Human rights: transforming services?

social care institute for excellence

Access to health care and human rights

Annex of international standards

INTERNATIONAL TREATIES AND MECHANISMS

International Treaties

1. As long ago as 1946, the Constitution of the World Health Organisation ("WHO") recognised the right to health. It stated that "the enjoyment of the highest attainable standard of health is a fundamental right of every human being." This was followed two years later by the recognition of the right to health in the Universal Declaration of Human Rights ("UDHR"). Article 25 (1) states:

> Article 25.
> (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Since then the right to health has become codified in numerous legally binding international treaties. These are now beginning to generate case law and other jurisprudence and so adding content to the right to health. As Mary Robinson, the UN High Commissioner for Human Rights, has said the right to health is not the right to be healthy, but rather it requires "governments and public authorities to put in place polices and action plans which will lead to available and accessible health care for all in the shortest possible time."[1]

3. The most notable and authoritative expression of the right to health[2] can be found in Article 12 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), which has been ratified by 151 countries including the UK, it states:

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
>
> (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

[1] See "25 Questions and answers on Health and Human Rights", WHO Health and Human Rights Publication series Issue No. 1 July 2002, p.11
[2] For the most detailed and specific enunciation of the right to health see Article 24 of the Convention on the Rights of the Child.

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

4. This Article has been clarified and expanded upon by General Comment 14[3], issued by the Committee on Economic, Social and Cultural Rights on 12th May 2000. The General Comment recognises that the right to health is closely linked to and dependant on other human rights, including the right to food, housing, work, education, participation, the enjoyment of the benefits of scientific progress, life, non-discrimination, equality, the prohibition of torture, privacy, access to information, and the freedoms of association, assembly and movement[4]. The first paragraph makes clear the fundamental nature of the right:

> "1. Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realisation of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organisation (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable."

5. The footnote to the last sentence referring to legal enforceability notes that the principle of non-discrimination in relation to health facilities, goods and services is legally enforceable in numerous national jurisdictions. The right to health is clearly a right the enjoyment of which must be non-discriminatory, this is reflected not only in the ICESCR, but also in Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

6. In its' "25 Questions and Answers on Health and Human Rights" the WHO specifically dealt with how the principle of freedom from discrimination relates to health[5]. It summarised the non discrimination in relation to health and health care by reference to General Comment 14 which defines it as proscribing "any discrimination in access to health care and the underlying determinants of health, as well as to means and entitlement for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social in origin,

[3] E/C.12/2000/4.
[4] See paragraph 3
[5] *ibid* n. 1, p. 13, Question 5.

property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, civil, political, social, or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health."[6] The report also noted that public health practice is heavily burdened with the problem of inadvertent discrimination, and gave as examples of outreach activities that may "assume" that all populations are reached equally by a single dominant language message on television, or analysis which "forgets" to include health problems uniquely relevant to specific groups, like breast cancer, or sickle cell disease[7].

7. The General Comment usefully sets out four criteria by which to evaluate the right to health[8]:
    1. **Availability.** Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity.

    2. **Accessibility.** Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:
        i. Non-discrimination
        ii. physical accessibility
        iii. Affordability
        iv. Information accessibility

    3. **Acceptability.** All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve health statues of those concerned.

    4. **Quality.** Health facilities, goods and services must be scientifically and medically appropriate and of good quality.

8. The General Comment does however acknowledge that the right to health, as defined in the Covenant as being the right to the "highest attainable standard of health", does take into account a State's available resources. Article 12(1) is said to take into account both the individual's biological and socio-economic preconditions and a State's available resources and so the right to health must be understood as a right to the enjoyment of a variety of facilities, goods and services and conditions necessary for the realisation of the highest attainable standard of health.

9. As set out above Article 12(1) of the ICESCR, States parties recognise "the right of everyone to the enjoyment of the highest attainable standard of physical and mental

[6] General Comment No. 14.
[7] The paper quoted from The Hastings Centre Report, Volume 27, No. 3. May-June 1997 p.9, where Jonathan Mann went as far as saying that inadvertent discrimination is so prevalent that all public health policies and programmes should be considered discriminatory until proven otherwise placing the burden on public health to affirm and ensure its respect for human rights.
[8] See paragraph 12

health". Article 12(2) enumerates a number of steps to be taken by States parties to achieve the full realisation of this right, which include the right to prevention, treatment and control of disease, and the right to health facilities, goods and services.

10. In General Comment no.14 the right to health facilities, goods and services in article 12(2)(d) is said to include appropriate treatment of prevalent diseases, preferably at community level, and the provision of essential drugs. The core obligations on States Parties under the Covenant (specified in General Comment no.14) specifically includes the provision of essential drugs, as defined under the WHO Action Programme on Essential Drugs, and a national public health strategy and plan of action with particular attention to vulnerable or marginalised groups.

States Parties Obligations under ICESCR

11. There is clearly a difference in language between the rights contained in the International Covenant Civil and Political Rights ("ICCPR") and those in the ICESCR. The ICCPR sets rights out in terms of "Everyone has the right to …" or "No one shall be subject to …", whereas in the ICESCR the rights are set out in terms of the "The States Parties recognise the right…" or " The States Parties undertake to ensure…". It is for this reason, and the undertaking in Article 2 of the ICESCR "to take steps" which has led to the nature of ICESR being described as a "promotional". However, this may belie the true nature of the obligation States Parties undertake when becoming parties to the ICESR.

12. Article 2 of the ICESCR sets out the nature of the obligation that States parties undertake when they ratify the Covenant. Article 2 states:

> "1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
>
> 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

13. In General Comment No.3 (The nature of States parties obligations (art. 2, para. 1 of the Covenant)[9], the Committee said that:

> “Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties’ obligations. One of these, which are dealt with in a separate general comment, and which is to be considered by the Committee at its sixth session, is the "undertaking to guarantee" that relevant rights "will be exercised without discrimination.
>
> 2. The other is the undertaking in article 2 (1) "to take steps", which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is "to take steps", in French it is "to act" ("s'engage à agir") and in Spanish it is "to adopt measures" ("a adoptar medidas"). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.”

14. The means to be used in order to satisfy the obligation “to take steps” are stated in article 2 (1) to be "all appropriate means, including particularly the adoption of legislative measures". The Committee in the General Comment recognised that in many instances legislation is highly desirable and in some cases may even be indispensable. For example “in fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.”

[9] 14th December 1990

15. The Committee went on to note that the phrase "by all appropriate means" must be given its full and natural meaning and that the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make. Importantly among the measures which might be considered appropriate is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justifiable.

16. The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realisation of the rights recognised" in the Covenant. The term "progressive realisation" is often used to describe the intent of this phrase. The concept of progressive realisation recognises the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the ICCPR which embodies an immediate obligation to respect and ensure all of the relevant rights. However as the Committee noted:

> “9. Nevertheless, the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”

17. The Committee has also expressed the view that there is “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.” A State party in which “any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant”, in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources “it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”

18. The Committee emphasised that even where the available resources are demonstrably inadequate, “the obligation remains for a State party to strive to

ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances." (paragraph 11)

Justiciability of Economic, Social and Cultural Rights

19. The justicialbility or otherwise of economic, social and cultural rights is a large topic and one that is the subject of much debate[10]. The difference in definition of economic, social and cultural rights as primarily aspirational goals to be achieved progressively has led some to argue that they cannot therefore be justiciable. However their different treatment in respect of the means by which they are defined should, it is submitted, in no way relegate them to a lower hierarchical rung from that of civil and political rights or necessarily mean they cannot be the subject of adjudication. It does however require consideration to be given to the means by which the courts should interpret the obligations undertaken and the extent to which the courts can and should interfere with matters concerning government policy and resource allocation.

20. The UN has recently set up a working group to consider whether the ICESCR should be subject to the same individual complaints mechanism as the ICCPR. The Commission on Human Rights established the working group by its resolution 2003/18, and in November 2005 its' Chairperson drafted a paper on the elements for an optional protocol for discussion[11]. The paper in particular identifies as an issue how the operation of an optional protocol might affect domestic decisions on resource allocation. At paragraphs 37 to 39 of the paper it is said:

> "37. ... [C]ommunications could also require the Committee to consider the compatibility of certain policy decisions of public authorities with the provisions of the Covenant, in particular if a communication concerns the alleged non-fulfilment of the obligation to "take steps" under Article 2(1). The question arises whether treaty bodies face any new challenge to their role in relation to economic, social and cultural rights in comparison to other areas of law, including civil and political rights.
>
> 38. In understanding the role of a treaty body in such situations, an important starting point is the examination of the appropriate role of the judiciary in decision-making at the national level. Constitutionally, the judiciary has a role to uphold the balance of powers between the executive, the parliament and the courts, which sometimes requires judicial review of the acts and omissions of public authorities. The judiciary makes such decisions according to established legal doctrine and principles. In South Africa, these matters were debated at the time it was decided to include socioeconomic rights in the Bill of Rights. There, the Constitutional Court pronounced itself on the matter of the separation of

[10] A full discussion of the debate is outside the remit of this paper, for a recent and full analysis see "Justiciability of Economic, Social and Cultural Rights: Should there be an international complaints mechanism to adjudicate the Rights to Food, Water, Housing and Health?" by Michael J Dennis and David P Stewart, American Journal of International Law, Vol. 98 p.462 2004.

[11] See http://www.ohchr.org/english/issues/escr/docs/report2006_wg2advedit.doc

> powers doctrine and admitted that, when pronouncing itself on economic, social and cultural rights, a court could make orders with budgetary implications. However, in the Court's opinion, this was not fundamentally different from what already occurred in relation to adjudication of civil and political rights. The Constitutional Court then stated that "[a] court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view, it cannot be said that by including socio-economic rights within the bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers."
>
> 39. In *Minister of Health and Others v. Treatment Action Campaign* [South African Court of Appeal 2002 (5) SA 721, 2002 10 BCLR 1033] the South African Court of Appeal referred directly to this question of separation of powers between the judiciary and executive. After examining practice in Canada, Germany, India, the United Kingdom and the United States, the Court concluded its own position, noting that: "This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy". The Court further noted that a dispute concerning socioeconomic rights would thus be likely to require a court to evaluate State policy and to give judgement on whether it is consistent with the Constitution."

21. The paper also considers cases concerning civil and political rights where resources are in issue, in particular those involving delay in court proceedings and the right to a hearing within a reasonable time where governments have sought to argue as a "defence" lack of resources. In these cases it is noted that the ECtHR has distinguished between temporary backlogs and "organisationally in-built" backlogs. In cases of endemic backlog, it is said to be implicit in several decisions that the State is under the duty to reorganise structurally its delivery of judicial services (see para 42). Another example is the case of *Mukong v. Cameroon* a case before the Human Rights Committee concerning conditions of detention and lack of resources where the Committee concluded that "certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development".

22. The Conclusion to this section of the paper is that:

> "43.The above analysis is not intended to oversimplify the often difficult role facing judges at the national level or human rights treaty bodies in determining the compatibility of government decisions with legislation,

constitutions and human rights treaties. The balance between judicial activism and judicial deference will alter over time and between countries, and tensions can arise. Most cases at the national and regional level require courts and quasi-judicial bodies to investigate a State act or omission and declare it compatible with the constitution or treaty. In some cases, it might be appropriate for the court or treaty body to advise public authorities of the nature of the course to be taken, for example by indicating the specific result required (without establishing the method to employ) or alternatively, where there is only one possible means of obtaining the required result, by describing the action to be taken. **The most important issue to emphasise is that the judicial and quasi-judicial consideration of economic, social and cultural rights does not raise any judicial conundrums that are substantially different from others already dealt with in other areas of the law**." [emphasis added]

23. Specific reference is made in the paper to the lack of any quasi-judicial adjudication at the international level concerning unjustified or disproportionate restrictions on access to essential medicines or health care (see paragraph 46). At paragraphs 61 to 63 the paper refers to a trend both in domestic decisions and regional communications[12] to a growing acceptance of the appropriateness and effectiveness of considering economic, social and cultural rights in a judicial context.

24. While a Protocol to the ICESCR allowing for individual complaints may one day come into existence, the question of whether the UK will sign up to it is another matter. But at the very least its very existence would assist in adding to the growing trend and development of the recognition that economic, social and cultural rights are justitiable and an area with which the courts can and should be willing to become involved.

UN Special Rapporteur

25. Other than the treaties and their monitoring bodies the most important mechanism for monitoring and implementing the right to health at the international level is probably the UN Special Rapporteur on the right to health. The Special Rapporteuer, who is currently Paul Hunt, was appointed by the UN Commission on Human Rights by Resolution 2002/31 and has been asked to apply a "gender perspective" and to pay "special attention to the needs of children in the realisation of the right to health". He also when carrying out his mandate takes into account the relevant provisions of the Durban Declaration and Programme of Action, and to bear in mind in particular General Comment

[12] The cases referred to are *Minister of Health v. Treatment Action Campaign* Constitutional Court of South Africa Case CCT 9/02, *People's Union for Civil Liberties (PUCL) v. Union of India and Others*, Supreme Court of India, Writ Petition [Civil] No. 196 of 2001, *Marchidio Jose Bautista y Otras – AMPARO* Expendiente No 200004/36, *Jorge Odir Miranda Cortez y Otros* (El Salvador) Report No. 29/01 of 2000 (Inter American Commission on Human Rights), *International Commissions of Jurists v. Portugal* Compliant No, 1/1998 (European Committee on Social and Cultural Rights)

No. 14 of the Committee on Economic, Social and Cultural Rights (CESCR) and General Recommendation No. 24 of the Committee on the Elimination of Discrimination against Women.

26. In the discharge of his mandate the Special Rapporteur undertakes country and other visits, receives individual complaints and transmits communications to States with regard to alleged violations of the right to health, and submits annual reports on the activities carried out under the mandate to the UN Commission and the General Assembly.

REGIONAL MECHANISMS: EUROPE

Convention on Human Rights and Biomedicine

27. A relevant Council of Europe Convention to the right to health is: The Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine[13], Article 3 of which states:

> – Equitable access to health care
> "Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality."

28. The "Explanatory Note" to the Convention says with regard to Article 3 that:

> "Article 3 – Equitable access to health care
>
> 23. This article defines an aim and imposes an obligation on States to use their best endeavours to reach it.
>
> 24. The aim is to ensure equitable access to health care in accordance with the person's medical needs. "Health care" means the services offering diagnostic, preventive, therapeutic and rehabilitative interventions, designed to maintain or improve a person's state of health or alleviate a person's suffering. This care must be of a fitting standard in the light of scientific progress and be subject to a continuous quality assessment.
>
> 25. Access to health care must be equitable. In this context, "equitable" means first and foremost the absence of unjustified discrimination. Although not synonymous with absolute equality, equitable access implies effectively obtaining a satisfactory degree of care.
>
> 26. The Parties to the Convention are required to take appropriate steps to achieve this aim as far as the available resources permit. The purpose of this provision is not to create an individual right on which each person may rely in legal proceedings against the State, but rather to prompt the latter

[13] Oviedo, 4.IV.1997

to adopt the requisite measures as part of its social policy in order to ensure equitable access to health care.

27. Although States are now making substantial efforts to ensure a satisfactory level of health care, the scale of this effort largely depends on the volume of available resources. Moreover, State measures to ensure equitable access may take many different forms and a wide variety of methods may be employed to this end."

29. Under Chapter XI (Interpretation and follow-up of the Convention) Article 29, the European Court of Human Rights may give, without direct reference to any specific proceedings pending in a court, advisory opinions on legal questions concerning the interpretation of the Convention at the request of the Government of a Party, after having informed the other Parties, or the Committee set up by Article 32, whose membership is restricted to the Representatives of the Parties to the Convention, by a decision adopted by a two-thirds majority of votes cast.

30. Although the United Kingdom is not a party to this Convention it is arguable that it is relevant to the developing "right to healthcare" in international law and more specifically to the United Kingdom's obligations under the ICESCR as well as under Article 8 ECHR. Many other members of the Council of Europe are parties to the Biomedicine Convention and reference to it in cases involving Article 8 are therefore likely to influence the interpretation of Article 8, which will subsequently become binding on the United Kingdom (see for example the recent case of Evans v. United Kingdom Application no. 6339/05, 7th March 2006 where the Biomedicine Convention was referred to under "Relevant International Texts")

The European Social Charter

31. The European Social Charter guarantees social and economic rights; it was first signed in Turin in 1961, and was then revised in 1996. The revised version came into force in July 1999. The UK has signed (7th Nov 1997), but not yet ratified the Revised Charter. The Social Charter is designed "to improve the standard of living" and to promote "social well-being". It deals with both substantive and procedural rights. The Charter guarantees rights such as the right to housing, to health, the right to education, the right to social security, to employment, and the provision of welfare services.

32. Under the Charter states must guarantee the right to protection of health, social security, social assistance, and social services. There are two basic undertakings that a State must accept, and these are set out in Article 20. First the state must "undertake to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means…" The aims referred to are the "attainment of conditions" in which the 19 rights listed in Part I "may be effectively realised". This is a political and not a legal undertaking. The second undertaking is a legal one, and it is to accept at least 10 of the 19 Articles that make up Part II, or 40 of the 72 "numbered paragraphs" of which these articles consist. The UK has agreed to be

bound by 60 of the 70 paragraphs. Each of the 19 Articles relate to one of the rights listed in Part I.

33. The rights are very broadly phrased - for example in Part I Article 13 states that "Anyone without adequate resources has the right to social and medical assistance", and Article 15 states that "Disabled persons have the right to independence, social integration and participation in the life of the community."

34. In Part II of the Charter, the most relevant Article in relation to the right to health is Article 11, The Right to protection of health:

> With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:
>
> 1 to remove as far as possible the causes of ill health;
>
> 2 to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
>
> 3 to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

35. The obligations are not unqualified; Article 31 effectively permits restrictions provided that they are "prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals."

Supervision of the Charter

36. The main method of supervision is through the provision of reports to the Council of Europe on how they apply the Charter, the reports are public and the social partners (e.g. trade unions, NGO's and employer organisations) may make observations on them. Individuals cannot apply to the ECSR. Proposals have been made to include certain of the rights guaranteed by the Charter in the European Convention but states have not yet agreed to this, however it may be possible to use Social Charter rights as means of interpretation of ECHR rights. For example health care standards may be relevant to violations of Article 2, 3 and 8 ECHR, and collective bargaining rights my impact on Article 11 ECHR. In Schmidt and Dalstrom v. Sweden the scope of any right to strike under Article 11 of the Convention was determined by reference to the Social Charter.

37. It has been argued that the rights in the Charter are collective rights, and so individual complaints regarding violations are not possible. It is true that the rights in the Charter do appear to be conferred on classes of people rather than individuals, so for example, categories of people are highlighted, "workers", "Children and

Young Persons", "employed women", "migrant workers" and "elderly persons", unlike the ECHR where the rights are conferred on "everyone". However this may merely reflect that these social rights arise in certain circumstances, rather than suggesting that the rights are "collective rights" and so prevent individual claims. On the other hand the breadth of the rights, and the phraseology used would make it difficult for an individual to assess whether there has indeed been an infringement, for example it may be difficult for an individual to evaluate whether the state had taken appropriate measures to "to prevent as far as possible epidemic, endemic, and other diseases", or whether they have received "access to housing of an adequate standard"[14].

The European Charter of Fundamental Rights

38. The European Charter of Fundamental Rights is unique in that unlike an ordinary EU policy initiative it is aimed not at the policy-maker, but largely at the "citizen". The Charter is currently a non-binding political declaration, and so has declaratory status only; it is not incorporated into a treaty. Following the rejection of the European Constitution, of which the Charter is part, by France and The Netherlands, it is now difficult to say when, or even if the Charter will become a legally binding document.

39. However, the European Parliament, the Council and the Commission proclaimed the Charter and the proclamation represents a solemn commitment by the three institutions to respect the Charter. It is probable that the Court of Justice will also draw inspiration from the Charter and so it is possible that it will become binding through its being interpreted by the Court of Justice as enshrining the general principles of Community law. Before the Charter existed the Court of Justice had to rely on Article 6 of the Treaty of European Union, as the expression of the general principles of Community law, in order to proceed against violations of fundamental rights. This Article lacks clarity in that it refers not only to the European Convention but also to the constitutional traditions of the Member States. The Charter will possibly provide the Court of Justice (and domestic?) judges with a much more explicit guide to their reading of fundamental rights. Even though therefore it currently has no legally binding force it may yet still be found to become a powerful document and tool in the enforcement and protection of human rights in Europe.

40. The Charter consists of a Preamble which states that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity and is based on the principles of democracy and the rule of law. It also states that the Union respects regional diversity, ensures freedom of persons, goods, services and capital, and the freedom of establishment, and that in a developing society it is necessary to strengthen the protection of fundamental rights by making them more "visible" in a Charter. The Preamble also makes reference to the ECHR, including its case-law, and ECJ jurisprudence. Each of the Charter's 50 articles, which set out

[14] For a discussion on this issue see "Are Social Rights Necessarily Collective Rights? A Critical Analysis of the Collective Complaints Protocol to the European Social Charter", [2002] 2002 E.H.R.L.R Issue 1 p.50

individuals' rights or freedoms, is taken from a "precursor" text. This can be another charter, a convention, a treaty or jurisprudence.

41. The Charter consists of 54 Articles, which are grouped under 7 Chapters. The Charter is innovative in including fundamental economic and social rights, alongside the more traditional civil and political rights and citizens' rights resulting from Community treaties. Chapter Four, “Solidarity,” contains novel individual rights, including the right to reconcile one’s family and professional life, one’s right to social security benefits and services, as well as one’s right to healthcare. Article 35 states:

> 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.[15]

42. Currently European citizens can refer to the Charter to challenge any decision taken by the Community institutions (European Commission, Council of Ministers of the European Union, European Parliament, etc.) and by Member States when implementing EU law. As far as its domestic use is concerned the House of Lords Select Committee on the European Communities conducted an inquiry into the Charter, it received evidence from interested parties (including JUSTICE) and its report (published 16 May 2000) concluded that although the potential significance of the Charter, both politically and legally, is very great, the extent of its usefulness would depend on its status and the purpose it is intended to serve. The UK Government has stated that it supports the human rights guarantees in the EU.

[15] EN C 364/16 Official Journal of the European Communities 18.12.2000