

Submission by Liberty to the House of Lords European Communities Committee, Sub Committee E (Law and Institutions) on proposals for an EU Charter of Rights

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research. It is the largest organisation of its kind in Europe and is democratically run.

1 Introduction

Liberty welcomes the initiative of the European Council to create a body (now called "Convention") charged with drafting a European Charter of Fundamental Rights ("the Charter"). The particular significance of Annex IV of the conclusions of the Cologne European Council is that, for the first time, reference is made specifically to the European Union, rather than the European Community. The European Council there, rightly, recognises that:

"Protection of fundamental rights is ... an indispensable prerequisite for her [the Union's] legitimacy."

In this context, Liberty particularly welcomes the initiative of this Committee to conduct an inquiry at such an early stage in the debate. Building on this Committee's expertise gained, in particular, in the context of its two previous inquiries into human rights in the EC, any report adopted by this Committee, will hopefully inform not only the Convention in drafting the Charter but also the UK government in its approach to the Convention's activities.

The Cologne European Council, in Annex IV to its conclusions, expressly refers to the "overriding importance and relevance" of fundamental rights and the need to make this "overriding importance and relevance more visible to the Union's citizens". It is therefore highly regrettable that the only firm undertaking by the European Council is to propose the draft Charter as a solemn declaration made by the Council, the Commission and the European Parliament and expressly leaves open the question of "whether and, if so, how the Charter should be integrated into the treaties.". In Liberty's view there are already sufficient solemn declarations (whether joint or unilateral) as to the importance of fundamental rights. Though not deprived of all legal effect and "must be taken into account", it is clear that these declarations are not binding instruments of European Community, let alone European Union, law, enforceable as such by the European Court of Justice ("ECJ"). As Alston and Weiler rightly state:

"A cleavage between the increasingly generous verbal affirmation of commitment to human rights without matching the rhetoric with visible, systematic and comprehensive action will

eventually undermine the legitimacy of the European construct."

Liberty, however, takes heart from the speech made by the Convention's chairman, former German President, Professor Dr. Roman Herzog, upon his election on 17 December 1999: "We all share the same basic conviction, or else we would not have agreed to join the body, that it is time to give a clear signal to the outside world that the European Union must not be any less bound to its citizens than are the Member States under their own constitutional laws.

...

We know how much has already been done over the years to turn the concept of fundamental and human rights into reality within the European Union. We are going to draft a text that will not be immediately binding as European law or Community law. Despite this, we should constantly keep the objective in mind that the Charter which we are drafting must one day, in the not too distant future, become legally binding. This calls for a little discipline on our part, as I feel we should not draft a list which will need to be curtailed or revised when the time comes to make it binding. We should therefore proceed as if we had to submit a legally binding list, and we should not forget that our mandate is in principle to draft a list addressed to the bodies of the European Union, by which they will be bound. This being so, it must not only be our duty but also in our joint interest to take account of national traditions, national legal traditions, national decision-making structures, not to mention the dignity of the national parliaments, as after all it will be a list of fundamental rights addressed to the bodies of the European Union." (emphasis added)

Liberty's submissions set out below are therefore based on two premises taken from this passage:

- a) those within the jurisdiction of the European Union should be no less protected against potential violations of their fundamental rights committed by the institutions of the European Union or in execution of a European Union instrument than they are, under any national laws, against potential violations of their fundamental rights by national authorities; and
- b) any Charter drafted by the Convention should be drafted in a form that can and will "in the not too distant future" become a legally enforceable and binding document; a Bill of Rights for the European Union.

2 The need for an EU Charter

Liberty shares the view that there are currently no "...systematic violations of human rights occurring within the Union which remain entirely unaddressed. But, by the same token, there clearly are many human rights challenges which persist and to which greater attention must be given."

The process started by the Cologne European Council and now in the hands of the Convention provides a unique opportunity to address these challenges. Though this Committee previously concluded that a "separate catalogue of fundamental rights for the Community" was undesirable, this now seems inevitable and the opportunity should be used to achieve the aims set out at paragraph 5(a) and (b) above.

2.1 Human Rights in the EU

It is undisputed that the extent of human rights protection provided by EC law, and primarily through the case-law of the ECJ, is equal if not more extensive than that provided for by most national constitutions. The ECJ has held that: "...it is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories."

This (in principle) applies both to the ECJ as well as national courts hearing EC cases.

The protection offered under these "general principles", however, has two significant weaknesses:

- c) it has never been (fully) incorporated into the EC- or EU-Treaty; and
- d) as an enforceable set of rules, it is really only enforceable within the context of the EC Treaty.

2.2 Substantive defects

Only part of this "general principle" has been "incorporated" into Article 6(1) and (2) (ex-Article F) of the Treaty on European Union ("TEU"):

"The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

It is clear at first blush that Article 6 is drafted in terms significantly more restrictive than the ECJ's statement of the law: no mention is made (with the exception of the ECHR) of the "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories". It is, however, this (missing) limb of the ECJ's formula, which is of crucial importance. It has enabled the ECJ (and its Advocates General) to draw inspiration from a much wider variety of human rights instruments on which the Member States had "collaborated", such as the International Covenant on Civil and Political Rights, the European Social Charter and ECHR Protocols, despite the fact that not all Member States had ratified these instruments.

This ability to provide (at least in relation to substantive rights) extensive human rights protection unhindered by "the lowest common denominator" represented by those instruments ratified by all Member States, will become even more important as the EC now has competence in areas inextricably linked with some of the most fundamental human rights: e.g. in such areas as the (new) Title IV "Visas, asylum, immigration and other policies related to free movement of persons" .

Furthermore, it will allow the ECJ to treat fundamental human rights law as a "living" system of law by being able to take account of recent developments in international human rights law. One example of a recent Convention with relevance to EC law is the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine .

2.3 Enforcement defects

One disadvantage of the ECJ's statement of the role of human rights in EC law, which is exacerbated by the incomplete "incorporation", is the fact that neither the individual nor the domestic judge, sitting as an EC court, can with any degree of certainty identify the fundamental human rights protected by EC law. At least ostensibly, this is the problem that the initiative of the Cologne European Council and the Convention is seeking to address.

It is for this reason that Liberty would welcome it if the Charter:

- e) identified and enshrined the correct approach as adopted by the ECJ to the bases of human rights protection in EC law as the approach underlying the Charter and its future application and development; and
- f) identified and listed those rights already recognised and protected in the case-law of the ECJ, thereby increasing the legal certainty of the individual and the domestic courts when confronted with issues of EC law and/or actions of EC institutions.

2.4 EC

A further (recent) reduction in (judicial) protection from potential violations of fundamental rights further underlines the need for a Charter which will provide a human rights "safety net" within the areas of competence of the EC (and EU) and irrespective of artificial limitations on jurisdiction imposed either in the Treaties or in secondary legislation. Two prime examples are:

g) Article 68(2) (ex-Article 73p):

"In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) [abolition of controls on internal borders] relating to the maintenance of law and order and the safeguarding of internal security."

and

Article 2(1) of the Schengen Protocol:

"In any event, the Court of Justice shall have no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security."

Inevitably, measures and decisions taken in relation to internal security and the maintenance of law and order carry with them significant human right implications (as can already be seen, e.g. in the context of the Schengen Information System, Europol and Eurodac). and

h) Article 3(2) of Directive 95/46/EC expressly exempts from its application:

"... the processing of personal data:

- in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law"

By this mechanism the first EC legislation primarily concerned with the protection of fundamental rights (and in particular the right to respect for private life under Article 8 ECHR) exempted from its application some of the most human rights "intensive" areas of application. The most notable anomaly of this example in terms of human rights protection is that most of the Member States have not translated this caveat into the domestic implementing statute. In the EC context this is of significance e.g. in relation to the exchanges of data between the customs authorities of various Member States *inter alia* under the Customs Information System. However, it is proving even more significant in the context of EU activities, such as the Schengen Information System.

2.5 EU

Far more significant, however, is the lack of (any) enforceable human rights protection in the context of the inter-governmental co-operation between the Member States, be it in the framework of the Second and Third Pillar of the European Union or otherwise.

This limitation is currently expressly provided for in Article 46(d) (ex Article L) of the TEU which provides that the ECJ shall have jurisdiction over:

"Article 6(2) with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty."

The ECJ has so far only once exercised this jurisdiction: Case C-17/98 *Emesa Sugar (Free Zone) NV v Aruba*, Order of 4 February 2000, and only in the context of EC law. In that case, the ECJ reviewed its own procedures concerning Advocate General's opinions and closure of oral proceedings against the backdrop of the case-law of the European Court of Human Rights. The ECJ distinguished the ECHR jurisprudence and gave itself a clean bill of health. This seems to be one of the most obvious examples where access to the European Court of Human Rights, as final arbiter of the interpretation and application of the ECHR, would be highly desirable. To have such access would effectively prevent two parallel bodies of case-law on the meaning of the ECHR to arise within Europe.

The ECJ's jurisdiction within the context of the TEU is limited to

i) under Title VI, the power to

i) give preliminary rulings on the validity or interpretation of framework decisions, the interpretation of conventions and the validity and interpretation of implementing measures, if the Member State in question has made the required declaration; and

ii) to review the legality of framework decisions and decisions in actions brought by Member States or the Commission.

Both these jurisdictions are, however, subject to the caveat that

"The Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibility incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

j) under Title VII, the power to review the operation of the provisions authorising some Member States to establish closer co-operation.

In principle, only the preliminary reference procedure (if available) provides any possibility for the individual to seek clarification of his fundamental rights within the European Union from the ECJ and this only in the context of Title VI.

However, some of the activities undertaken under the TEU are particularly human right intensive. This leads to two particular problem areas:

k) where the EU institutions themselves may be in violation of an individual's fundamental rights; and

l) where the operation of EU structures means that one Member State acts upon (unchecked) information from another Member State where the Member State or person responsible is difficult or impossible to make out.

An example of the latter scenario can be found (almost daily) in the operation of the Schengen Information System ("SIS") as applied in the immigration context. As the Committee will be aware, the rules relating to the Schengen Information System "defaulted" into the Third Pillar as the Member States could not agree on a legal base. To provide a concrete example: Mr X seeks to enter the Netherlands from the UK (in exercise of his free movement rights). He is refused entry by the Dutch authorities on the basis of an entry into the SIS by the German authorities. Under the Schengen Agreement, the Dutch authorities are not empowered to check the accuracy of the data entered by the Germans; furthermore, the SIRENE bureau in Germany that entered the data on the SIS is also not responsible for the accuracy of the data unless domestic law provides otherwise. As a matter of domestic law in Germany, the individual officer who entered the data domestically (who in the immigration context is based within the borough or county authority) is responsible and only (s)he is able to correct any data entered. As a matter of fact, the individual, unable to enter continental Europe, is without any effective remedy to seek to enforce his right of free movement, which may carry with it his right to respect for family life, and his right to respect for private life (in the context of data protection, the right to have incorrect data corrected and/or deleted) etc.. The consequences of this are even more significant (potentially involving Article 3 ECHR (prohibition of torture) issues) where the information entered into the SIS leads to (automatic) expulsion of the individual from the Schengen territory.

The Joint Supervisory Authority of the SIS has no powers to intervene and nor will the EC Data Protection Supervisor have such powers, due to the limitations imposed by Directive 95/46. This is particularly concerning where it appears that because of the division of labour between the domestic agencies providing the data (immigration) and those inputting them on the SIS (police) neither seems to pay any attention to the accuracy and/or quality of the data entered.

A further example of the concerns arising in the context of the TEU is the operation of the Dublin Convention "determining the State responsible for examining applications for asylum lodged in one of the member states of the European Communities" (emphasis added). In about 1997, there were reports of an increasing uneasiness amongst Member States as to the applicability of the Dublin Convention to those who withdrew their asylum application

and claimed "subsidiary" protection instead, e.g. under Articles 3 ECHR and/or UN Convention against Torture. The UK Presidency is reported to have asserted that the Dublin Convention continues to apply. In light of the very different state practice as to the extent of Article 3 protection, which according to the European Court of Human Rights is absolute, this assertion could have had far reaching consequences. However, there was no means of getting either an authoritative ruling from the ECJ on the issue nor could the individual returned challenge this interpretation of the application of the Dublin Convention in any Community courts.

2.6 Standing

However, Article 46(d) TEU not only imposes significant limits on the jurisdiction of the ECJ. Where it does confer jurisdiction it limits the causes of actions to those already in existence: e.g. Article 230 (ex-Article 173) EC Treaty, which limits the rights access to the ECJ for natural or legal persons to those to whom the decision is addressed or to those to whom it is of "direct and individual concern". The definition given to this requirement is far more restrictive even than the "victim" requirement imposed by Article 34 ECHR and section 7(1)(b) and 7(7) of the Human Rights Act 1998.

This deficit was recognised by the ECJ itself. In its report dated May 1995 "On certain aspects of the Application of the Treaty on European Union", the ECJ questioned whether the Article 173 EC Treaty criteria were "sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions." In the context of the Charter the "victim" test laid down by the ECHR must surely be the minimum standard for access to the ECJ; any more restrictive test is likely to fall foul of the ECHR in itself.

Enforcement of fundamental human rights in the EU/EC context and effective monitoring of compliance with any Charter are therefore of fundamental importance to the achievement of the aims set out above.

In the context of monitoring compliance, Liberty would advocate the creation of an independent Human Rights monitoring centre along the line of the European Monitoring Centre on Racism and Xenophobia in Vienna. As one of the aspects of enhanced enforcement mechanisms it may be considered that such a body could or should be able to bring "test" cases to the ECJ. The creation of such a body seems to have some support amongst the Member States: paragraph 46 of the Conclusions of the Cologne European Council stated that, following the Presidency's interim report on human rights, it concluded to consider "the advisability of setting up a Union agency for human rights and democracy". Liberty is of the view that this issue is inextricably linked with the drafting of the Charter. It could provide the platform for the creation of an independent agency monitoring compliance with the Charter by the European Union institutions.

2.7 Subsidiarity

The Committee expressly asked what role the principle of subsidiarity should play in this process. As set out above, the primary aim of the Charter should be to ensure that individuals within the jurisdiction of the European Union should be no less protected against potential violations of their fundamental rights committed by the institutions of the European Union or in execution of a European Union instrument than they are, under national law, against potential violations of their fundamental rights by national authorities. It is therefore not advocated to grant the EU new legislative competence in the whole field of fundamental rights.

For the reasons set out above, Liberty is of the view that the adoption of an EU Charter is a clear expression of the principle of subsidiarity in action. The Protocol on the Application of the Principles of Subsidiarity and Proportionality expressly states the criteria to be: "the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of the national constitutional system and can therefore be better achieved by action on the part of the Community."

EC/EU action is particularly appropriate where the potential violations of fundamental rights are such that the Member State who may prima facie be responsible, is almost by definition not able (at least unilaterally) to remedy the situation. The most recent example of such a

situation arising in the EU context are the two decisions of the French Conseil d'Etat of 9 June 1999 in which that court held the German authorities to have erred in law by including the applicants in the Schengen Information System. This leaves any applicant in the highly undesirable state of having convinced the courts of one Member State that their entry in the SIS is incorrect but without any means of enforcing such a judgment against the Member State who entered the data on the SIS nor against any other Member State. In light of the intention to create an area within which there is free movement of persons the legal uncertainty that arises out of this situation can only be a major obstacle to such freedom of movement: the individual would have to "hope" that the other Member States shared the French interpretation of the Schengen Agreement and not the German interpretation. This highly unsatisfactory state of affairs can only be fully remedied by giving the ECJ jurisdiction over such matters and in particular the issue of observance of fundamental rights.

2.8 ECHR

The defects set out above are also not adequately remedied by access to the European Court of Human Rights. Though there has been some development in relation to the admissibility of complaints involving EC law, these have been confined to issues where the Member State, in implementing its obligations under EC law, has not complied with its obligations under the ECHR: the latest decision of the Court *Matthews v United Kingdom* is a case in point. Though it has been read as suggesting that the European Court of Human Rights would be willing to review all Community acts, this is far from certain. It has been pointed out that:

m) the European Court of Human Rights itself distinguished this case on the basis that the instruments which led to UK to take the course of action it took were "freely entered into by the United Kingdom" with one of them not being subject to the ECJ's jurisdiction on the basis that it was a treaty (not the case with the majority of EC/EU instruments especially if adopted under qualified majority voting); and

n) it has been suggested that the case can be further distinguished on the basis that EC law did not require the UK to take the course it took but rather left it to the UK to define the extent of its territory for the purposes of European Parliamentary elections. The application in *T.I. v United Kingdom* and Application No. 51717/99 *Guérin Automobiles v The 15 Member States of the European Community*, may well lead to some clarification of this issue.

Unless the Court of Human Rights departs from its (and the Commission's) earlier case-law, however, it seems unlikely that an application directed against a EC or EU measure (in particular where it does not take the form of a Treaty amendment) would be admissible in the European Court of Human Rights. By way of an example, the Committee is referred to App 21090/92 *Heinz v. The Contracting States Party To The European Patent Convention Insofar As They Are High Contracting Parties To The European Convention On Human Rights*, i.e. Austria ; Belgium ; Denmark ; France ; Germany ; Greece ; Ireland ; Italy ; Liechtenstein ; Luxembourg ; Netherlands ; Norway ; Portugal ; Spain ; Sweden ; Switzerland ; The United Kingdom. The Commission declared this application inadmissible on 10 January 1994 and, in doing so, expressly relied on its decision in *M & Co v Germany*, where it had held that an application against the enforcement of a fine imposed by the EC Commission for breach of Article 81 (ex Article 85) EC Treaty was inadmissible.

The uncertainty about the extent of ECHR supervision of EC/EU measures makes it highly desirable, as part of the Charter process, to open the way to the accession of the EC/EU to the ECHR. This is in line with Liberty's long-standing position and is also advocated inter alia by the Parliamentary Assembly to the Council of Europe and Judge Marc Fischbach of the European Court of Human Rights and Deputy Secretary General of the Council of Europe, Hans Christian Krüger, official observers of the Council of Europe to the Convention process. The timing of this process, i.e. to coincide with the conclusion of the IGC, makes it particularly appropriate to consider accession now, as the Treaties are to be amended in any event in order to accommodate enlargement.

3 The status of the Charter

For the reasons set out above, Liberty is of the view that any Charter adopted by the institutions at the end of the year should, as soon as possible, be given binding legal force, preferably by incorporation into the EC and EU Treaties. Any such Charter should,

furthermore, be subject to the enforcement and monitoring mechanisms set out at paragraphs 26 to 29 above. However, of particular importance is the supervisory jurisdiction of the ECJ both by means of preliminary rulings and (enhanced) direct actions.

In relation to the relationship between the ECJ and the European Court of Human Rights, Liberty maintains the position it took in 1992, supported by the EC Commission, that "...the relationship of the two courts would be no different to that between a national court of final appeal and the European Court of Human Rights."

The ECJ's recent decision in Case C-17/98 *Emesa Sugar (Free Zone) NV v Aruba*, if it came before the European Court of Human Rights, would be no different to the position of the German Bundesverfassungsgericht in *Pammel v Germany*, where the European Court of Human Rights found that the proceedings before the Bundesverfassungsgericht did not comply with the requirements of Article 6(1) in respect of a hearing within a reasonable time.

4 The scope of the Charter

The universality of human rights as expressed inter alia in Article 1 ECHR or Article 2(1) ICCPR requires that the rights laid down in the Charter and developed thereunder must be secured to "everyone within their jurisdiction" and, as a matter of principle, should not be limited to citizens of the Union. Though Liberty recognises that, traditionally, certain rights (such as the right to vote and/or stand in elections) has been reserved to own nationals, any such limitations should be kept to the absolute minimum and any such restriction should be subject to sufficient safeguards against abuse. It is highly desirable and in the interest of the integration of long-term residents that any such limitations should not exclude long-term residents after e.g. a period of five years lawful residence in the EU. For the reasons set out above, it is crucial to the success of the Charter that it applies to all three pillars. Anything less would make the Charter no more than a restatement of existing law with likely negative consequences in

- o) Restricting the ECJ's otherwise generous approach as to the basis of its human rights supervisory jurisdiction; and
- p) By failing to bring the rights closer to the individual (as envisaged by the Cologne Council Conclusions) by failing to include some of the areas of law with the most significant human rights implications for the individual.

5 The content of the Charter

As is clear from the above submissions, Liberty is of the view that any Charter must build on the ECJ's formula of fundamental rights as a general principle of EC law as developed in Opinion 2/94 and *ERT*. This formula (in full) being the starting point for the Charter it is inevitable that

- q) The Charter not only includes civil and political rights but also some social and economic rights; and
- r) In due course, more economic and social rights will be recognised by the ECJ in developing the principles laid down in the Charter.

This approach would also inevitably make the Charter a "living instrument" in the same way that the ECJ's approach is currently, while being more visible as a guarantee of fundamental rights for the individual and the domestic courts having to implement it (at least in the EC context).

6 Conclusion

It is early days yet in the development of the EU Charter of Fundamental Rights but Liberty hopes that the above submissions assist the Committee in its task of providing constructive input into both the Convention's work and the Government's approach thereto.

Liberty intends to monitor the developments of the EU Charter closely over the next 10 months and would be very happy to assist the Committee further be it through further written submissions or by giving oral evidence.