The Drafting of the EU Charter of Fundamental Rights

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1. Ambivalent constitutionalism

While much has already been written in the popular media on the nature and desirability or otherwise of a European Union Charter of fundamental rights,¹ and a great deal more is no doubt soon to appear in the academic journals and elsewhere,² little has so far been written on the process of drafting itself. And yet this process, established and conducted entirely outside the framework of the EU Treaties, which reached its conclusion in a document finalised in October 2000 and adopted by declaration of the Commission, Council and Parliament at the Nice European Council in December 2000, is a fascinating one for a number of reasons. Apart from the interesting possibilities it suggests in terms of new and future forms of constitution-building in Europe, it also provides a quintessential example of the ambivalent, complex and often contradictory nature of EU constitutional development. The history of the EU is full of examples of awkward political compromise designed to accommodate fundamentally different visions,

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¹ See e.g. the Times newspaper campaign against the Charter during the summer of 2000, led by William Rees-Mogg, and the opposition and scepticism expressed by the Economist magazine on a number of occasions. More positive assessments have appeared in the Italian media, particularly in the pages of la Republica.

² See the helpful House of Lords Select Committee 8th Report on the EU Charter of Fundamental Rights, 16 May 2000, and the summary in Regards sur l'Actualité: Vers une Chartre des droits fondamentaux de Union européenne (La documentation Française, 2000), of commentaries from a Round Table held in the Université de Paris II in May 2000. Also A. Heringa "Towards an EU Charter of Fundamental Rights" (2000) MJ 111.
compromises which have often subsequently crystallized and developed into central constitutional features of the EU, or which have evolved incrementally into legal and political settlements not envisaged at the time an agreement was reached. Whether we conceptualise this characteristic of European constitutional development as incomplete contracting, or more optimistically as an inevitable feature of an evolving discursive democratic process, or more crudely as simply fudging things, it is an enduring feature of the legal and political process in Europe. The Maastricht Treaty and the process leading up to its signature provides another example of this - the planned Intergovernmental Conference on economic and monetary union being belatedly accompanied by a much more ambivalently conceived and divisive conference on political union, which led ultimately to the heavily-critiqued three-pillar structure of the Union. This complex arrangement had its legal core in the first 'Community' pillar, while the second and third pillars were considerably more ambiguous in their legal nature and gave rise to a good deal of debate as to their constitutional character. Yet these features - which represented another of the clumsy compromises between those seeking a more centralised political union enshrined in law, and those seeking to maintain the intergovernmental nature of Europe's political processes - have already developed into something rather different (even if no less ambiguous) after the Treaty of Amsterdam, and this process of evolution is ongoing.

The point being made is that the grand moments of legal and constitutional change in the EU have long been characterised by precisely the kind of deeply ambivalent process

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represented by the drafting of the EU Charter, a compromise which bridges sharp
divisions of political opinion about the nature, role and future of the EU, as well as the
relationship between the EU and its Member States. The fact that a number of the central
actors involved in the Charter process have been capable - as will be outlined below - of
providing entirely different accounts of the nature of the undertaking in which they are
engaged, illustrates this feature sharply. From the perspective of one key participant it
was essentially a consciousness-raising public relations exercise, albeit a deliberative one,
involving no change in the legal status quo and leading to no binding instrument.\(^4\) Yet
from the perspective of another, the process involved a fundamentally important
constitutional forum charged with producing an ambitious and forward-looking bill of
rights to be incorporated in the EU Treaties and to consolidate the Monnet and Spinelli
visions of a federal Europe.\(^5\) However contradictory these accounts may appear, the
contested nature of the process, far from leading to deadlock or undermining its integrity,
is unlikely to prevent the activities and results of the past year from themselves forming a
significant stage of a future constitutional settlement.\(^6\)

The intention of this article is, briefly, to expose and examine some of the contradictions
and ambiguities in the establishment and conduct of the drafting process, to consider their
significance for the constitutional nature of the EU, and to some extent also for the role of

\(^4\) See the speech of Roman Herzog, cited below at footnote 24, and also the views of another member of the
drafting body's praesidium that the body had no constitutional mandate: see Guy Braibant 'Les Enjeux pour
l'Union' in Vers une chartre des droits fondamentaux de l'Union européenne, op. cit footnote 2.
\(^5\) See the speech of Mendez de Vigo, footnote 24 below.
\(^6\) Further, whether the document declared by the Commission, Council and Parliament, and mentioned
approvingly in the conclusions of the European Council at Nice, becomes justiciable at some time in the
future or not, or whether it remains a declaratory statement rather than a binding legal document or even an
integral part of the Treaties, it is not easy to predict what use the Court of Justice (or domestic courts) might
make of it. See B. de Witte "The legal status of the Charter: Vital Question or Non-issue?", paper given at
the Congres Ius Commune Onderzoeksschool, Leuven 23 November 2000. See also the communication of
the Commission on the legal nature of the Charter, COM(2000)644 and the rather negative response from
the IGC working group to the European Parliament's proposal to make a reference to the Charter in Article
6 TEU - CONFER 4804/00.
human rights within that polity. Essentially, the political motivation for initiating the drawing up of a charter has been highly ambivalent, and this ambivalence has characterised and influenced the process in a number of significant ways. In the first place, there has been an overtly acknowledged uncertainty as to the nature of the document proposed, specifically whether it was to be legally binding and justiciable or not. This is also known as the "as if" doctrine: that whereas the document was to be drawn up as if it were eventually to be incorporated into the Treaties, the choice as to whether or not it would be binding would not be taken until after the draft was finalised, and then would be taken by the European Council which – as events indeed proved - was highly unlikely to agree to make it legally binding. Secondly, the political desire to draw up an instrument proclaiming the role of human rights in the EU contrasts with the political will, evident in other contexts but apparent also within this Charter process, to constrain and keep within clear limits the human rights role of the EU.7 Thirdly, and related to this second point, there is considerable ambivalence about the extent to which the Charter and the rights set out in it are to be relevant to the Member States, as opposed to (or in addition to) the Union institutions.8

2. The Charter initiative.

Although discussion of the desirability or otherwise of an EU Charter or Bill of Rights (including, but not limited to, discussion of the prospects of EC accession to the ECHR) is far from new, the origin of this particular initiative lies with the German presidency of

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8 Thus two of the three aspects of the European Council mandate which were stressed by the Finnish presidency at Tampere concerned, firstly, what could be called the 'cosmetic' or non-creative nature of the
the Union in the first half of 1999. The fiftieth anniversary of the Universal Declaration of Human Rights occurred in 1998 and in addition to the numerous conferences and meetings held to mark it, a number of reports on human rights matters which had been commissioned by the EU had just appeared. Following a 1996 Comité des Sages report on Civic and Social Rights, two further reports on human rights were presented in 1998 and 1999 respectively: firstly the report commissioned by what was then DG 1A of the Commission (external relations), which resulted in a human rights ‘agenda’ signed by A. Cassesse, C. Lalumiere, P. Leuprecht and Mary Robinson together with a report and an accompanying volume of essays⁹; and secondly the report of the expert group on fundamental rights commissioned by DG V (now social affairs) and chaired by Professor Spiros Simitis.¹⁰ The German presidency was decidedly unenthusiastic about many of the substantive suggestions which were made in the first and more detailed of the two reports (for example the setting up of a specific Commission directorate with responsibility for human rights, or the establishment of a human rights monitoring centre, similar to the Racism Monitoring centre for Member States within the EU¹¹), but was attracted to the theme of the second report, which focused on the perceived need for an EU Bill of Rights. What the Presidency chose to do was to seize the initiative to launch something which would constitute a high-profile move as far as human rights and the EU was concerned, but simultaneously which would not, in its view, introduce any concrete policy changes nor alter anything significant within the existing legal, political and

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¹¹ It is notable that these two particular suggestions received support and were proposed in para 119 of the report adopted by the “three wise men”, Aahtisaari, Frowein and Oreja, on the EU’s sanctions against Austria, in September 2000.
constitutional framework. Its intention to propose a European charter was first formally announced in April 1999 at a conference entitled “Towards a new Charter of Fundamental Rights?” co-hosted by the German Ministry of Justice and the Commission representation in Germany, just a few months before the Cologne European Council meeting.

Joseph Weiler’s editorial in the European Law Journal12 expresses a view which is probably not uncommon amongst those working within the field of EC law and EU policy in the area: i.e. that of all the initiatives in this field which might benefit the EU, a new charter of rights, whether legally binding or otherwise, would not be at the top of the list. A degree of de facto legal ‘enshrinement’ of human rights is already present within EC and EU law, the European Convention on Human Rights is a point of reference for all of the European institutions and the Member States alike, and if the symbolic implications of ‘Europe’s own brand new’ charter are evident, their policy relevance is considerably less so. If the EU and its Member States wished to formally ‘bind’ the EU’s own institutions to the human rights norms accepted by all of those states, they could long ago have chosen to amend the relevant Treaties to permit accession to the ECHR, but the political will to do this has been noticeably and persistently absent.13 A clear expression of this absence of political will can be observed in the number of Member State governments which intervened before the Court of Justice in Opinion 2/9414 to argue against the legality of accession by the Community to the ECHR. Further, it has

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13 For an argument that the drafting of the current Charter is only a small first step and that EU accession to the ECHR remains the real goal to be achieved, see D. Curtin "The EU Human Rights Charter and the Union Legal Order: the 'Banns' before the Marriage?" in Liber Amicorum in honour of Lord Slynn of Hadley: Judicial Review in European Union Law, D O’Keeffe and A. Bavasso eds, (Kluwer, 2000), 303.

been proposed several times over the years by the Commission, and was raised at successive Intergovernmental Conferences but notably not taken up in these.

However, it becomes clear even on reading the conclusions of the Cologne European Council meeting that the drafting of a bill or Charter was not an ordinary policy initiative. It was aimed not primarily - or at all - at the policy-maker or the lawyer, but largely at the ‘citizen’. This was clearly to be a visibility exercise or a 'showcase' as one of the UK members of the drafting body expressed it, a way of pronouncing and proving both what the EU already claimed to have done in the area of human rights, and a way of declaring its commitments in a public process which would help to secure a degree of popular legitimacy for a political entity which continues to be contested and questioned.

A second relevant point in this context, although one which emerges less unequivocally from the European Council’s formal decision to establish the process, is that it was not intended to create anything new of substance, other than increasing the visibility of what was considered already to exist. The consolidating, or non-creative, nature of the process is implicit in the Cologne Conclusions which begin by asserting that: “The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the Court of Justice”.

The sentence immediately following this expresses the apparent motivation for proposing a charter:

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15 This perspective is confirmed by statement in the Commission’s communication, adopted after an almost-final draft of the Charter was published in September, that the Convention’s task was one ‘of revelation rather than creation, of compilation rather than innovation’ COM(2000)559. On the other hand the Commission also promotes the idea that the charter is ‘ambitious’ and enshrines ‘certain new rights which already ‘exist' but have not yet been explicitly or formally protected as fundamental rights.
“There appears to be a need, at the present stage of the Union’s development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union’s citizens.”

What was required, according to the Council, was to render the existing Union ‘obligation to respect fundamental rights’ more visible and its relevance more obvious to the ordinary person. The second paragraph of the Conclusions confirms the impression that this was intended to be a consolidating process rather than an innovative one, since it specified that the rights to be contained in the Charter were those in the ECHR, and derived from the ‘common constitutional traditions’ of the Member States, as well as from provisions of the European Social Charter and the Community Charter of Fundamental Social Rights of Workers which go beyond mere objectives. In other words, the body to be charged with drafting the Charter was being directed in advance to the source of the rights to be contained in the Charter. And all of those mentioned by the European Council are contained in instruments which had already to some extent been indirectly adopted as Community fundamental rights, either by the Court of Justice or by the Member States in their declarations or preambles to other European instruments or Treaties. Thus the constitutive potential of the proposed charter was downplayed or denied.

3. The significance of the process

The securing of a greater degree of popular legitimacy, then, was quite expressly the primary aim of the political proposal to draft a Charter. It was not to be a new policy initiative, but largely an exercise in gathering support for existing EU activity. Thus in
many ways, and this is by now an obvious point, the process of drafting the Charter was always going to be at least as important - if indeed not more so - than the substantive document which eventually emerged.\textsuperscript{16} Or perhaps, to put it less crudely, the outcome, however good or bad in itself, was to be closely linked with and to benefit directly from the strength and merits of the drafting procedure, even more significantly than the normal relationship between process and outcome. Nonetheless, although the Charter initiative may have been 'aimed at' the citizen, and a virtue made of the openness and novel nature of the process, this was not to be a genuinely participative process but one which, albeit deliberative in nature, was to be composed only of institutional representatives from the national and European level.\textsuperscript{17}

Membership of the body was specified to include representatives of four constituencies in particular: the Member State governments (fifteen), the Commission (one), the European Parliament (sixteen), and national parliaments (thirty), bringing the number to sixty-two in all. In addition, observer status was given to two representatives of the Court of Justice and two of the Council of Europe, one of which was to be drawn from the Court of Human Rights. In addition to the significantly representative nature of the body’s composition and in particular to the deliberate predominance of parliamentary

\textsuperscript{16} In his speech at the first meeting of the body set up to draft the Charter, the Commission representative António Vitorino said that he was “convinced that this wise combination of the Community and national sides and, above all, the parliamentary predominance will help bolster the draft Charter’s legitimacy in the eyes of a public which is often critical of the complex decision-making machinery at European level.”

\textsuperscript{17} In his discussion of the possibilities for transnational democracy, J. Dryzek in Deliberative Democracy and Beyond (OUP, 2000) Chap 5, argues, in contrast to the ‘cosmopolitanism’ model propounded by writers such as David Held, for the taking into account of other discursive sources of governance and order, such as the actors within civil society, rather than focusing solely on the organs of government. The Convention body, on the other hand, in its marginalisation of the role of civil society and in its institutional composition, remains far from being a communitarian or a radically deliberative democratic forum of the kind which has increasingly been argued for by academic observers. See also R. Bellamy and D. Castiglione, “The Normative Challenge of a European Polity: Cosmopolitan and Communitarian Models Compared, Criticised and Combined”, in A. Føllesdal and P. Koslowski (eds), Democracy and the European Union, pp. 254-84.
representation, the working method was expressly prescribed in a way which immediately contrasts with other significant constitutional processes within the EU - if indeed this process of drafting the Charter can be termed a constitutional one.\(^\text{18}\) It is as though this procedure represented a kind of trial response to the major criticisms of the normal Intergovernmental Conference procedure for amending the Treaties, in that the Tampere conclusions stipulated a degree of openness, inclusiveness and transparency, which have been conspicuously absent from the IGC treaty revision processes of the past.\(^\text{19}\) The major criticisms of the IGC process have included its lack of transparency, lack of openness to popular input and the non-consultation of candidate countries. On this occasion, by contrast, it was specified by the European Council that hearings held by the body and documents submitted at the hearings were to be public, and this procedure has been followed throughout. The website on the Europa server has been useful and has enabled the process to be followed reasonably closely from without. Similarly, the European Council specified that certain other European institutions which were not involved in the body itself – the Economic and Social Committee, the Committee of the Regions and the Ombudsman – should be invited to give their views, and that an ‘appropriate exchange’ of views be held with the states which have applied for EU membership. Finally, the Tampere Council encouraged (rather than required) 'other bodies, social groups or experts' to be invited to give their views. Despite this exclusion of representatives of civil society from formal involvement in the drafting process and in

\(^{18}\) It is interesting to note that while the Charter process could hardly be characterised as a moment of constitutional baptism for the EU, some aspects of its functioning might be seen as prototypical for such a process. Jon Elster in his essay on “Deliberation and Constitution Making” in J. Elster ed. Deliberative Democracy (CUP, 1998) sets out some propositions concerning the optimal conditions for a constitution-making process, at least some of which can be seen reflected in the institutional arrangements for drafting the EU Charter

\(^{19}\) In a recent report commissioned by the EC Commission from the Robert Schuman Centre of the EUI, dealing with reform of the Treaty revision procedure, one of the suggestions made was that the system set up for drafting the charter of rights could be adopted as a possible alternative for certain types of Treaty amendment: see the Second Report on the Reorganisation of the European Union Treaties, July 2000, available at http://europa.eu.int/comm/igc2000/offdoc/discussiondocs/index_en.htm
particular from membership of the body, a number of well-attending hearings took place and a vast number of submissions and representations were made by a wide range of organisations and interests, thus testifying to the emergence and potential vibrancy of a European civil society.\textsuperscript{20}

Thus, between the time of the Cologne European Council in June and that of Tampere in October, the General Affairs Council had decided on the composition, working methods and practices of the ‘Body’ which would be responsible for drafting the document. On examining the Tampere conclusions, it is immediately evident from the political choice to establish such a large body with such a broad and high-profile membership, that this was to be a significant initiative, and not simply yet another of the many Sages reports or working group proposals which have gathered dust on Community shelves over the years. Whatever the ultimate proposals of the body, the nature of the process specified made it apparent that they would have to be taken seriously. Indeed the very choice of procedures ensured an almost unprecedented momentum for the initiative, and would serve to have made it very difficult for any effective opposition to emerge, as long as the final product was not patently unacceptable in some respects. Certainly, looking back at almost a year of the body's functioning, it seems that the relative openness, transparency and high profile of the process has attracted a good deal of positive comment, including from some of the NGOs and others who have sought access to it, although less so from the governmental representatives involved, some of whom consider the nature of the

proposals and many of the amendments suggested by NGOs and taken up by members of
the body to be politically unrealistic. 21

Despite the appearance of inclusiveness and at least openness to some degree of
engagement, if not deliberation, with civil society more generally, 22 those with most
influence over the drafting process were evidently the members of the small group
composed of the chair, and the three vice-chairs. 23 Roman Herzog, former president of
the federal republic of Germany was chosen by the body as its chair, and each of the
subgroups – national parliamentarians, European parliamentarians, and member
states/European Council – chose Gunnar Jansson, Inigo Mendes de Vigo, and Paavo
Nikula (to be replaced, as the presidency of the European Council rotates, by Pedro
Bacelar de Vasconcelos and Guy Braibant) respectively. This group, according to the
Tampere European Council, was to propose a work plan for the body and “perform other
appropriate preparatory work”. In accordance with its members’ perception of the
solemnity and importance of this body, it was decided early on, at Herzog’s prompting, to
rename the somewhat unfortunately entitled ‘body’ the ‘Convention’ (with certain

21 It is sometimes said that the openness and inclusiveness of a process of drafting (in international human
rights law in general) tends to be inversely related to the legal strength of the final document which
emerges.
22 On the growing attempts of the EU - until now in particular the Commission - to recognise and engage
with the increasing activism of 'civil society', rather than merely with organised business interests or even
neo-corporatist social partners, see the 1997 Commission Communication on Promoting the Role of
Voluntary Organisations, and its more recent Discussion Paper in 2000 on The Commission and NGOs:
building a stronger partnership, together with the responses of many of those organisations, available on
and the production of governance”, paper delivered at the workshop on Constitutionalism and Constitutive
Policies Beyond the State, Queen’s University, Belfast, 19-20 May 2000.
23 Having said that, it does not seem to be the case that this ‘praesidium’ monopolised the development of
the draft Charter by being the proponent of each of the drafts. Apparently over one thousand amendments
were submitted, and successive drafts of the praesidium, which set out with the ECHR provisions as a
baseline, were based on an attempt to represent some kind of compromise between the different views.
Further, some eight or nine rights which did not form part of the list originally drawn up by the praesidium
were included in the latest draft. COM(2000) paras 4 and 20. It was agreed that there would not be any
numerical voting, but rather an attempt to proceed by consensus, and it appears that the final draft was
constitutional overtones) and the drafting group as ‘the Praesidium’. Otherwise, the body agreed to work through working parties on specific subjects and categories of rights.

The difference in views as to the aims and ambitions of the process, even amongst the members of the praesidium, is evident from their initial speeches. Herzog, whose views seem most clearly to reflect the view expressed in the original European Council mandate, and that of the German presidency whose initiative it was, argued that it was not a matter of drafting a European constitution, but “to put together a list of fundamental rights which will enable us together…to bring about a more ‘people-centred’ approach in the European Union”. His speech also expresses nicely the political ambivalence about the eventual status of the charter: “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”. The first of the vice-presidents, however, Mendez de Vigo on behalf of the European Parliament, expressed a somewhat different perspective on the mandate given by the European Council and was clearer in his own view as to whether or not the charter was to be legally binding: “I would like to make it quite clear that for us a mere declaration is not enough…The Charter of Fundamental Rights must be binding and must be incorporated into the Treaty…the fact that our work will finish at the same time as the Intergovernmental Conference offers a good opportunity for us to meet this objective”. His view was also shared by the Commission representative, António Vittorino, who said in his initial

approved with the “almost unanimous” agreement of the Convention members. See letter of Roman Herzog to Jacques Chirac, 5 October 2000, CHARTRE 4960/00.
speech that “this body must, therefore, come up with a text which the Commission believes should meet the necessary format and content requirements for integration into the Treaties”.

4. Restraining influences

One of the less obvious but nonetheless significant influences on the drafting of the Charter appears to have been that of the secretariat to the convention body, which was drawn mainly from the general secretariat of the Council.\(^{25}\) The head of this secretariat, J.P. Jacqué, was a prominent academic and senior legal adviser to the Council who was considered to have been primarily responsible for a controversial legal opinion on the legality of a proposed EC human rights and democracy regulation in 1997,\(^{26}\) which adopted a restrictive reading of the European Court of Justice’s ruling in Opinion 2/94 on accession to the ECHR, and a restrictive reading of the Community’s competence to act to promote human rights in general. Early on in the proceedings of the new body, Herzog in his capacity as chair asked the secretariat to provide the body with guidance as to certain ‘horizontal’ questions which would have to be examined. This request resulted in a document produced by the secretariat on certain key issues such as the scope of the charter, identifying the holders of the rights set out, as well as those to whom the rights were addressed and who would be bound by them.\(^{27}\) Firstly, the same, restrictive view of Opinion 2/94 and of the competence of the Community in the field of human rights –

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\(^{24}\) See the speeches annexed to the report of the first meeting of the Body drawing up the charter, held on 17 December, 1999, CHARTRE 4105/00. All quotes from these speeches cited below are to be found in this document.

\(^{25}\) Although being required to maintain “close contacts…with the General Secretariat of the European Parliament, the Commission, and… the secretariats of the national parliaments”.

essentially presenting this as a ‘negative’ (judicially enforceable set of standards) rather than a ‘positive’ (basis for political action) competence - emerges: “The aim of the Charter is to establish a bill of rights, rather than to confer new powers on the Union to legislate in the field of fundamental rights. In its Opinion 2/94 the Court of Justice made a clear distinction between the obligation to respect fundamental rights and the power to legislate with regard to fundamental rights”.28 This interpretation of the Court’s opinion has of course been previously challenged, on the basis that the Court may have ruled out the possibility of a certain kind of legislation in the field of human rights (viz, accession to the ECHR with its specific and highly significant institutional and constitutional implications), but did not rule out the possibility of any kind of legislation.29 This particular legal view of the secretariat which was advising and steering the drafting group clearly complements, in the formal language of lawyers, the more general political ambivalence about acknowledging or promoting a broader human rights role for the EU.

There are some contradictions to be observed within this particular legal opinion. Having initially argued the case for a clear distinction between judicial monitoring and the obligation to respect fundamental rights on the one hand, and the power to legislate on the other hand, the secretariat's note later acknowledges that some of the rights to be listed in the draft charter ‘require action by the EU for them to be implemented’,30 thus at least indirectly acknowledging that legally binding negatively worded rights provisions have often been treated as giving rise to a positive legislative obligation to act – as indeed the case law of the European Court of Human Rights has at times indicated clearly.

27 CHARTRE 4111/00, 20 January 2000.
28 Ibid.
Nonetheless, the intention of the Charter secretariat was clearly to buttress the contrary argument that the EU/EC has no competence to legislate in the field of human rights and that this Charter, whether it becomes legally binding or not, will have no effect on that and will not create any new policy competence.\textsuperscript{31} Again, the constitutive potential of the charter, whether in terms of political values or of legal rights, was here being denied.

Further, the tensions apparent in this legal opinion are mirrored in the inconsistent standards and contradictory approaches adopted by the Member States and the Council towards the existence and extent of an EU human rights policy competence more generally. In adopting the recent race directive,\textsuperscript{32} for example, although the legal competence for the measure was (unlike the earlier regulation establishing a racism monitoring centre,\textsuperscript{33} or one of the two human rights and democratization regulations adopted in 1999\textsuperscript{34}) on this occasion derived from a clear Treaty basis, the Council arguably took a very broad view of the 'powers conferred by the Community' in Article 13 of the EC Treaty and even arguably exceeded express Community competence by

\textsuperscript{30} N. 27 above, para 20.

\textsuperscript{31} Observe the precisely opposing viewpoints on the one hand of those who, like the Charter secretariat, perceive the legitimacy of the EC and EU to reside in the drawing of clear limits to its positive policy competence in the field of human rights and a simultaneous assertion of ‘negative’ constraints on its general powers through a set of judicially enforceable human rights; and on the other hand of those who see the existence of an entrenched set of EU constitutional rights as an anti-democratic constraint on legitimate political processes, whilst simultaneously basing a degree of the EU’s legitimacy in its ability to adopt positive human rights measures. See N. Walker, “Human rights in a Postnational Order: Reconciling Political and Constitutional Pluralism”, forthcoming, and R. Bellamy "The 'right to have rights' - citizenship practice and the political constitution of the European Union" forthcoming in R. Bellamy and A. Warleigh (eds) Citizenship and Governance in the European Union (Pinter, 2001). Contrast further, however, a third view which perceives the strengthened commitment to rights in the EU not as indicative of a negative liberal constitutionalism, but as a development which, by “increasing the range of normative claims people can make... is bound to foster more deliberation in and on the EU”, D. Eriksen and J. Fossum "Legitimation through Deliberation” in their co-edited collection, Democracy in the European Union: Integration through Deliberation. (London: Routledge, 2000).

\textsuperscript{32} Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. COM (2000) 328

\textsuperscript{33} Council Regulation 1035/97, based on Articles (ex 213) and 308 (ex 235) EC.

\textsuperscript{34} Council Regulation (EC) No 976/1999 of 29 April 1999, on human rights and democratization in the field of cooperation policy, based on Article 308 (ex 235).
including provisions concerning discrimination in public sector healthcare and housing. It is generally acknowledged that the political impetus for adopting the anti-racism directive so promptly in July 2000 was the coming into office of the FPÖ in Austria. That same contradictoriness is again evident in the contrast between the rush to adopt ad hoc sanctions against Austria and subsequently to request the European Court of Human Rights to appoint a three-person committee to report on Austria's compliance with ‘common European values’, and on the other hand an ambivalence about presenting this action as EU or Community action (as opposed to a measure adopted by the 'fourteen').

Secondly, the secretariat’s note emphasises again the intention to limit the applicability of the Charter to the Member States, as opposed to the EU institutions: “The Charter is intended to apply to the Union’s institutions and not to activities of Member States which fall outside the scope of EC or EU legislation”. It is significant to note that the way in which the scope of application of notions of ‘fundamental rights’ emerging in EU law to the Member States has been expressed in the past has been the subject of debate and disagreement, partly for legal reasons (i.e. because the Court of Justice has expressed it in different ways on different occasions) and partly because of the fundamental

35 Unless, as is unlikely, the Directive is interpreted as being restricted to race discrimination against EC nationals only when e.g. they are in a Member State other than that of their nationality, or exercising their freedom of movement.

36 It should be noted that it was Austria which sought to provide a legal form and a Treaty basis to monitoring and sanctions of this kind for the future, in its submission to the IGC for reform of Articles 7 and 46 of the Treaty on European Union. See CONFER 4748/00, earlier this year. Proposals were also put forward by Belgium, by the Portugese presidency, and by the Commission (see further CONFER 4782/00 and CONFER 4785/00) and Article 7 has indeed been amended by the final Treaty signed at Nice. Furthermore, not only will the new amendment to Article 7 strengthen the EU’s legal competence to act in relation to human rights situations internal to Member States by permitting action where a risk of breach exists, the article seems even prior to this amendment - both because it governs the Union and not just the Community, and because it is not restricted to any particular field of policy competence - to provide legal contradiction of the narrow view of EC/EU competence to act in the field of human rights.

implications this is likely to have for the autonomy of the Member States in fields not obviously central to EC/EU activities.

In an early draft the relevant clause read so as to specify that the provisions of the Charter would be “binding on the Member States only where the latter transpose or apply the law of the Union”. A few months later it had changed so as to read: “the provisions of this Charter are addressed to the Member States exclusively within the framework of implementing Community law”. These are reasonably restrictive formulae which clearly seek to limit the extent to which Member States are to be affected by the Charter, the one referring to Union law and the second to Community law only. In a subsequent draft, however, the clause was broadened in a way which more directly reflected the relevant case law of the Court of Justice and which referred to the EU rather than EC, so as to provide that the Charter provisions were addressed “to the Member States exclusively within the scope of Union law”. In the explanatory statement of reasons accompanying this particular draft, the case of Wachauf and the more recent Kjell Karlsson were cited, declaring that the requirement to respect fundamental rights has already been held by the Court of Justice to be binding on the Member States ‘when they act in the context of Community law’. Both of these formulations - including the expression in the explanatory memorandum as well as in the draft article itself – can be seen to be quite a bit broader, in terms of what they suggest the potential impact of the Charter provisions on Member State action will be, than that originally expressed either

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38 CHARTRE 4123/1/00 of 15 February, 2000
39 CHARTRE 4235/00 of 18 April, 2000
40 CHARTRE 4360/00 of 14 June, 2000.
42 Case 292/97, judgment of 13 April, 2000.
43 Footnote 39 above.
in the secretariat’s note for guidance or in the first draft of the Charter produced.\textsuperscript{44} However, this was changed again following a number of later amendments proposed by members of the Body\textsuperscript{45}, and by the time of the drafts published in August and September, the relevant article read that the provisions of the Charter are addressed to the Member States “only when they are implementing Union law”\textsuperscript{.46} This formulation, which has made its way into the final version of the draft Charter as Article 51 thereof, is clearly narrower in some ways than the existing case law of the Court of Justice which specifies that Member States are bound by fundamental rights guarantees when they are acting “within the scope of Community law”, although it does refer to Union rather than Community. It is clear from the Court's case law that "within the scope of Community law" can include either situations where the Member States are implementing EC law, or where they are derogating from it,\textsuperscript{47} or possibly in other contexts too which fall more generally within the field of or within the scope of EC, and now EU, law. It is also notable that explanatory note on Article 51 of the final draft of the Charter, use is made of a looser and broader term which is that the provisions are "only binding on the Member States when they act \textit{in the context of} Community law" (emphasis added).\textsuperscript{48} In this document, the Court's statement in one of the most recent of its rulings on the scope of Member States' obligations to respect fundamental rights, where it specifies that fundamental rights principles are binding on the Member States when they are "implementing Community rules", seems to be treated as though that were a summary of the entire jurisprudence, rather than a specific and fairly narrowly defined scope which

\textsuperscript{44} The Finnish presidency at Tampere had argued that the purpose of the work of the body was to draw up a list of rights applicable to the activities of the Union "and not to prepare a text applicable to the Member States when exercising their own powers". There is again quite a degree of ambiguity in this sentence, given the uncertainty over what exactly are the Member States 'own powers' and when are they acting as entities which are part of the European Union.

\textsuperscript{45} See CHARTRE 4373/00 of 23 June 2000, and see the praesidium draft of 3 July, CHARTRE 4383

\textsuperscript{46} CHARTRE 4470/00, 14 September 2000

was suitable to the particular facts of that case which concerned the implementation of Community agricultural rules.\footnote{49}

This somewhat tedious tracing of the convoluted path taken by what might seem like a fairly innocuous ‘horizontal’ clause, from its earliest and reasonably strict interpretation by the secretariat's guideline, through several broader intermediate formulations, and reverting ultimately to an even stricter version, illustrates an emergent reluctance to commit the Member States to observing the norms of Charter other than in the cases which are most closely linked to the EU where the Member States have little or no autonomy, i.e. in the actual implementation of EU legislation.

5. Conclusion

One of the points made here is that although the process of drafting an EU Charter of fundamental rights has been a highly ambivalent one in its establishment, its functioning, and its aims, exposing deeply contested political issues at its heart, the unresolved nature of the process and its desired outcome is not an uncommon feature of European constitutional development. The three fundamental points of political contestation which were evident in the decision to establish the Charter process, and which also emerged clearly within the process itself, concerned firstly whether the eventual document should be binding or not, secondly the nature and scope of the EU’s policy competence in the field, and thirdly the extent to which it should be applicable to the Member States. Nonetheless, the profound differences of view about its aims, even amongst the central actors within the process, are unlikely to affect the significance of the outcome, given the

\footnote{48} CHARTRE 4473/00.  
\footnote{49} Case 292/97, footnote 42 above.
deliberate emphasis which was placed on the nature of this process. Certainly, for the more immediate future, the high-profile nature of the drafting body’s membership effectively guaranteed that the outcome of the process, whatever form it took following the European Council decision at Nice, would be taken seriously. It was established as a novel, experimental, relatively deliberative and open forum for constitutional debate, contrasting quite starkly with the traditional state-dominated IGC processes of tough bargaining and closed diplomacy as the means for Treaty change in the EU. Clearly there were many limitations to the Charter process, such as the ambiguity of its aims, the suggestion of superficiality implicit in the ‘showcasing’ idea, the exclusion of civil society representatives from substantive involvement, and the strong position of the drafting group (arguably influenced, at the very least, by the Council’s legal advisers in their secretariat). Yet the very act of opening up of a new forum of this kind is suggestive of the potential for newer and more experimental forms of constitutional development in the EU.50 As Ulrich Preuss has commented, we should not underestimate ‘the cunning of reason’ and the likelihood of such a process, albeit developed on ad hoc basis and entirely outside the terms of the EU Treaties, outgrowing the limited intentions and design of the heads of state who established it, and acquiring an independent constitutional significance which could ultimately threaten their status as Herren der Verträge. Indeed, the nature and terms of the treaty revision process to take place in 2004, which was announced in the European Council conclusions at Nice, suggests that the traditional IGC process may not survive long in its current form, and that the normative appeal of the more open and

50 Deliberative and discursive forms of democracy and process-based ideas of constitutionalism have become ever more prominent in political theory over the past decade, and the work of writers such as Rawls, Michelman, Sunstein and Tully in America and Canada, and Habermas in Europe is increasingly influencing political scientists and lawyers who are exploring the phenomenon of EU constitutionalism and constitutional development. For a helpful overview of some of the work being done in this field, see J Shaw "Process and Constitutional Discourse in the European Union” (2000) Journal of Law and Society 4.
deliberative type of process commenced by the drafting of the Charter has already begun to take hold.