript{31} Ibid. under the heading «Towards a Constitution for European citizens».
\textsuperscript{32} Ibid.
\textsuperscript{33} See the House of Lords’ Press Information of 24 May 2000, according to which the UK Government wants the Charter to be a «showcase of existing rights» without binding effect. The House of Lords’ Select Committee on the EU, which prepared the Report on the Charter (see note 6 above), warned against the Government’s «extremely negative» attitude towards the Charter.
«I think ... that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right.»

Similarly, in his Opinion in Case C-377/98 Netherlands v. Parliament and Council, Advocate-General Jacobs relied on Articles 1 and 3(2) of the Charter to show that the right to human dignity and the right, in the fields of medicine and biology, to free and informed consent both of donors of elements of the human body and of recipients of medical treatment are fundamental rights, and added that «it must be accepted that any Community instrument infringing those rights would be unlawful.»

In Case C-270/99 PZ v. Parliament, Advocate-General Jacobs expressed the opinion that while the Charter itself is not legally binding, it «proclaims a generally recognised principle» in formulating the right to good administration in Article 41(1).

It seems thus inevitable that the provisions of the Charter will find their way, expressly or by implication, into the body of Community law through the case-law of the ECJ and CFI – if nothing else as manifestations of the «general principles of law» on which the Courts have always relied, and which the Union is obliged to respect in accordance with Article 6(2) of the Treaty on European Union.

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34 Opinion of 8 February 2001, para. 28, not yet reported. See also paras. 26-27. In its Judgment of 26 June 2001, the Court did not rely on the Charter and on fundamental rights, but derived the right to paid annual leave directly from Directive 93/104 (the working time Directive, OJ 1993 L307/18); see para. 47 of the Judgment, not yet reported.

35 Opinion of 14 June 2001, para. 197. not yet reported. See also para. 210. In its Judgment of 9 October 2001, the Court recognised as part of the general principles of Community law the fundamental right to human dignity and integrity, including the right, in the context of medicine and biology, to free and informed consent of the donor and recipient, but without expressly relying on the Charter or on any other instrument, see paras. 70 and 78-79 of the Judgment, not yet reported.

36 Opinion of 22 March 2001, para. 40. not yet reported. In its Judgment of 27 November 2001, not yet reported, the Court referred to general principles of Community law, but did not mention the Charter.
On the other hand, if the Charter is given binding force as part of the EU and EC Treaties, the Charter will be extended to its interpretation and application in full, in the same way as it extends to any other provision of the EC Treaty. The Charter cannot form a «fourth pillar»: it can only make sense if it applies right across the whole body of EU law, and governs the actions of the institutions and Member States whether taken under the first, second or third pillar. Therefore, the jurisdiction of the ECJ and CFI in respect of the Charter cannot be restricted in the same way as it is restricted in respect of the second and third pillars.

Should the Charter be brought into force, the question remains whether it would still be necessary or advisable for the EU and/or the EC to accede to the European Convention. As seen above, the Laeken Declaration of 15 December 2001 does foresee such a possibility. Accession to the Convention is also supported by the House of Lords and by the Council of Europe, mainly on the grounds that it would enable the Strasbourg Court to act as an external final authority in the interpretation of Convention rights incorporated in the Charter, thereby guaranteeing the necessary consistency between the two instruments. This would secure the status of the ECHR as the common code for Europe.

While these are perfectly valid arguments, it is submitted that accession would still create at least as many problems as it would solve, the most serious of which would be the considerable extension of the

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37 The Charter could be incorporated into EU law in one of several ways. First, it could be inserted, word for word, into the EU and EC Treaties or in the new Constitution or Basic Treaty that might emerge from the 2004 Intergovernmental Conference. Secondly, it could be annexed to the Treaties as a Protocol, having the same force as the Treaties. Thirdly, it could be adopted in the form of secondary legislation – possibly as a regulation – but only after the Treaties have been amended to create the necessary legal basis in accordance with Opinion 2/94, see note 8 above. This latter would be the least satisfactory solution. The Charter has been drafted in such a way that, given legal force, it would be capable of judicial application and enforcement (except perhaps some of its provisions dealing with economic, social and cultural rights as discussed above).

38 Except the newly inserted Title IV of Part Three, see Article 68.

39 See Article 46 TEU.


41 See the Comments of the Council of Europe observes on the Draft Charter of 13 November 2000, CHARTE 4961/00, CONTRIB 356.
Conclusions

The Charter has already attracted both praise and criticism. Some view it as a significant achievement, while others reject it as a totally unnecessary exercise. Some believe it has struck a right balance between the different (political, civil, economic, social and cultural) rights, while others criticise it either for going too far or for not going far enough.

It is submitted that, as everything else, the Charter has both a positive and a negative side.

On the positive side:

First, if and when the Charter comes into force, human rights will at long last be codified and given full Treaty status, as opposed to their present position as general principles of law. They will be enforceable (subject to certain difficulties as discussed above) before the ECJ and – through the concept of direct effect – also before the national courts in the same way as other provisions of the EC Treaty. They will enjoy the supremacy of Community law over the national laws of the Member States when the latter act in implementation of Community law.

Secondly, since practically all the substantive rights protected by the European Convention will be incorporated into Community law, the relationship between the two systems – hitherto unclarified – will be

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42 Any case would have to go before the CFI and/or ECJ prior to being referred to the ECtHR, as those two Courts would become the «domestic» Courts of the EU/EC. This could add anything up to five years or more to the length of the proceedings.

43 See further Toth, op. cit. at note 9 above.
On the negative side:

First, the unity of human rights protection in the whole of Europe will be broken: there will be two sets of human rights, one for the EU and one for the rest of Europe. This seems incompatible with the «indivisible and universal» nature of human rights.

Secondly, practical problems may also arise in the interpretation and application of the Convention rights in situations where the ECJ is called upon to decide issues which have not previously been clarified by the ECtHR. This may lead to conflicting interpretations of the same rights by the two Courts. The possibility of parallel proceedings being brought before the two Courts involving similar cases can also not be ruled out.

Thirdly, difficulties may also arise in determining when a Member State is acting in implementation or within the scope of Community law, and thus bound by the Charter and subject to the jurisdiction of the ECJ, and when it is acting outside the scope of Community law and thus bound by the Convention and subject to the jurisdiction of the ECtHR.

Fourthly, It is in principle objectionable that the enjoyment of some of the rights protected is dependent on the citizenship of the individual concerned. Human rights should be available to all.

Whether these problems and difficulties are real or only potential, and if they are real, how they will affect the application of the Charter, only time will tell.