

CHAPTER THIRTEEN

HUMAN RIGHTS AND CIVIL LIBERTIES

Constitutional and Administrative Law

GENERAL INTRODUCTION TO CIVIL LIBERTIES

Protecting Rights

For years there had been discussion of a need for a bill of rights. It appears we now have such a document. The European Convention was incorporated into domestic law by the **Human Rights Act 1998**, which came into force in October 2000.

The material below will consider the arguments for and against a bill of rights and the content it should have and the form it should exist in. Incorporating the European Convention into UK law provided a way of addressing the issue. It may well be that this does not do all that you might be desired of a bill of rights and there may well be problems with the chosen solution. Any critique of this constitutional development should address the value of a code of fundamental rights, an overview of the workings of the European Convention and an evaluation of its successes and failures (if any) since commencement.

The preamble to the Act states that it is intended to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights¹; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.

- 1(1) *In this Act, "the Convention rights" means the rights and fundamental freedoms set out in-*
 - (a) *Articles 2 to 12 and 14 of the Convention, and*
 - (b) *Articles 1 to 3 of the First Protocol, as read with Articles 16 to 18 of the Convention.*
- 1(2) *Those Articles are to have effect for purposes of this Act subject to any designated derogation or reservation.*
- 2(1) *A court or tribunal determining a question which has arisen under this Act in connection with a Convention right must take into account any judgement, decision, declaration or advisory opinion of the European Court of Human Rights, report adopted under Article 31 of the Convention, decision of the Commission in connection with Article 26 or 27(2) of the Convention, or decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.*
- 3(1) *So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*
- 3(2) *This section-*
 - (a) *applies to primary legislation and subordinate legislation whenever enacted;*
 - (b) *does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and*
 - (c) *does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.*
- 4(1) *Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with one or more of the Convention rights.*
- 4(2) *If the court is satisfied that the provision is incompatible with one or more of the Convention rights, it may make a declaration of that incompatibility.*
- 4(3) *Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with one or more of the Convention rights.*
- 4(4) *If the court is satisfied-*
 - (a) *that the provision is incompatible with one or more of the Convention rights, and*
 - (b) *that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.*
- 4(5) *In this section "court" means- Generally courts from the High Court up.*

¹ Note that Articles 1 and 13 are not included in the HRA

Constitutional and Administrative Law

- 4(6) A declaration under this section ("a declaration of incompatibility")-
- (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
 - (b) is not binding on the parties to the proceedings in which it is made.
- 5 If a declaration is in issue the Crown can join the proceedings.
- 6 Liability for public authorities (which includes a court or tribunal, and any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament) under the convention unless primary legislation meant that the authority could not have acted differently; or in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
- 7 Alleged victims under 6 above will be able to bring proceedings or rely upon the Convention in proceedings. The remedy will be the remedy that the particular body has available to it. The HRA does not provide for new remedies.
- 10 If a provision of legislation has been declared under section 4 to be incompatible with one or more of the Convention rights; or it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights, a provision of legislation is incompatible with one or more of the obligations of the United Kingdom arising from the Convention a Minister can amend the legislation using the power conferred by this subsection. Amendment will include repeal.
- 11 The remedial order can be made to operate from a date earlier than it is made.
- 19(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill- (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

Hood Phillips tells us that in English Law there are no strict fundamental rights in the sense of having rights that are entrenched and inalienable. Due to adherence to the Doctrine of the Supremacy of Parliament we do not have a written constitution with entrenched provisions. Compare this with the constitution of the U.S.A. where the courts have the power to declare purported legislation unconstitutional if it attempts to undermine constitutionally protected rights of the individual. In this sense our courts do not have the power of judicial review of the legislature as opposed to judicial review of the executive and administrative affairs. This position would not be altered by the Human Rights Act.

The notion of natural or fundamental or human rights has been considered in various societies at different times in different places. Should we have and should we protect what are often called Human Rights? There have been suggestions that they should only apply to particular societies. Others suggest that there are certain rights that should apply to all societies. Allied to this is the idea that the state should consciously uphold rights.

A number of attempts have been made to suggest universal rights, for instance the Universal Declaration of Human Rights by the United Nations in 1949, which the U.K. signed but which has no enforcement mechanism, since it is only a non-binding declaration. The European Convention on Human Rights 1950 entered into force in 1953. It was based on the U.N. declaration. The U.K. signed in 1951. Other parties to the convention enacted it as part of their domestic law. Several European States have not enacted it but they have Bills of Rights within their written constitutions achieving the same or similar results. Until 2000 the European Convention could be used in three circumstances by the English Courts ;

- As an aid to interpretation in ambiguous cases.²
- To assist judicial reasoning
- To delimit the outer boundaries of the Common law.³

² See ex parte See **Brind**

³ See **Derbyshire County Council v. The Times**.

Constitutional and Administrative Law

The courts were able to take account of the Convention because of the general principle of Statutory Interpretation that there is a presumption that the legislature will not legislate contrary to treaty obligations, but since the presumption could be rebutted by clear words and intentions the Convention could not formally bind the courts. Its impact was further limited because the type of language used in the Convention was alien to UK judges used to applying specific terminology via the three forms of statutory interpretation. Contrast the judgements of Denning with that of Scarman in **Ahmed v ILEA**⁴ regarding a teacher of the Muslim faith who claimed he had been discriminated against for religious reasons contrary to art 9 ECHR.

Denning ' ... *the convention is not part of our English law, but as I have often said, we will always have regard to it. We will do our best to see that our decisions are in conformity with it. But it is drawn in such vague terms that it can be used for all sorts of unreasonable claims and provoke all sorts of litigation ... I see nothing in the ECHR to give Mr Ahmed any right to manifest his religion on Friday afternoons in derogation of his contract of employment and certainly not on full pay.*'

Scarman ' ... *if the section (s30 Education Act 1944) lends itself as successful human rights or constitutional legislation must lend itself, to judicial interpretation in accordance with the spirit of the age, there is nothing in this point, save for the comment that Parliament by refusing to be too specific was wiser than some of us have subsequently realised. The choice of construction, while it must be exercised judicially, is ours ...*'

Lord Templeman in **Lord Advocate v Scotman Publications**⁵ ' ... *it is for Parliament to determine the restraints on freedom of expression which are necessary in a democratic society. The courts of this country should follow any guidance in a statute. If that guidance is inconsistent with the requirements of the Convention then that will be a matter for the Convention authorities and for the UK government. It will not be a matter for the courts. ...*'

In **Malone v MPC**⁶ : Megarry : reiterated that the ECHR is not law in the UK : then referring to its effect on statutory interpretation '.... *I readily accept that if the question before me were one of construing a statute enacted with the purpose of giving effect to obligation imposed by the Convention, the court would readily seek to construe the legislation in a way that would effectuate the Convention rather than frustrate it. However, no relevant legislation of that sort is in existence. ...*' Note of course that it is in existence now.

The dicta of Gibson LJ and Butler-Sloss LJ in **Derbyshire CC v Times**⁷ indicate a move towards judicial recognition of the Convention in the UK as a source of law in situations where there is an omission in the law or uncertainty in which case the principles of the Convention should form the basis of Judicial decision making, This is however far from complete recognition of the Convention since it would have no impact where UK law already exists in relation to the dispute and that law is clearly at variance with the Convention,

The ECJ has also gone some way towards basing its decisions on the tenets of the Convention where applicable - but clearly again this does not amount to full adoption of the Treaty as UK Law. The Treaty on European Unity however appears to go much further than this and seems to state that the EC must provide itself with the means necessary to attain the objectives of the Convention and carry through its policies.

The European Convention on Human Rights

Considering the Universal Declaration of Human Rights 1948 the aim is to secure universal recognition and observance of the rights declared within it and to achieve greater unity between states. Reaffirming profound belief in fundamental freedoms as the foundation of justice and peace and being resolved that as nations of a common heritage have agreed as follows:-

- Article 1 signatories shall ensure rights and freedoms in articles 2-18.
- Article 2 right to life - excepting due process of law. See Sixth Protocol to the Convention.
- Article 3 torture etc not permitted. An absolute right.
- Article 4 no slavery : forced labour - excluding work in prison - work in lieu of conscientious objection to military service - emergency work - civic obligations.

⁴ **Ahmed v ILEA** 1978

⁵ **Lord Advocate v Scotman Publications**

⁶ **Malone v Metropolitan Police Commissioner** [1979] Ch 344

⁷ **Derbyshire CC v Times** [1993] 143 NLJ 283

Constitutional and Administrative Law

- Article 5 right to liberty and security of the person - excepting imprisonment regarding due process of the law. Right to be informed of charges made against an arrested person : to be taken before a court quickly : availability of mechanism to question lawfulness of arrest & subsequent compensation if appropriate.
- Article 6 right to a fair, public trial - exclusions regarding national security, public morals, public order, juveniles and in the interests of justice: presumption of innocence : legal representation : legal aid : rules of natural justice.
- Article 7 No retrospective criminal offences: unless criminal in international law even though not in that state at the time the act was committed.
- Article 8 Private life and correspondence to be respected: exceptions for national security: public safety: economic well being of the state : to prevent crime.
- Article 9 Freedom of thought, conscience and religion - alone or in groups and to teach religion: exceptions to public worship for public order health and morals and the protection of others.
- Article 10 freedom of expression: to give and receive opinions: exclusion to licence the media: duties imposed on the media.
- Article 11 freedom of assembly and trade unions: exceptions in the public interest.
- Article 12 Freedom to marry - according to domestic law.
- Article 13 Remedy for breach of the above.
- Article 14 Above rights available without discrimination for sex, race, colour, language, religion, political or other opinion, national or social origin, association, property, birth or status.
- Article 15 State can derogate from the above in times of war and public emergency.
- Article 16 Aliens do not have to be given political rights.
- Article 17 The only permitted exceptions are those outlined above.
- Article 18 The exceptions can only be used for the purposed outlined above.
- Article 19 established the European Commission of Human Rights and the European Court of Human Rights.
- Article 20 commission to have a representative from each signatory state.
- Article 21 representatives to be elected by a committee of ministers.
- Article 22 For the Commission an election process.
- Article 23 Commission members sit in individual capacity.
- Article 24 member states can refer other states to the Commission for alleged breaches of the Convention.
- Article 25 Individuals can petition the Commission.
- Article 26 All domestic remedies must be exhausted first.
- Article 27 petitions must not be anonymous and can be rejected if irrelevant.
- Article 28 Investigation process.
- Article 29 Investigating sub-commission includes the complainant state and defendant state if relevant - the other 5 members to be chosen by drawing lots.
- Article 30 May reach a friendly settlement.
- Article 31 If no settlement a report is published.
- Article 32 If there is no judicial hearing under Article 48 the commission may rule on the legality of the affair and require remedial action - and can publish a report if no remedial action taken and decide to take action (what action is not specified).
- Article 33 Commission meets in camera.

Constitutional and Administrative Law

- Article 34 Majority voting system.
- Article 35 Secretary General of the Council of Europe convenes meetings as circumstances require.
- Article 36 Commission draws up its own procedures.
- Article 37 *****
- Article 38 Judges of the European Court of Human Rights to be drawn one from each signatory state.
- Article 39 Judges elected by the Consultative assembly- candidates being nominated by member states.
- Article 40 judicial tenure - 9 years - split appointment procedure.
- Article 41 Court presided over by President & Vice President for 3 years.
- Article 42 *****
- Article 43 *****
- Article 44 Only signatories have the right to bring an action.
- Article 45 jurisdiction covers interpretation of the convention.
- Article 46 Any signatory can make reference to the court on interpretation of the convention compulsory : with or without a rider that other concerned contracting states must do the same.
- Article 47 Efforts for a friendly settlement are a prerequisite.
- Article 48 Who can bring an action and in what circumstances?
- Article 49 The availability of jurisdiction is for the court to decide.
- Article 50 The court can compensate individuals if the signatory state is unprepared to do so.
- Article 51 Reasons for decision must be given : dissenting judgements permitted.
- Article 52 Court judgement shall be final.
- Article 53 Signatories undertake to abide by courts decisions.
- Article 54-9 *****

Note there are a number of protocols as well.

Whilst the European Court of Human rights at Strasbourg can make a decision as to whether or not there has been a breach of the convention it cannot enforce decisions and cannot annul Acts of the British parliament. It merely establishes a climate of opinion which is dependent on the nature of the government concerned.

Individual Applications to the E.C.H.R.

Art 25: Individuals who claim to be directly affected victims of a violation of the convention must address a petition to the Secretary General of the Council of Europe.

Art 26: All domestic remedies must be exhausted first so as to give the state the chance to conform with the convention. In **Lawless v Ireland**⁸ the applicant failed to apply for Habeas Corpus in Ireland so his application was not allowed. The applicant must have applied for domestic remedies within the time limits prescribed by domestic law. The applicant must apply to the commission within 6 months of the final decision of the domestic court.

Art 27: Applications cannot be anonymous: the same issue cannot be discussed twice : abuse of the right to petition and ill-founded petitions will be rejected. Note that similar rules exist both for the ECHR and for the ECJ in that neither court will entertain mere questions of law based on hypothetical issues - there must be a factual case and an actual complaint.

Art 28: The petitioner must be prepared to be examined by the commission.

Rules of the court : The domestic remedy sought by the applicant must be adequate for the objects of the application and must be effective.

⁸ **Lawless v Ireland** (1961)

Constitutional and Administrative Law

Importance of and influence of the ECHR

By 1990 there were 17,000 applications of which only 700 were admitted, this being only the first hurdle. By then 30 cases had been heard against the U.K. with a finding against them in 21 cases. Bradley and Ewing state that to 1995 there were 35 cases with at least one finding against the U.K., much less than Italy with 82, France with 29 and Germany with 11. When population and the number of years in which it has been possible to petition are taken into account then Britain came 14th out of 30. Thompson (1997) states that there have been more than forty cases involving the U.K. The U.K. cases have been on issues as wide ranging as corporal punishment in Scottish schools, freedom of the press in relation to the thalidomide cases, and detention in Northern Ireland. Statutes have been introduced by the UK government in response to applications to and findings of the court. Constitutional Law.

Some ECHR Cases involving the U.K..

Brogan v UK 1988: findings that UK violates the ECHR with its anti terrorist legislation.

Powell v UK: 1990 P complained that there was no remedy available in the UK courts for the disturbance he suffered as a householder living under a flight path into Heathrow airport : Whilst he suffered high noise levels which disturbed his quiet enjoyment of property - the Convention refers to quiet enjoyment from Government interference not from private tortious sources : The lack of a remedy only refers to a lack of remedy for wrongs protected by the Convention - so no jurisdiction to hear the complaint.

Observer & Guardian v UK 1991: Protection of MI6 insufficient reason for ban preventing publication contrary to art 10. (Spycatcher)

Vilvarajah v UK 1991: Britain not in breach of Convention over deportation of Tamil refugees : re arts 3 and 13 and applications for political asylum.

Campbell v UK : 1992 : UK breach over interference with prisoner's correspondence with his solicitor.

Grainger v UK 1990: Refusal of legal aid breaches fair trial requirements : Grainger wanted legal aid to appeal against a conviction for perjury : Legal Aid committee had decided that he did not have substantial grounds for an appeal.

Pine Valley v Ireland 1991: art 14 : Discrimination issue was admissible where P had not been able to seek a remedy in Ireland since at the time of his application it was not available. After he applied to the ECHR Ireland changed the rules so there may have been a remedy in Ireland. P was not prevented from continuing because of a failure to exhaust a local remedy.

Ireland v UK 1978 - Inhumane torture and treatment by UK government in questioning prisoners held to be contrary to the Convention.

The general issue of a Bill of Rights ?

For years there has been discussion of a need for a bill of rights and it seems that we are likely to get such a document shortly. I am writing as at May 1998 in order to produce material for September 1998. You will look at this material some months later. Things may have changed by then and change may continue for some time. Flexibility is what will be required.

The material will consider the arguments for and against a bill of rights and the content it should have and the form it should exist in. Incorporating the European Convention was a popular option and that is what the proposed legislation aims to do. It may well be that it does not do all that you might desire of a bill of rights and there may well be problems with what is produced. So the basis for a critique needs to be provided and this material should be of use for this.

The traditional U.K. approach was different from most other constitutions in that it contains no declaration by which certain rights such as freedom of association, expression, assembly, of the person etc are guaranteed. All rights were merely residual. Recent independent states have incorporated the European Convention into their law or versions of the U.N. Charter, or have extracted bits from each. Since the U.K. has no written constitution it makes the idea of a Bill of Rights problematic. What status would be given to it and what form should it take and how if at all would it be protected? Most written constitutions have entrenched rights such as a 75% majority or a referendum before change is permitted. If one produces a Bill

Constitutional and Administrative Law

of Rights within the form of an ordinary Act of Parliament it could be repealed by any future Act of Parliament. Therefore it would not be protected. If one is prepared to entrench the Act this will mean that there is a partial rejection of the Doctrine of Sovereignty of Parliament. This could be countered by stating that such a partial rejection occurred when the U.K passed the E.C.A. 1972. However, Hood Phillips believes this would require a revolution in our constitutional system in order to entrench a Bill of Rights and in order to provide for Judicial Review that would enable the courts to declare an Act of Parliament unconstitutional.

The 1998 Act does not provide for entrenchment. It tries to prevent conflict between new legislation and the Convention but it also provides a system for producing contrary legislation. It also provides for a system of removing problems in existing legislation. But does it do much more?

Arguments for a New Constitutional Bill of Rights

- 1 A Bill of Rights might provide a national minimum standard of protection ie guarantees instead of residual rights.
- 2 A Bill of Rights might act as a restraint to Public Authorities and Public Officials thus preventing an abuse of power.
- 3 A Bill of Rights would allow the U.K. to fulfil its international obligations in particular if the provisions of the European Convention were to be introduced thus meeting that treaty's obligations.
- 4 By ensuring the rights in the European Convention it should become possible for the judges in the U.K. to enforce those rights and then any complaints of our citizens would not have to be aired before European institutions ie it is better for us to quietly wash our dirty linen than to have it splashed across the Courts in Strasbourg thus embarrassing our Government.
- 5 A Bill of Rights would provide an influential moral and educational force which would be of assistance in moulding public opinion.
- 6 It would avoid criticism of the U.K. as a nation with double standards when it seeks to criticise other states for failing to have due regard for Human Rights and would legitimise action taken by the U.K to make such countries reform.
- 7 The U.K. has provided ex colonies with Bills of Right showing that the advantages are in reality understood and appreciated by the executive.

Against a Bill of Rights

- 1 The declaration of a Bill of Rights is contrary to our national heritage and distinctly un-British. That is not the way we do things.
- 2 It could be argued that individual rights are already adequately provided for by our current legal system and so a Bill of Rights would be superfluous. Any defects that do exist can be adequately dealt with by peace meal legislation as and when such defects are discovered as demonstrated by the passing of the Race Relations Act and the Sexual Equality Legislation.
- 3 A Bill of Rights could lead to excessive litigation.
- 4 A Bill of Rights could cause uncertainty in the law. There are problems as to how it would relate to existing statute and common law provisions - especially if enacted in the loose form of the European Convention - a method which the judges in the U.K. may struggle with. High sounding ideals and principles are useless unless they are capable of comprehension and enforcement under the common law system. Many other states have wonderful sounding constitutions and Bills of Rights but provide the citizen with fewer rights than available to the British citizen.
- 5 It would require the judges to make policy decisions to which they are unsuited by both training and nature in their judicial office (this argument assumes they are not already so involved).
- 6 It may in fact be possible that the rights selected will be contrary to existing commitments in the international field.
- 7 Hood Phillips - the enactment of a Bill of Rights and the debate prior to it may in fact delay other reforms required in the constitution.

Constitutional and Administrative Law

8 A Bill of Rights would deprive the U.K. of one of its most essential assets - flexibility - which has enabled us to adapt to the changing needs of society without undue constitutional crisis.

What form should a New Constitutional Bill of Rights take?

An ordinary Act of Parliament or some form of entrenchment? An Act could be overturned. If entrenchment is chosen, what method should we adopt? A useful comparison can be made with the Canadian Bill of Rights 1960. s2 C.B.R. 1960 states that unless it is expressly declared by an Act of the Canadian Parliament that a law shall operate notwithstanding the Bill of Rights, every law of Canada shall be construed and applied as not to abrogate, abridge or infringe the rights or freedoms protected in the Bill of Rights and in particular no law of Canada shall be construed or applied so as to infringe the protected rights. (The 1998 Bill has a similar device and perhaps similar in-built problems). How much power did the Canadian Bill of Rights give the courts? Was this merely a new principle of statutory interpretation or could statutory provisions be struck down? In **R v Drybones** (1970) it was held that the provisions of a prior statute were amended by the Bill of Rights so that discrimination against an Indian for being drunk outside an Indian reservation simply because he was an Indian was pre-empted. It is unclear what the effect would be regarding a later statute that did not expressly state that it should take effect even though in conflict with the Bill of Rights.

What should a New Constitutional Bill of Rights contain?

Should the U.K make its own list or import from for example the European Convention? This has been criticised as being 50 years out of date. It does not mention property rights, and intellectual property rights, the right of succession or the right to join a trade union. The convention is subject to wide limitations and exceptions and is written in a very loose inexact manner. If you are really serious about rights you should aim to do better than this. In 1998 clearly they thought that the European Convention was good enough. If one makes one's own list, it is possible to think of many so-called rights that do not receive universal approval e.g.

- The Right to private / public medicine.
- The Right to private / public education.
- The Right of abortion / right to life.
- The Right to picket / right to work.
- The Right to strike / to sack un-cooperative workers.
- The Right to privacy / freedom of information.
- The Right to life / euthanasia.
- The Right to vote / the right to abstain.
- The Right to protest / not to be harassed.
- The Right to develop property / environmental protection.
- The Right to smoke / not to be forced to be a passive smoker.
- The Right to social support / not to be excessively taxed.
- The Right to work / the duty to support oneself.
- The Rights of suspects / society's right to protection.
- The Rights of AIDS sufferers / society's right to protection. etc.

There are a great number of so called contradictory rights. In certain circumstances the desire to have a certain right is evident - but the possession of such a right could cause considerable hardship to someone else or prejudice the interests of society in general. The list above highlights issues which have made the headlines in recent years - both sides of each argument being supported for different reasons. Provisions which strike a balance between the competing demands of society would be very difficult to draft - though this is not a reason in itself for not attempting to do so.

Even if a Bill of Rights reached a successful balance between such competing needs there would still be problems with enforcement of social rights. For example that the constitution guarantees the right to work.

Who should adjudicate on Bill of Rights disputes?

If a Bill of Rights is passed a major problem then occurs as to who should judge on disputes involving these issues? The Institute of Public Policy Research has grappled with this thorny problem. The ordinary courts are seen as a problem since the judges are clearly nearly all white male, middle class products of Oxbridge

Constitutional and Administrative Law

and are perceived of as unsuitable people to protect the Human Rights of the ordinary citizen. Many solutions to this problem have been suggested. It would be possible to follow the French Model and create a Constitutional Court to deal exclusively with Administrative Law or with actions based on infringement of the proposed Bill of Rights. Should this court have the power to strike down new legislation? If so would this be on the basis of a new principle of statutory interpretation leading perhaps to the same problems now being grappled with by such cases as **Factortame** in relation to the E.C. or as a direct power to strike down legislation? Since Public Law and Bill of Rights issues have a strong political content, perhaps the setting up a separate Constitutional Court where the judges are trained to be more aware of political and administrative issues would solve the problem without having to be unduly concerned about the social background of the judges.

Conclusion.

The mere fact that there are problems involved in introducing a Bill of Rights into the U.K. constitution should not, in itself, be a reason for not doing so, since there should be no insoluble problems. The ultimate question must be, Are human rights already adequately protected under the present system or would the introduction of a Bill of Rights better protect human rights, without producing undue adverse side effects which would substantially weaken other equally important aspects of our constitution? Even if human rights are not already adequately protected under the present system, it may be that piecemeal legislation can be passed to remedy current defects, as the need becomes known. This would preserve the flexibility so much valued by some constitutional commentators so that future human rights demands can be met, whereas a Bill of Rights might prove to be as difficult to improve as it might be to harm.

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Constitutional and Administrative Law

CIVIL LIBERTIES and HUMAN RIGHTS

WHOSE LAW GOVERNS LIBERTIES AND FREEDOMS IN THE UK?

Until the advent of the European Convention on Human Rights and the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg freedoms in the UK were exclusively governed by UK Law and the law was to be found in the Statutes of the UK Parliament and in the relevant case law. The European Convention on Human Rights and Fundamental Freedoms 1950 is of persuasive authority to the UK judges and clearly binds the UK Government in Public International Law. The European Community however is a direct source of law in the UK and decisions of the E.C.J are binding on the UK. The E.C. has gradually been developing Human Rights jurisprudence and it is essential to consider the impact of E.C. provisions on this area of domestic law. The first major development was in 1977.

Joint Declaration by European Parliament, Council and Commission on Human Rights.⁹

The European Parliament, the Council and the Commission,

“Whereas the Treaties establishing the European Communities are based on the principle of respect for law;

Whereas, as the Court of Justice has recognised, that law comprises, over and above the rules embodied in the treaties and secondary Community legislation, the general principles of law and in particular the fundamental rights, principles and rights on which the constitutional law of the Member States is based;

Whereas, in particular, all the Member States and Contracting Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, have adopted the following declaration:

- 1 *The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms.*
- 2 *In the exercise of their powers and in pursuance of the aims of the European Communities they respect and will continue to respect these rights.*

Done at Luxembourg on the fifth day of April 1977.”

What legal standing if any does this declaration have? It is neither a Community Treaty, a directly applicable regulation nor a directive of the Council of Ministers - though it could influence the exercise of judicial discretion by the two European Courts of Justice and of the Commission in its regulatory capacity to the extent that all community measures might have to be interpreted in accordance with the Treaty.

The E.C.J. broached this topic in the **Stauder Case**,¹⁰ and in the **Internationale Handeisgesellschaft Case**,¹¹ declaring that E.C. citizens have fundamental human rights.

What happens if the European Convention for the Protection of Human Rights and Fundamental Freedoms conflicts with the aims and objectives of the Treaties of Rome? If an individual is affected differently from a general class of persons by the regulations and directives he can now challenge the E.C. provision through the E.C.J. If an entire class is affected the individual should wait till the measure is enforced against him in his country and then challenge it in his own domestic court which can in turn make a reference to the E.C.J. challenging the measure's constitutional validity on the basis of ultra vires.

If the constitutions of the member states are a source of fundamental rights, or as in the U.K is the only legal source of rights, what happens if the constitution of that member state conflicts with either the aims and objectives of the Treaties of Rome or the European Convention for the Protection of Human Rights and Fundamental Freedoms from the E.C.J's perspective? At present this is only a problem for the U.K. as the only member state not to incorporate the E.C.H.R. into its constitution but new members could be in the same position as the U.K.

⁹ Joint Declaration by the European Parliament, The Council and the Commission on Human Rights. OJ 1977, No.c103/1.

¹⁰ **Stauder Case** 29/69 1969 ECR 419

¹¹ **Internationale Handeisgesellschaft Case** [1970] ECR 1125 Case 11/70

Constitutional and Administrative Law

If the conflict involves an E.C. law then it becomes a matter for the E.C.J. If not, then the principle of subsidiarity comes into play and as and until the issue becomes one of the aims or objectives of the community domestic law prevails. However, under Art 3b Treaty on European Union, the notion of subsidiarity only permits the use of domestic law when it is obvious that the domestic law is just as efficacious as community action.

T.Hartley,¹² implies that the E.C.J. already treats the Human Rights Convention as part of E.C. law though he does not back this up in the article, merely referring readers to his book 'The Foundations of European Community Law.'

That the E.C.H.R. was already part of U.K. Law was implied by Gibson LJ in **Derbyshire County Council v Times Newspapers Ltd.**¹³ where a matter "... was not clear (by reference to) established principles of our law ... the court must ... have regard to the principles stated in the Convention ..."

Butler-Sloss LJ reinforced this stating that 'where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but ... obliged to consider the implications of Article 10 (E.C.H.R)' Unfortunately neither judge in the CA told us why this is true. The House of Lords reached the same decision but by a different route which avoided using the Convention - but did not state that the method of achieving the result by the CA was wrong.

The second and clearly more serious reference to Human Rights Convention lay in the confirmation to and in the new **Article F of the Treaty on European Union** (Maastricht), which is now incorporated into the EC Treaty.

Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

Article F.

- 1 *The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.*
- 2 *The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedom 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.*
- 3 *The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.*

This must be allied to the activities set out in **Art 3(t)** regarding measures in the sphere of civil protection and the principle of subsidiarity in **Art B** as defined in **Article 3b**

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein (ie **Art 2** ... promote .. social cohesion ...)

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty. What legal standing does the European Convention on Human Rights have in the light of the Treaty on European Union ? Clearly under **Art F** the ECJ will / must respect the Convention in its judgements - but further than this Art F3 states that the Union shall provide itself with the means necessary to attain its objectives. It is possible that at some stage the Commission might attempt to assume the power to enforce the Convention.

What is the status of the Convention in the *interim period ? Is there even an interim period ? Whilst Art F is an integral part of the Common Provisions and thus presumably incorporated as a source of law into the law of each member state the ECJ has recently held that this does not imply that the

¹² T.Hartley ICLQ 1993 p214 : 'The Foundations of European Community Law 1988. pp132-139 - but see footnotes 2 & 3 in Bradley & Ewing p424.

¹³ **Derbyshire County Council v Times Newspapers Ltd** (1993) 143 NLJ 283 HL :

Constitutional and Administrative Law

Convention on Human Rights is part of Community Law, merely that EC institutions must comply with the European Convention. The duty to provide itself with the means must be complied with before Human Rights becomes a Treaty obligation. The three yearly review sessions are a potential forum for achieving this. The current session is likely to run continuously up to 1999. The main target appears to be to introduce further steps towards financial union though it is possible these may fail. It is conceivable that in order to provide a measure of success some positive outcomes will be necessary and could include means in respect of human rights.

The flexibility of the notion of subsidiarity in that the Community can take action if it considers it to be more efficacious than domestic law and the judicial attitude exhibited in **The Stauder Case** shows that by taking a broad interpretation of E.C.Law the E.C.J. could have found that the spirit of the Treaty on European Union requires the E.C.J. to take action to ensure that all citizens have the benefits of the European Convention on Human Rights. The court has now ruled decisively against this at present but since there is no notion of binding precedent the court could change its mind in the future.

Art 164. *The Court of Justice shall ensure .. application of this Treaty and the law is observed.*

Art 177. *The Court of Justice shall have jurisdiction to give rulings concerning (a) the interpretation of this Treaty : Where any such question is raised in a case pending before a court of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.*

What happens if a defendant to a criminal charge claims the UK law does not afford him or her the benefits of the European Convention on Human Rights ? It appears that for the time being there is nothing the E.C.J. can do because of the notion of subsidiarity under **Article 3b**.

Article 3b.

The community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of This Treaty.

As long as the European Commission chooses not to put forward regulations regarding Human Rights this area of law will not be occupied by Community Law and thus subsidiarity will ensure that domestic provisions alone apply. However, if on the basis perhaps of **Article 3t** the Commission were to occupy this field of law then subsidiarity would cease to apply and the E.C.J. would then apply, subject to any restrictions based on the E.C. notion of proportionality. At this point the E.C.H.R. principles would then apply and the E.C.J. would require domestic law to conform to and comply with both the provisions of the regulation and the standards to be achieved under the guidance of the E.C.H.R.

The E.C.J. may under **Art 177** interpret the Treaty and presumably the Convention and declare whether or not domestic law is in accordance with it if a UK court chooses to make a reference. There is no obligation on the UK court to make a reference if the court feels that it is sure of the meaning.¹⁴

If a defendant disagrees he has the ability to appeal from the Crown Court to the CA and then to the H.L and if there is a breach of natural justice to apply for Judicial Review to Q.B. Division. On this basis there is no duty to refer the matter to the Court of Justice. If the U.K. Court refuses to make a reference it may be difficult for an individual to challenge a decision of the U.K. court.

Where E.C. Law infers a right which does not at present exist under U.K. Law there is no judicial remedy under national law. The court is duty bound to bring the matter before the Court of Justice

¹⁴ See Lasok - SLR Autumn 1993 p34 : Use & abuse of Art 177.

Constitutional and Administrative Law

(eg **Marleasing** - the Commission on receiving a complaint of a failure to make a reference in appropriate circumstances may take an action against the member state - but the individual has no right to apply direct to the ECJ **under Art 173** unless he is questioning the legality of acts of the E.C. itself and likewise petitions to the European Parliament under Art 138d and to the European Ombudsman Art 138e must relate to E.C. matters).

It is essential to ascertain if there are any new rights afforded to citizens over and beyond those afforded by domestic law to determine which cases must go to Luxembourg. **Marshall v Southampton A.H.A. No2**,¹⁵ points out that the remedies available in national law for breach of Community obligations must be effective. If not this could give rise to a duty on the UK court to refer the case to the Court of Justice. **The Braserie du Pecheur v Germany & Factortame**¹⁶ joint references to the E.C.J. and succeeding cases have not succeeded in clarifying when damages are payable.

If the Commission chooses to occupy the legal area of Human Rights it would thus provide an effective way of enforcing and incorporating the European Convention into U.K. Law. Where would this leave the European Court of Human Rights at Strasbourg ? Would there be any need now to apply to the court ? The one remaining advantage would appear to be that where a U.K. court refuses to make a reference to Luxembourg the citizen must rely on the Commission taking up his case in an action against the member state for non-compliance with the Treaty. The Citizen can force the pace by applying direct to Strasbourg - but would the fact that the citizen could then complain to the E.C.J. mean that he or she had not exhausted all available means of settling the dispute, thus taking the case outside the remit of the European Court of Human Rights at least until that avenue had been explored by the applicant ?

The European Court of Human Rights would not be rendered entirely redundant by incorporation of the E.C.H.R. in either U.K. or domestic law, since the E.C.H.R. still hears cases from states that have incorporated the E.C.H.R. into their constitutions. The court is still able to determine whether or not the domestic law has applied the convention properly. The main effect would be to reduce the incidence of applications to the court which still remains the final arbiter of the scope and meaning of the convention. Thus it is still possible for a signatory state's dirty washing to be aired in the international arena, it simply means that it should not happen so often.

The E.C.J. has demonstrated that it is reluctant to go further down the road of incorporation of the E.C.H.R. into E.C. law beyond that which has already been achieved. A number of the states seeking membership of the community at present have a different attitude towards human rights to the existing members. Turkey has a security problem on its Kurdish borders and the annexation of 40% of Cyprus will be problematic for the Union. Estonia, Lithuania and Latvia have problems with ex-patriot Russians. Relationships between Greece, Albania and Macedonia are strained. Albania has problems with its Macedonian citizens. If these countries are admitted to the Union then setting too high a standard in relation to human rights may be problematic. It may take several years of economic development before sufficient political stability takes root in these countries and a political climate which can accommodate the rigours of the European Convention on Human Rights is fostered.

The above debate lost much of its import once the UK introduced the Human Rights Act 1999. However, the relationship with EU law is of continuing importance, particularly in the light of the proposal by Michael Howard to either reform or even to repeal the Act and for the UK to withdraw from the ECHR.

The EC has now retaken the initiative, providing its own Human Rights legislation as an integral part of the European Constitution, the text of which has been approved by member states but has not been ratified by member states at the present time. It should be noted that **THE CHARTER OF FUNDAMENTAL RIGHTS OF THE UNION** contained in **PART II of the European Constitution** -, far from replicating the ECHR is quite different and distinct.

¹⁵ **Marshall v Southampton A.H.A. No2** [1993] The Times European Law Report 4th August

¹⁶ **The Braserie du Pecheur v Germany & Factortame** C46/93 & C48/93.

Constitutional and Administrative Law

PART II THE CHARTER OF FUNDAMENTAL RIGHTS OF THE UNION¹⁷

PREAMBLE

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

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.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

TITLE I DIGNITY

Article 11-61 Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 11-62 Right to life

1. *Everyone has the right to life.*
2. *No one shall be condemned to the death penalty, or executed.*

Article 11-63 Right to the integrity of the person

1. *Everyone has the right to respect for his or her physical and mental integrity.*
2. *In the fields of medicine and biology, the following must be respected in particular:*
 - (a) *the free and informed consent of the person concerned, according to the procedures laid down by law;*
 - (b) *the prohibition of eugenic practices, in particular those aiming at the selection of persons;* (c) *the prohibition on making the human body and its parts as such a source of financial gain;* (d) *the prohibition of the reproductive cloning of human beings.*

Article 11-64 Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 11-65 Prohibition of slavery and forced labour

1. *No one shall be held in slavery or servitude.*
2. *No one shall be required to perform forced or compulsory labour.*
3. *Trafficking in human beings is prohibited.*

TITLE II FREEDOMS

Article 11-66 Right to liberty and security

Everyone has the right to liberty and security of person.

¹⁷ Official Journal of the European Union C 3104116.12.2004

Constitutional and Administrative Law

Article 11-67 Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 11-68 Protection of personal data

1. *Everyone has the right to the protection of personal data concerning him or her.*
2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
3. *Compliance with these rules shall be subject to control by an independent authority.*

Article 11-69 Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 11-70 Freedom of thought, conscience and religion

1. *Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.*
2. *The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.*

Article 11-71 Freedom of expression and information

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*
2. *The freedom and pluralism of the media shall be respected.*

Article 11-72 Freedom of assembly and of association

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.*
2. *Political parties at Union level contribute to expressing the political will of the citizens of the Union.*

Article 11-73 Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 11-74 Right to education

1. *Everyone has the right to education and to have access to vocational and continuing training.*
2. *This right includes the possibility to receive free compulsory education.*
3. *The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.*

Article 11-75 Freedom to choose an occupation and right to engage in work

1. *Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.*
2. *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.*
3. *Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.*

Article 11-76 Freedom to conduct a business

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

Article 11-77 Right to property

1. *Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.*

Constitutional and Administrative Law

2. *Intellectual property shall be protected.*

Article 11-78 Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Constitution.

Article 11-79 Protection in the event of removal, expulsion or extradition

1. *Collective expulsions are prohibited.*
2. *No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*

TITLE III EQUALITY

Article 11-80 Equality before the law

Everyone is equal before the law.

Article 11-81 Non-discrimination

1. *Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*
2. *Within the scope of application of the Constitution and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.*

Article 11-82 Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 11-83 Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 11-84 The rights of the child

1. *Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
2. *In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
3. *Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.*

Article II-85 The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article II-86 Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

TITLE IV SOLIDARITY

Article II-87 Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

Article II-88 Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article II-89 Right of access to placement services

Everyone has the right of access to a free placement service.

Constitutional and Administrative Law

Article 11-90 Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

Article 11-91 Fair and just working conditions

1. *Every worker has the right to working conditions which respect his or her health, safety and dignity.*
2. *Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.*

Article 11-92 Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 11-93 Family and professional life

1. *The family shall enjoy legal, economic and social protection.*
2. *To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.*

Article 11-94 Social security and social assistance

1. *The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.*
2. *Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.*
3. *In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.*

Article II-95 Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Article II-96 Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Constitution, in order to promote the social and territorial cohesion of the Union.

Article II-97 Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article II-98 Consumer protection

Union policies shall ensure a high level of consumer protection.

TITLE V CITIZENS' RIGHTS

Article II-99 Right to vote and to stand as a candidate at elections to the European Parliament

1. *Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.*
2. *Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.*

Article II-100 Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Constitutional and Administrative Law

Article II-101 Right to good administration

1. *Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.*
2. *This right includes:*
 - (a) *the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
 - (b) *the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
 - (c) *the obligation of the administration to give reasons for its decisions.*
3. *Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.*
4. *Every person may write to the institutions of the Union in one of the languages of the Constitution and must have an answer in the same language.*

Article 11-102 Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.

Article 11-103 European Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

Article 11-104 Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

Article 11-105 Freedom of movement and of residence

1. *Every citizen of the Union has the right to move and reside freely within the territory of the Member States.*
2. *Freedom of movement and residence may be granted, in accordance with the Constitution, to nationals of third countries legally resident in the territory of a Member State.*

Article 11-106 Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

TITLE VI JUSTICE

Article 11-107 Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

Article 11-108 Presumption of innocence and right of defence

1. *Everyone who has been charged shall be presumed innocent until proved guilty according to law.*
2. *Respect for the rights of the defence of anyone who has been charged shall be guaranteed.*

Article 11-109 Principles of legality and proportionality of criminal offences and penalties

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.*

Constitutional and Administrative Law

2. *This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.*
3. *The severity of penalties must not be disproportionate to the criminal offence.*

Article 11-110 Right not to be tried or punished twice in criminal proceedings for the same criminal offence.

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

TITLE VII GENERAL PROVISIONS GOVERNING THE INTERPRETATION AND APPLICATION OF THE CHARTER

Article 11-111 Field of application

1. *The provisions of this 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. 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.*
2. *This 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, or modify powers and tasks defined in the other Parts of the Constitution.*

Article 11-112 Scope and interpretation of rights and principles

1. *Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*
2. *Rights recognised by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within the limits defined by these relevant Parts.*
3. *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.*
4. *Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.*
5. *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.*
6. *Full account shall be taken of national laws and practices as specified in this Charter.*
7. *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.*

Article 11-113 Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 11-114 Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

Constitutional and Administrative Law

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