

Working Group II

Working document 16

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

**Subject : Note by Baroness Scotland of Asthal: "The search for the "missing horizontal"
in the Charter of Rights – an interim report on progress"**

I. Introduction

1. My paper on the "missing" horizontal article in the Charter of Rights¹ discussed the problem concerning the meaning and scope of provisions in the Charter which are based neither on the Treaties nor on the ECHR. Since then our Working Group has had the benefit of the opinion of M. Piris², Director-General of the Council Legal Service, that the existing horizontal articles in the Charter are insufficient. I have also studied Professor Mac Cormick's paper³ which contains helpful proposals for dealing with some (but not all) of the problem. My paper, for discussion, reports further progress. It is intended to help find a positive way to give the Charter greater legal status without losing or changing the wording of any of the substantive Charter articles.

¹ Working document 4 - Brussels, 9 July 2002

² Working document 13 – Brussels, 5 September 2002, (p 23-27)

³ Working document 14 – Brussels, 4 September 2002

The problem

2. Charter Article 52 does not deal with all the rights in the Charter. 52(2) tells us about rights which are based on the Community Treaties or the Treaty on European Union; and 52(3) tells us about rights corresponding to provisions in the ECHR. But there is no 52(4) to tell us how to interpret Charter provisions which do not fall into either of those categories. What legal meaning and scope should be given to those provisions in a legally binding Charter by our citizens, or the Court?

3. Amongst the horizontal articles, the only available guide to the interpretation of such provisions appears to be Charter Article 51. But that article deals with the scope of the provisions of the Charter as a whole and the general exclusion of any new powers or tasks for the Community or the Union. It would leave many ambiguities and unresolved questions were the Charter to be incorporated within the Treaties. For example, does Article 51 mean that Charter provisions based neither on the Community Treaties or ECHR are to be interpreted as having no legal effect?

4. My earlier paper gave examples of Charter provisions which appear to fall into this uncertain category. I offered some practical illustrations⁴ of why the absence of a horizontal article to deal with them could be a serious difficulty. The problem is essentially one of ambiguity and the absence of legal certainty. And the more status the Charter is given, the more important it is to be clear about what such provisions actually mean. We should not open Europe to the accusation that it is misleading its citizens. And national Governments will expect to be clear about the obligations a legally incorporated Charter entails for them. I believe that our Group should address such issues directly in its Report to the Convention plenary – and make appropriate recommendations.

⁴ My paper listed Article 3 (right to integrity), 9 (right to marry), 10 (freedom of thought, conscience and religion), 13 (freedom of the arts), 14 (right to education), 19 (Protection in the event of removal, expulsion or extradition), 21 (non-discrimination), 24 (rights of the child), 25 (rights of the elderly), 26 (integration of the persons with disability), 28 (right of collective bargaining and action), 29 (right of access to placement services), 30 (protection in the event of unjustified dismissal), 31 (fair and just working conditions), 32 (child labour), 33 (family and professional life), 50 (right not to be tried or punished twice in criminal proceedings for the same criminal offence).

A. Clues

5. I do not claim to have discovered a simple, single answer to the problem. However, our Working Group discussions have pointed us towards three concepts which are already within the Charter and which seem to be important clues towards an acceptable solution. Indeed, I think that it is common ground that these three concepts formed part of the approach which enabled a consensus on the Charter to be reached within the original Convention. They are:

- A. existing Community law on the constitutional traditions common to the Members States which is referred to in the Charter Preamble⁵ and in the Commentary⁶
- B. the concept of “principles” which also appears in the Charter Preamble⁷, in Charter Article 51(1) – “observe the principles” – and in several of the substantive Charter articles⁸ and commentaries⁹
- C. the references to subsidiarity in the Charter Preamble¹⁰, Article 51(1) and the related references to “national law and practices” in the texts of some of the articles themselves¹¹.

6. In the present Charter text these three important concepts are not dealt with in the same way as those provisions of the Charter which correspond to provisions of the ECHR or the Union and Community treaties (dealt with by Charter Articles 52(2) and 52(3)). In particular, it is for the most part not clear which concept applies to which Charter article. There is the possibility that some Charter articles do not benefit from A, B or C, or from the

⁵ “This Charter reaffirms, with due regard for the powers and tasks of the Community and 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 (...)”

⁶ E.g. Articles 14, 17, 20, 49.

⁷ “The Union therefore recognises the rights, freedoms and principles set out hereafter”

⁸ Articles 23, [41], 49.

⁹ Articles [1], 3, 14, 20, 23, 26, 34(1), 35, [36], 37, 38, [41], 47, 49, 50.

¹⁰ “This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights (...)”

¹¹ Article 9 (right to marry), 10(2) (right to conscientious objection), 14 (right to education), 16 (freedom to conduct a business), 27 (workers’ right to information and consultation), 28 (right of collective

existing provisions in Charter article 52. Is such uncertainty tolerable in a Charter which has legal status beyond that of a solemn declaration?

II. Way forward?

7. I believe that the “missing horizontal” (notionally 52(4)) should address itself to all the Charter provisions not covered by 52(2) and 52(3). Following the logic of the Charter itself (as discussed above) the “missing horizontal” should contain three elements. First, regarding the constitutional traditions, the new horizontal provision could usefully confirm that, in the cases where the remaining Charter provisions are indeed part of the constitutional traditions of all the Member States, they enjoy the status of general principles of law which the Community must respect¹². I would go further and say that, even where a Charter provision does not have that status, it should be regarded, by virtue of its inclusion in the Charter, as an aspiration for the Union.

8. It might also be possible to connect this latter point with the Charter concept of “principles” so that the aspirational character of all such Charter articles is suitably clarified and confirmed. But special provision concerning “principles” would be desirable even if no such connection is made. We should avoid the possibility of confusion between, on the one hand, the meaning of “principles” as in Article 6(2) of the Union Treaty and, on the other hand, the “principles” referred to in Charter Article 51 which are to be observed by the institutions and bodies of the Union within the strict limits of their competences.

9. As regards subsidiarity, it should not be necessary to duplicate the general reference to the topic which is made in Charter Article 51. However, I believe that there may be a special need to reflect the fact that some Charter provisions refer in particular to national

bargaining and action), 30 (protection in the event of unjustified dismissal), 34 (social security), 35 (health care), 36 (access to services of general economic interest).

¹² C.f. ECJ, Judgment of 18/05/1982, AM & S / Commission (155/79); ECJ, Judgment of 14/05/1974, Nold KG / Commission (4/73); ECJ, Judgment of 17/12/1970, Internationale Handelsgesellschaft mbH / Einfuhr- und Vorratsstelle für Getreide und Futtermittel (11/70)

law and practice. The new horizontal provision could require full regard to be given to such references.

10. I believe that it should be possible to draft an extension to Charter Article 52, to cover the matters I have proposed, with economy and precision.

11. Finally, I would strongly support the expert opinion put forward to our Group by M. Piris that the interests of legal certainty and security also require clarification of precisely which Charter provisions are referred to by Charter Articles 52(2) and 52(3). M. Piris suggested that the Commentary issued by the Praesidium to the original Convention was helpful to us in that regard. He also suggested that it should make clear that the restriction on new (or modified) tasks or powers in Article 51 applies also to Article 52 (and the other horizontal articles). I believe that our Group should consider these points with a view to making a recommendation on this matter as well.

Summary

12. There is currently a gap in Charter Article 52. This gap could prejudice a favourable decision on incorporating the substantive articles of the Charter in their current form. I believe we can build on the work of our predecessors to fill that gap in a positive way.