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**THE CHARTER OF FUNDAMENTAL RIGHTS
OF THE EUROPEAN UNION:
QUESTIONS, PROBLEMS AND PERSPECTIVES¹**

The Charter of Fundamental Rights of the European Union was signed and solemnly proclaimed in Nice in December 2000². A large question accompanied its inception, namely: what would be the status of this Charter? That question may be broken down into numerous inter-related questions, including, *inter alia*, what were the reasons for drafting this Charter; would the Charter be referred to, or incorporated in, the Treaty; would its provisions be legally binding; what would be the scope of its provisions; how would consistency of interpretation of political and civil rights between the European Court of Justice and the European Court of Human Rights be ensured?

The scope of the Charter's provisions remains problematic, as does the Charter's legal effects. The social/solidarity articles in the Charter are controversial and a problem for the United Kingdom. The general provisions on the application and interpretation of the Charter, explanatory notes and the Charter's preamble purport to put these questions and problems into perspective. This paper will question such perspectives.

Questions

The European Council at Cologne in 1999 decided that 'there appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more

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² [2000] OJ C364/1.

visible to the Union's citizens'³. The decision was taken by the European Council to 'propose to the European Parliament and the Commission that, together with the Council, they should solemnly proclaim on the basis of the draft document a European Charter of Fundamental Rights. It will then have to be considered whether and, if so, how the Charter should be integrated into the Treaties'⁴.

What reasons were given for drafting this Charter? A visible and specific list of values and fundamental rights on which the European Union is based serves the political ideal of citizenship and identification with a closer 'federal' Union⁵. The adoption of the Charter as an explicit internal statement of fundamental rights, where previously one did not exist, would address the allegations of double standards earned by a European Union which attached conditions of respect for democracy, the rule of law and fundamental freedoms to all membership applications⁶, and, particularly to those acceding Member States in the recent wave of enlargement⁷. A Charter is not a legally binding document in itself but a statement of aspirations, of political intent. Because of the novel composition of the body responsible for its drafting⁸, and, significantly, its solemn proclamation by the European Union institutions, the weight of academic opinion was that legal effect had been accorded to it⁹, or would be, indirectly, through the interpretative role of the European Court of Justice¹⁰. A decision as to the status of the Charter was postponed at Nice until the next European Union Intergovernmental Conference in 2004¹¹. The Charter has been referred to in an increasing number of the Opinions of Advocates General in their legally reasoned, researched Opinions given in open Court prior to the Courts majority ruling. Advocate General Léger analysed the principle of access to documents, concluding that it constitutes a fundamental right, *inter alia*, in

³ European Council Decision on the Drawing Up of a Charter of Fundamental Rights of the European Union, Annex IV to the Conclusions of the Presidency of the Cologne European Council of 3 and 4 June 1999, <http://www.europarl.eu.int/dg7/summits/en/kol2.htm#UP>. Quoted in Koen Lenearts 'Fundamental Rights in the European Union', (2000) *ELRev.* p. 575, at p. 576. House of Lords (HofL) Select Committee on the European Union (EU), *EU Charter of Fundamental Rights*, Eighth Report Session 1999-2000, para. 30. Cf, D. Ryland, 'The Charter of Fundamental Rights of the European Union: Pandora's Box or Panacea?', vol. 45, number 5/6 (2003), *Managerial Law*, p. 145 ff.

⁴ HofL Select Committee on the EU, *op. cit.* para. 123.

⁵ P. Eeckhout, 'The EC Charter of Fundamental Rights and the Federal Question', (2002) *CML Rev.*, p. 945 at p. 991; Ch. McCrudden, 'The Future of the EU Charter of Fundamental Rights', 'Jean Monnet Working Paper' 10/01, p. 4 at p. 21; <http://www.jeanmonnetprogram.org>, J. H. H. Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' (2000), *ELJ*, p. 95.

⁶ Article 46(d) of the Treaty on European Union. HofL Select Committee on the EU, *op. cit.*, para. 150.

⁷ Known as the Copenhagen criteria, pursuant to which applicant States are required to achieve, *inter alia*, 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.' Conclusions of the Presidency of the Copenhagen Council 1993, EC Bull 6-1993, p. 13. Quoted in A. Williams, 'Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction?' (2000), *EL Rev.*, p. 601 and 607.

⁸ Cf G. de Burca, 'Drafting of the EU Charter of Fundamental Rights' (2001), *ELRev.*, p. 126.

⁹ K. Lenearts and E. de Smijter, 'A Bill of Rights for the European Union' (2001), *CMLRev.*, p. 273 at p. 298 and 299.

¹⁰ HofL Select Committee on the EU, *op. cit.*, para. 125; Ch. McCrudden, *op. cit.*, p. 12. Editorial Comments, 'The EU Charter of Fundamental Rights Still Under Discussion' (2001), *CML Rev.*, p. 1 at p. 5. Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union. COM (2000) 644, 11 October 2000, para. 9, p. 5.

¹¹ Declaration 23 on the Future of Europe, Nice, [2001] OJ C80/1.

view of its inclusion in the Charter¹². Advocate General Tizzano was of the opinion that the Charter provides the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right¹³. The Court of First Instance ruled that the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated has been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union¹⁴, proclaimed at Nice on 7 December 2000¹⁵. The Court of Justice, in comparison, has been conspicuously silent and has not mentioned the Charter in its judgments¹⁶. One leading commentator has submitted: ‘The solemn declaration of such a Charter, whatever its provisional or its final legal status, might be part of an ongoing process that has the potential to transform substantially the Union and its legal system’¹⁷.

The Charter¹⁸, comprised of civil, political, economic and social provisions is divided into seven titles, under the respective headings of Dignity; Freedoms; Equality; Solidarity; Citizen’s Rights; Justice and General Provisions Governing the Interpretation and Application of the Charter. It contains rights, which already have legal effect in the Treaties, and provisions purporting to state new ‘rights’¹⁹. There is nothing controversial in the Charter preserving the jurisprudence of the European Court of Justice under which, in addition to limiting the institutions in the exercise of their legislative role, Member States are required to protect fundamental principles of law when implementing European Community law²⁰. Some perceive the Charter as potentially expanding the competence of the European Union in respect of human rights, i.e. imposing duties on Member States, espe-

¹² *Ibidem*, p. 949. Article 42 of the Charter (now Article II-102 of the Treaty establishing a Constitution for Europe (TCE)). Case C-353/99P, *Council v Houtala*, [2001] ECR I-9565, Opinion of Advocate General Léger of 10 July 2001, para. 77 ff.

¹³ Article 31(2) of the Charter (now Article II-91(2) TCE). Case C-173/99 *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v S of S for Trade and Industry*, [2001] ECR I-4881, Opinion of Advocate General Tizzano, 8 Feb. 2001, paras. 19, 20, 22, 28 and 29.

¹⁴ Now Article II-107 TCE.

¹⁵ Case T-177/2001 *Jégo-Quéré and Cie SA v Commission*, Court of First Instance, 3 May 2002, para. 42, [2002] ECR II-2365.

¹⁶ G. de Burca, ‘Human Rights: The Charter and Beyond’, *op. cit.*, p. 5; P. Eeckhout, *op. cit.*, p. 945 at p. 950. Case C-112/00, *Schmidberger v Republic of Austria*, [2003] ECR I-5659, cited in J. Dutheil de la Rochère, ‘The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty’ (2004), *CMLRev.*, p. 345 at p. 349.

¹⁷ A von Bogdandy, ‘The European Union as a Human Rights Organisation: Human Rights and the Core of the European Union’ 2000, *CML Rev.*, p. 1307.

¹⁸ Now entitled the Charter of Fundamental Rights of the Union, CONV 726/03, ‘Draft text of Part II with comments’, The European Convention, The Secretariat, Brussels 26 May 2003, http://european-convention.eu.int/doc_register.asp?lang=EN.

¹⁹ Commission Communication on the Charter of Fundamental Rights of the European Union, COM (2000) 559, 13 September 2000, para. 9.

²⁰ HofL Select Committee on the EU, *op. cit.* para. 148. Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609. Article 51 of the Charter – Now Article II-111(1) and (2) TCE, which aims to determine the field of application of the Charter, provides that the provisions of the 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, and that 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. 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.

cially if the Charter is incorporated into the Treaties²¹. What would be the relationship between the Charter and the European Convention on Human Rights?²² Would there be two human rights mechanisms with scope for diverse interpretations from the Court of Justice and the European Court of Human Rights?

Problems

There will be tensions between the Charter's provisions and the existing balance achieved in the Treaties argues Graine de Burca. She submits that one example of considerable potential disharmony is the obligation to promote the right of collective bargaining in Article 28 of the 'Solidarity' section of the Charter, (now Article II-88 TCE) which includes strike action. This provision conflicts with Article 137(5) of the European Community Treaty (now Article III-210(6) TCE), which excludes Community power to act in respect of the right to strike (despite the reference to national laws in Article 28 of the Charter (now Article II-88 TCE). Thus, a particular tension exists between the competences of Member States and the Charter's promotion of social rights²³.

The Charter has 'highlighted' two issues, namely: the lack of a Treaty-based catalogue of EU fundamental rights; and the abstention of the European Union as a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms²⁴. A Working Group under the Convention on the Future of Europe, Working Group II, was convened with a dual mandate: first, to consider the procedures for, and the consequences of, any incorporation of the Charter into the Treaties; and, second to consider the consequences of accession by the Community or the Union to the European Convention on Human Rights²⁵.

Perspectives

The final report of Working Group II informed of the consensus to incorporate the Charter into the Convention's new consolidated Constitutional Treaty, at the beginning as a Title or Chapter of that Treaty. The basic starting point for the Working Group's conclusions was that of respect for the substantive content of the Charter, which, having been reached by a consensus of those with specific expertise in fundamental rights, would not be undone by this Working Group. Any technical drafting amendments advocated by the Working Group, specifically to the hori-

²¹ G. de Burca, 'Human Rights: The Charter and Beyond', *op. cit.*, p. 12 and 13.

²² Ch. McCrudden, *op. cit.* p. 18. HofL Select Committee on the EU, *op. cit.* paras. 96, 99, 103 and 136.

²³ G. de Burca, 'Human Rights: The Charter and Beyond', *op. cit.*, pp. 2 and 12.

²⁴ HofL Select Committee on the EU, *op. cit.*, para. 119.

²⁵ 'Mandate of the Working Group (II) on the Charter'. CONV 72/02, The Secretariat, The European Convention, Brussels 31 May 2002, <http://www.european-convention.eu.int/bienvenue.asp?lang=EN&Content=WGII>. 'At the Council of Europe level, accession by the European Union to the European Convention on Human Rights would require an amendment to the ECHR, necessarily to its Article 59 which currently restricts contracting parties to members of the Council of Europe, which may only be European States.' CONV 116/02, *op. cit.*, p. 19.

zontal (now general) provisions, would be just that and would serve to confirm and render clear and legally watertight the Charter's provisions. The Working Group stressed the importance of the distinction between rights and principles in the Charter, and recommended the insertion of a new horizontal Article 52(5)²⁶. In order to assuage doubts and dilemmas in the controversial area of social 'rights', in particular those of the United Kingdom government²⁷ which is opposed to their direct enforceability in the national courts, the inserted Article 52(5) of the Charter (now Article II-112(5) TCE) provides: '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*'²⁸.

All members of Working Group II either strongly supported, or were ready to give favourable consideration to, the creation of a constitutional authorisation enabling the European Union to accede to the European Convention on Human Rights. The Working Group stipulated that accession by the European Union would have legal effect only insofar as European Union law is concerned. The Group recognised that accession had become a question of credibility in a European Union to which Member States have transferred more and more competences, and which attached as a condition of membership to applicant Member States adherence to the European Convention on Human Rights. According to the Group's arguments, accession would be the tool to bring about a harmonious development in the jurisprudence on fundamental rights emanating from the two distinct European Courts, the European Court of Justice and the European Court of Human Rights. Accession would not result in a loss to the autonomy of the European Court of Justice. 'After accession, the Court of Justice would remain the sole supreme arbiter of questions of Union law and of the validity of Union acts'²⁹.

The European Council meeting in Thessaloniki welcomed the presentation of the draft Constitutional Treaty³⁰ as a good basis for the work of the Intergovernmental Conference culminating in agreement on the Constitutional Treaty in 2004³¹. The amended Charter of Fundamental Rights of the Union forming Part Two of the draft

²⁶ 'Final Report of Working Group II'. CONV 354/02, The Secretariat, The European Convention, Brussels 22 October 2002, Chapter A, p. 3-6, 8 and Annex, p. 17, <http://www.european-convention.eu.int/bienvenue.asp?lang=EN&Content=WGII>.

²⁷ Which government believes that the Constitution should recognise the diversity of the social systems in the EU, in particular collective bargaining arrangements and the role played by trade unions, and which argues that there must be a balance between regulation and labour market flexibility. Working Document 13 *Contribution by the UK, Spanish and Estonian Government Representatives*. Convention on the Future of Europe: Social Europe Working Group XI, <http://www.european-convention.eu.int>.

²⁸ (*emphasis added*). 'One may wonder to what extent the Court of Justice of the European Communities will accept such limitation.' J. Dutheil de la Rochère, *op. cit.*, p. 352.

²⁹ CONV 354/02, *op. cit.*, Chapter B, p. 11-13, *cf.* p. 14.

³⁰ CONV 820/03. The Secretariat, The European Convention, Brussels, 20 June 2003; CONV 802/03, volume II, parts two, three and four, The Secretariat, The European Convention, Brussels, 12 June 2003, http://european-convention.eu.int/doc_register.asp?lang=EN.

³¹ Presidency Conclusions, Thessaloniki European Council, 19 and 20 June 2003. <http://www.europa.eu.int/p?MAX=&BID=76&DID=76279&LANG=&FILE=/pressData/en/ec/76279.pdf&Picture=0>.

Constitutional Treaty³², incorporated all the alterations to the general provisions of the Charter on which Working Group II reached consensus as detailed in its final report³³.

Debates and negotiations concerned to limit the jurisdictional reach of the Charter and the interpretative jurisdiction thereunder of the European Court of Justice, by way of reference to the explanations³⁴ relating to the Charter, continued during the proceeding Italian and Irish Presidencies³⁵. Finally³⁶, the 5th paragraph of the Preamble of the Charter reads:

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 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.*

A new sub-article (7) to Article II-52 (now Article II-112(7) TCE) on the Scope and interpretation of rights and principles, provides: *'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'*³⁷.

The details of the explanations of the Praesidium have been moved to a Declaration concerning the explanations relating to the Charter of Fundamental Rights and incorporated in the Final Act. According to Declaration 12 annexed to the Constitutional Treaty: *'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.'* Thereafter, under the heading of Explanations relating to the Charter of Fundamental Rights, it is stated: *'These explanations*

³² CONV 802/03, *op. cit.* ['The full text of the Charter, with all the drafting adjustments given in Working Group's final report (CONV 354/02) will be set out either in a second part of the Constitution or in a Protocol annexed thereto, as the Convention decides.'] CONV 528/03, *op. cit.*, p. 3.

³³ CONV 354/02, *op. cit.*, p. 2. See also, above notes 50, 51, 97, 99, 100 and 101. Technical amendments include, *inter alia*: amendments to the heading 'general provisions governing the interpretation and application of the Charter (*emphasis added*)'; 'Community' and 'Treaty establishing the European Community'/'Treaty on European Union' have been replaced with 'Union' and with 'Constitution', respectively; and, institutions, bodies and agencies of the Union (*emphasis added*). CONV 726/03, *op. cit.*, p. 3.

³⁴ CHARTE 4473/00, CONV 49, 11 Oct. 2000. Updated under the Praesidium of President Valéry Giscard d'Estaing, CONVENT 828/1/03 REV 1, 18 July 2003; CONVENT 4554/02, p. 10. References taken from Professor A. Jacobs, 'The Fences Surrounding the Charter of Fundamental Rights in the New European Constitution', in: D. Ryland (ed.) *International Legal Essays in Honour of Jo Carby-Hall: An Era of Human Rights*, Barmarick, Forthcoming 2006.

³⁵ The 2003/2004 Intergovernmental Conference, http://europa.eu.int/scadplus/cig2004/debates2_en.htm. The Intergovernmental Conference agreed on the continuous numbering of the text of the Constitution using Arabic numerals. In order to make clear the division of the Constitution into four parts, these continuous numbers are preceded by Roman numerals corresponding to each part.

³⁶ CIG 82/04, PRESID 24, Annex 7, 16 June 2004 and CIG 85/04, PRESID 27, Annex 10, 18 June, IGC 2003 – Meeting of Heads of State or Government, Brussels, 17/18 June 2004, Brussels.

³⁷ Whereas Professor Antoine Jacobs, *op. cit.* asserts that by asserting the reference to the explanations in the preamble to the Charter the status of the explanations was, thus, elevated, he believes that it is doubtful whether the insertion of sub-article 7 has further elevated their status.

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)³⁸ 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 Charter³⁹. It is to be noted that the explanations do not have the status of law.

The Treaty establishing a Constitution for Europe was signed on 29 October 2004 in Rome⁴⁰. The Constitution establishes the European Union⁴¹, merging its three pillars, and bestows legal personality on the Union⁴². The Union is founded on the values, which are common to the Member States, of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights⁴³. The Union's objectives include, *inter alia*, its aim to promote its values⁴⁴, and, in its relations with the wider world, that it shall contribute to the protection of human rights⁴⁵. The Charter of Fundamental Rights of the Union is given Constitutional status in Part One of the Treaty. Thereunder: '*The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II*'⁴⁶. A legal basis is inserted providing that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that such accession shall not affect the Union's competences as defined in the Constitution⁴⁷. 'Fundamental Rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'⁴⁸. This strongly worded provision⁴⁹ assimilates the legal protection of fundamental rights as general principles of Union law with those fundamental rights guaranteed under the European Conven-

³⁸ Articles II-111 and II-112 of the Constitution.

³⁹ CIG 86/02 ADD 2, Provisional consolidated version of the Declarations to be annexed to the Final Act of the Intergovernmental Conference, Brussels, 25 June 2004.

⁴⁰ CIG 87/1/04, 13 Oct. 2004, signed on 29 October 2004 in Rome, <http://uc.eu.int/igcpdf/en/o4/cg00/cg00087-re01.en04.pdf>. [2004] OJ C310. This Treaty shall enter into force on 1 Nov. 2006, provided that all the instruments of ratification have been deposited, Article IV-447 TCE.

⁴¹ Article I-1, Part I of the Treaty establishing a Constitution for Europe (TCE).

⁴² Article I-7, TCE. See 'Final Report of Working Group III on Legal Personality', CONV 305/02. The Secretariat, The European Convention, Brussels, 1 October 2002, <http://www.european-convention.eu.int/bienvenue.asp?lang=EN&Content=WGIII>.

⁴³ Article I-2 TCE.

⁴⁴ Article I-3(1) TCE. Cf. Article I-19(1) TCE The Union shall be served by a single institutional framework which shall aim to promote the values of the Union.

⁴⁵ Article I-3(4) TCE.

⁴⁶ Article I-9(1) TCE. (*emphasis added*).

⁴⁷ Article I-9(2) TCE. Cf. Declaration 2 on Article I-9(2) annexed to the Final Act. In accordance with Article III-325(6) TCE.

⁴⁸ Article I-9(3) TCE. (*emphasis added*).

⁴⁹ Article 6(2) of the Treaty on European Union (TEU) provides: 'The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law.' (*emphasis added*).

tion on Human Rights. Incorporation of the Charter of Fundamental Rights of the Union into Part II of the Constitutional Treaty raises enormous potential for the development of the protection of fundamental rights as general principles of Union law⁵⁰. In furtherance of their respective roles, the European Court of Justice and the General Court⁵¹ 'shall ensure that in the interpretation and application of the Constitution the law is observed'⁵². In addition, the role of national courts, developed in the jurisprudence of the European Court of Justice, is formally recognised in the Constitutional Treaty. An additional paragraph provides: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'⁵³.

The scope certainly will exist for judicial interpretative protection, through the mechanism for referral to the ECJ for preliminary rulings on all questions of European law, concerning the Charter of Fundamental Rights of the European Union⁵⁴. Two case studies may be given in example. First, there may, thus, be an avenue of redress in European Union law (and in circumstances where one does not exist under the ECHR) for victims of health-debilitating levels of nighttime aircraft noise. One commentator has expressed the opinion that: '[t]he wide competencies of the EU and the existing secondary legislation in this area⁵⁵, in conjunction with the existing provisions of international instruments regarding the rights to private life, to property, and political participation would allow for a substantive elaboration of fundamental principles of human rights regarding environmental protection by the Court of Justice. This has not yet happened, but could happen if sufficiently innovative and resourceful litigation was started within the Member States and was forwarded via preliminary references to Luxembourg'⁵⁶. There would be scope for the European Court of Justice to give more extensive protection as long as it did not reduce the protection accorded under a comparable provision of the European Convention of Human Rights by the European Court of

⁵⁰ There was no mention of human rights in the founding Treaty of Rome in 1957. The European Economic Community was founded primarily on economic policies. There was no basis in the Treaty for a general human rights policy. In order to reinforce the principle of the supremacy of Community law, the European Court of Justice declared that fundamental human rights were enshrined in the general principles of Community law and protected by the Court. Case 29/69 *Stauder v Ulm* [1969] ECR 419. Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁵¹ The Court of First Instance will be re-named the General Court under the Constitutional Treaty.

⁵² Article I-29(1) TCE. Maintaining the legal basis for the Courts role in interpreting general principles of Union law.

⁵³ Article I-29(2) TCE.

⁵⁴ In the context of social law see A. Jacobs, *op. cit.* K. Lenearts and D. Gerard, 'The structure of the Union according to the Constitution for Europe: the emperor is getting dressed', (2004) *ELRev.* p. 289 at p. 318, submit, 'Logically, principles can therefore be judicially cognisable only in the interpretation or appreciation of the legality of those acts. That is not to say, however, that such principles cannot play a role in the interpretation of Union law more generally'.

⁵⁵ Community Directives on noise protection provides the basis for the competence of the European Court of Justice to issue such preliminary rulings.

⁵⁶ P. Eleftheriadis, 'The Future of Environmental Rights in the European Union', in: P. Alston (ed.), *The EU and Human Rights*, Oxford University Press, 1999, chapter 16, p. 529 at p. 549 and 547. See further, D. Ryland, 'Aircraft Noise versus Respect for Home and Private Life', in: D. Ryland (ed.) *International Legal Essays in Honour of Jo Carby-Hall: An Era of Human Rights*, Barmarick, Forthcoming 2006.

Human Rights⁵⁷. There would, thus, be the potential for the European Court of Justice, on a referral for a preliminary ruling from a national court, to accord more extensive protection in an interpretation of Article II-67 of the Constitution on the right to respect for home and private life, aided by the principle of proportionality⁵⁸, than the finding that there had been no violation of Article 8 ECHR by the majority of the Grand Chamber of the European Court of Human Rights⁵⁹. Moreover, a preliminary ruling of the European Court of Justice under Article 234 of the European Community Treaty⁶⁰ is legally binding⁶¹; whereas, national courts have only to take into account a judgment of the European Court of Human Rights⁶².

In the second instance, the case of *Mary Carpenter v. Secretary of State for the Home Department*, concerning the freedom to provide services and, more particularly the right of the provider's third country national spouse to reside in the Member State of origin of the provider⁶³, would support such an argument for the interpretative development of fundamental rights under the preliminary ruling procedure. The European Court of Justice, in that case declared that a European Union Member State 'may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures.' The Court read and interpreted the Treaty 'in the light of the fundamental right to respect for family life', and went on to rule that the decision to deport Mrs Carpenter constituted 'an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ...which is among the fundamental rights which, according to the Court's settled case law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community law.' According to the Court, and on the facts, the decision to deport Mrs Carpenter did 'not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr Carpenter to respect for his family life, and on the other hand, the maintenance of public order and public safety.' It, thus, constituted an infringement which was not proportionate to the objective pursued⁶⁴.

⁵⁷ Article II-112(3) TCE: 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. K. Lenaerts and E. de Smijter, *op. cit.*, p. 292, 293 and 296.

⁵⁸ In accordance with Article II-112(1) CTE on the scope and interpretation of the Charter's rights and principles, Any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law, respect the essence of those rights and freedoms and satisfy the principle of proportionality.

⁵⁹ Application no. 36022/97, *Halton and Others v The United Kingdom*, judgment 8 July 2003. The European Court of Human Rights, sitting as a Grand Chamber.

⁶⁰ Article III-369 TCE.

⁶¹ The author is thankful to Professor Jo Carby-Hall for raising this relevant point.

⁶² Section 2 of the Human Rights Act 1998. J. Wadham, *The Human Rights Act 1998*, Oxford 2003, p. 63.

⁶³ Case C-60/00, ECR 2002 I 6279.

⁶⁴ *Ibidem*, paras. 40, 46, 41, 43 and 45 of the judgment.

The implications of this judgment for an interpretive ruling by the European Court of Justice of the right to respect for home and private life as a general principle of Union Law are profound.

Concluding Comments

The interpretative provisions incorporated in the Constitution may have circumvented the direct enforceability of the Charter of Fundamental Rights. The scope still exists for the provisions of the Charter, embedded as Part II of the Treaty, to be enforced indirectly by way of an interpretative ruling from the European Court of Justice, on a reference from a national court on a question of Union law. Potentially, there may be conflicts with the European Convention on Human Rights and the constitutional traditions of Member States. This is a constituent element of a healthy legal process in which laws evolve according to circumstances, social acceptance, policy and time⁶⁵. This author maintains that indirectly, in interpretation, the Constitution will give rise to some interesting case law on the protection of fundamental rights in the European Union.

⁶⁵ P. Eeckhout, *op. cit.*, p. 945 at p. 993. D. Spielman, 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities', in: P. Alston (ed.), *The EU and Human Rights*, Oxford 1999, p.757 at p. 778 and 779. At the same time see J. Dutheil de la Rochère, *op. cit.*, p. 353, according to whom, 'the risk of contradiction between the case law of the ECJ and the Court of Human Rights, which had been extraordinarily exemplified at the time the Convention was elaborating the Charter, now seems less threatening than expected.' She cites Case C-112/00 *Schmidberger*, as an 'example of the effort made by the ECJ to reconcile the free movement of goods under EC law with the freedom of expression and freedom of assembly and association guaranteed, within certain limitations, by Articles 10 and 11 of the ECHR.'