

**Working group II "Incorporation of the Charter / accession to the  
ECHR"**

**Working document by Baroness Scotland of Asthal**

**Subject: The “missing” horizontal article in the Charter of Rights**

*1. Introduction*

At the Working Group’s first meeting, I made reference to Charter articles based neither on the ECHR nor on the EC Treaty. I attach a table showing examples of these. My particular concern is that there appears to be no horizontal article governing these articles.

*2. Existing horizontal articles*

Of course, Charter articles corresponding to the ECHR are clarified by Article 52(3); and Charter articles based on the Treaties are clarified by Article 52(2). These so-called “horizontal” articles are of great importance - and their significance would be even greater were the Charter to be incorporated into the Treaties. But they do not help us with the other Charter provisions. These other provisions have no clarification other than the Praesidium Commentary (which is not part of the Charter) and perhaps Article 51(2), which confirms that the Charter is not intended to establish any new power or task for the Community or Union<sup>1</sup>.

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<sup>1</sup> For some Articles, this qualification is reinforced by Treaty provisions, which forbid the EC to legislate in certain areas (e.g. Education and vocational training [TEC Art 149(4) and c.f. Charter Art 14]; or Employment [TEC Art 129 and c.f. Charter Arts 15, 23, 29, 30, 31, 32, 33]); and reserve other areas to the Member States (e.g.

### *3. Implications*

I believe that this absence of clarification (for articles not based on the ECHR or Treaties) would be a serious problem were the Charter to be given greater legal status than it currently enjoys. The third column of the attached table identifies some practical implications which, I believe, the Group should have in mind when it considers this legal problem. Citizens and Member State Governments would not be clear precisely which rights and responsibilities are entailed by the Charter. There would be some major questions:

- Definition: what is the agreed basis for the article concerned? Is it a principle? Or a fundamental right or freedom, perhaps with some irreducible minimum “essence” such as is found with the rights in the ECHR?
- Scope: what is the extent and enforceability of the article concerned?
- Limitation: what are the circumstances in which the right may be curtailed and balanced, if any?

If the Charter were to be incorporated in its current form, the task of answering these questions would fall to the ECJ. But the questions involve important political considerations. Would it be right to delegate these from democratically elected politicians?

### *4. Common constitutional traditions?*

It is relevant to note that some of the Articles in the attachment may be part of the constitutional traditions common to the Member States (this is indicated in the Charter Preamble paragraph 5). But is that true in every case:

- Charter Article 3: according to the Commentary, this is based on the Council of Europe Convention on Biomedicine. But the Convention appears not to have been ratified by all the Member States.
- Charter Article 10(2): according to the Commentary, this is based on the common constitutional traditions. But is this right currently guaranteed by all the Member States?
- Charter Article 14: according to the Commentary, this is based on the common constitutional traditions and on Article 2 of the First Protocol to the ECHR. Have all Member States legal provision for parental “pedagogical convictions”? And Germany, Ireland, the Netherlands and the UK have reservations against Article 2 of the First Protocol to the ECHR.
- Charter Article 24: according to the Commentary, this is based on the UN Convention on the Rights of the Child. All Member States have accepted this Convention but Austria, Denmark, France, the Netherlands and the

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Health services [TEC Art 152(5) and c.f. Charter Art 1, 3, 25, 31, 34, 35]; or Public order and public security [TEC Art 64(1) and c.f. Charter Art 6, 10, 47]). *See also CONV 47/02 (Brussels, 15 May 2002).*

UK have entered reservations. The Charter has no provision to respect those reservations.

- All the Charter articles entirely or partly based on the European Social Charter or the Revised European Social Charter (Articles 14, 15, 23 and from 25 to 35) which are not accepted by all the Member States.

### ***5. Recommendations***

**I believe the Working Group should consider the need for a supplementary horizontal article or alternatively an appropriate provision in any proposed article of incorporation.**

### ***Baroness Scotland of Asthal***

*UK Government Alternate Representative to the Convention on the Future of the European Union*

Charter Article	Existing legal base (according to the “informal” Praesidium commentary from 1999/2000)	Practical implications
<i>Article 3</i> Right to the integrity of the person	The Commentary states that the "principles" are included in the Council of Europe Convention on Human Rights and Biomedicine. But 3(1) appears not to be; and the provisions in 3(2) have not yet been ratified by all Member States. Not clear which if any horizontal Article governs the interpretation of this Charter Article and its limitations.	"Integrity" in 3(1) is very wide in scope, and could interfere with e.g. national penal laws and policies, as well as health policies, such as compulsory AIDs screening and immunisation programmes. In Canada, “integrity” has been used to campaign against infant male circumcision. 3(2) has no qualifications at all and may outlaw Member State arrangements for e.g. genetic and pre-natal testing. 3(2) addresses matters reserved to the Member States (organisation and supply of medical care) – see final section below
<i>Article 9</i> Right to marry and right to found a family	The Commentary states that this is based on ECHR Article 12, but the scope is wider, embracing "same-sex" marriages – which a court might find is part of the essence of the right, which cannot therefore be curtailed by the laws and practices of Member States.. Though Charter Article 52 may apply, 52(3) does not "prevent Union law providing more extensive protection".	Despite the reference to national laws, Article 9 may lead to new national obligations e.g. to grant EC free movement rights to partners in same sex and transsexual marriages, including third country nationals, as well as an extension of asylum rights and family reunification rules. It might also have implications regarding adoption by homosexual couples ("right to found a family") which may cause problems for some MSs.
<i>Article 10</i> Freedom of thought, conscience and religion (conscientious objection)	The Commentary states that paragraph 2 (conscientious objection) corresponds to national constitutional traditions. Not clear which if any horizontal Article governs the interpretation of this Charter Article and its limitations.	On its face, 10(2) defers to national legislation, but the Court could find an irreducible minimum right, drawing upon ECtHR jurisprudence on fundamental rights and the first sentence of Charter Article 52(1). This would reduce the scope for national limitations and may lead to new States obligations.
<i>Article 13</i> Freedom of the arts and sciences	The Commentary states that this Article is "deduced" from the right to freedom of thought and expression. Not clear which if any horizontal Article governs the interpretation of this Charter Article and its limitations.	Article 13 claims to be deduced from the principles in ECHR Article 10, but the wording, and its separation from Charter Article 10, seems apt to create a new right and new positive duties. State controls on some forms of scientific research may not survive challenge under this Article. “Free of constraint” is as odd for the arts as for scientific research – some expression needs to be constrained in the public interest – obscenity laws?

<i>Article 14</i> Right to education	The Commentary states that Article 14(1) and (3) is based on the common Constitutional traditions and on Article 2 of the First Protocol to the ECHR, but with a wider scope. Article 14(2): Unclear. The Commentary states that this is a "principle" which was necessary to <u>add</u> to this provision. Article 14(2) is not based on the Treaties or ECHR. Unclear which if any horizontal Article governs the interpretation of this Charter Article and its limitations.	Article 14 goes beyond the ECHR provisions regarding access to <u>vocational and continuing training</u> , <u>parents pedagogical convictions</u> and <u>free compulsory education</u> . On its face, 14(3) defers to national legislation, but it may be argued that there is an irreducible minimum right, drawing upon ECtHR jurisprudence on fundamental rights and the first sentence of Charter Article 52(1) (in which case the scope for national limitations may be limited). New positive duties (e.g. an access to vocational training) are implied in an area where the EU is precluded from legislation. Germany, Ireland, the Netherlands and the UK have entered reservations against Article 2 of First Protocol to the ECHR. It is unclear that these would be respected.
<i>Article 19</i> Protection in the event of removal, expulsion or extradition	The Commentary states that paragraph 1 is based on Article 4 of the Fourth Protocol to the ECHR (which not all Member States have accepted) and on ECHR Article 3 (same scope).	The national positions of Member States which have chosen not to accept the Fourth Protocol to the ECHR on which 19(1) is based (Greece, Spain, UK) is not respected.
<i>Article 21</i> Non-discrimination	The Commentary states that this draws partly on Article 13 EC, but it contains a prohibition whereas Article 13 provides a power to legislate; and partly on Article 14 ECHR, but it is not mentioned in the list given for Article 52(3). Not clear which if any horizontal Article governs the interpretation of this Charter Article and its limitations.	Article 21(1) is close to ECHR Protocol 12 (which <u>no</u> Member State has yet ratified and several have not signed at all). Making the Charter legally binding could affect existing national derogations, including those expressly permitted in existing Community secondary legislation.
<i>Article 24</i> The rights of the child	The Commentary states that this is based on the UN Convention on the Rights of the Child, against which some Member States have entered reservations. Not clear which if any horizontal Article governs the interpretation of this Charter Article and its limitations.	All Member States have ratified the UN Convention, but not all have incorporated the provisions in domestic law. There are implications for national laws and policies (e.g. immigration, family reunification and social services). Article 24(1) provides no qualifying phrases such as "under conditions provided for by national laws and practices".
<i>Articles 25 and 26</i> The rights of the elderly; Integration of persons with disabilities	Mainly based on the Revised European Social Charter. Not clear which if any horizontal Article governs the interpretation of these Charter Articles and their limitations.	The Court could find new positive duties and States obligations here regarding special measures interfering with national arrangements and budgets. Note that Article 26 appears to include third country nationals. This could well have financial implications.

<i>Article 28</i> Right of collective bargaining and action	As for Article 25.	Could entail a positive duty to prohibit dismissal of striking workers. This topic is outwith EU competence (see below).
<i>Article 29</i> Right of access to placement services	As for Article 25.	Article 29 implies an irreducible minimum right not to be denied access to free placement services. Who is to define and limit that – and to pay for it?
<i>Article 30</i> Protection in the event of unjustified dismissal	As for Article 25.	The language is apt for a wide-ranging constitutional statement of rights, allowing a wide measure of judicial discretion and interference in national employment laws and practices. Does "every worker" include those unlawfully employed? And what is the scope of "unjustified dismissal"? Who is to decide and to pick up any bill?
<i>Article 31</i> Fair and just working conditions	Mainly based on the European Social Charter. Not clear which if any horizontal Article governs the interpretation of these Charter Articles and their limitations.	Do unlawful workers have a right to annual paid leave? Note absence of reference to "national laws and practices". Implies Community power to legislate on health and safety matters and positive duties.
<i>Article 32</i> Prohibition of child labour and protection of young people at work	As for Article 31.	Implications for national policies and finances (working hours, fair wages, paid holidays etc).
<i>Article 33</i> Family and professional life	As for Article 31.	Implications for laws and policies concerning paternity leave, depending on the approach taken by the Court. Implies positive duties to promote the economic, legal and social protection of family life by all appropriate means?
<i>Article 50</i> Right not to be tried or punished twice in criminal proceedings for the same criminal offence	The Commentary states that this is based on Article 4 of Protocol 7 to the ECHR which not all Member States have ratified. Horizontal article 52(3) applies.	Article 50 goes beyond Protocol 7 to the ECHR by protecting freedom from double jeopardy <u>between the jurisdiction of the Member States</u> , and not just within the same jurisdiction. The implication is that the EU constitutes a single criminal jurisdiction concerning the finality of the criminal process. Not all Member States have accepted Protocol 7 to the ECHR (i.e. Belgium, Germany, Ireland, Netherlands, Portugal, Spain and UK).