



# The EU Charter of Fundamental Rights: **Why a fudge won't work**

# The EU Charter of Fundamental Rights: Why a fudge won't work

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## Executive summary

As part of talks on the new version of the constitutional treaty, EU leaders are discussing the future status of the EU's Charter of Fundamental Rights

The Charter sets out an extensive list of social and political rights. The UK Government has always maintained that the rights it contains are based on existing rights and case law. Nonetheless, when the Charter was originally drawn up in 2000 the UK Government promised it would not become legally binding and would not be incorporated into the EU treaties. The then Europe Minister Keith Vaz promised that it would be no more legally binding "than the Beano."

However, during the negotiations on the first version of the constitutional treaty the Government allowed it to be included in the text, and made legally binding. However, the Government claimed that "safeguards" inserted into the text would mean that it would not change national law, despite being legally binding.

In the current negotiations the UK has briefed that it wants to see the Charter excluded from the new constitutional treaty. However, the draft mandate for the forthcoming IGC circulated by Angel Merkel on 19 June proposes that "the article on fundamental rights will contain a cross reference to the Charter on Fundamental Rights, giving it legally binding value and setting out the scope of its application." In other words – the same fudge as before, in which the Charter would become legally binding but there would be language and 'safeguards' designed to limit its effect on national law.

Open Europe's legal analysis, based on interviews with judges at the European Court of Justice, shows that there is a powerful body of evidence that even with such "safeguards", the Charter would still come to change national law.

- We interviewed several judges at the European Court of Justice (ECJ), who said that they believed the Charter would change national laws, despite the safeguards. This is crucial, as it would be the Court's judges who would ultimately decide on how to interpret the Charter if the constitutional treaty is ratified.
- One EU judge said it would "renew" member states' labour laws and would be "a basis for challenging national law". Another has said it is "foolish" to think it will not affect national laws. Even the President of the Court explicitly refused to deny that the Charter may be used to change member states laws.
- One judge told us: "The problem for the UK is that the social rights of the Charter could make it obligatory for the UK to accept some rights that they don't accept in the same way as other European countries... they are afraid that because of the social rights in the charter the Court and the EU would extend the practice of other member states to the UK. I'd say that it's more [like] a continental model, than an English model of social relations. So in this sense I understand that the companies' owners are worried because you could have the exportation of the continental model on them."

- Several judges said that the Charter, despite the “safeguards”, would give the court “more power”. Asked whether the proposal for safeguards would work, one judge said “I guess not, because I saw what was the destiny of other safeguard clauses in the treaty.”
- A legal opinion previously commissioned by the TUC found that, “The attempt by the New Labour government to ‘protect’ the UK’s restrictive labour laws from the fundamental rights proclaimed in the European Constitution failed...there will be no ‘protecting’ UK labour laws.”

The UK government is now briefing that it will get a “UK-specific” opt out from the Charter (Guardian, 21 June).

But it is hard to see how this could work. Jacques Ziller, a professor at the European University Institute in Florence, said that the idea of one country opting out of the charter was “nonsense” and would quickly be challenged in the courts. (European Voice, 31 May 2007) Firms operating in more than one member state would clearly be affected. Migrants coming from another member state to the UK would presumably still be covered. And anyone who travelled to another EU country – e.g. to use health services – would still be able to use the Charter.

While a lot of attention has focussed on the Charter’s affect on British labour law, the reality is that a binding Charter would be a tool for all kinds of groups from industrial lobbyists to anti-abortion groups. It is neither a left-wing or a right-wing document: it would simply mean that far more political decisions would be taken by the unelected and unaccountable judges of the European Court of Justice. The Court would have the power to rule on everything from limitations over sentences for criminals to freedom of expression, abortion, immigration, and the conditions under which public services are run.

**The debate surrounding the Charter when the original EU Constitution was first drawn up showed that the ‘safeguards’ approach would not work. For this reason the UK Government and others are extremely unlikely to sign up to anything which makes the Charter legally binding in any way – even with so-called safeguards. To do so would be a disaster for the UK.**

Apart from anything else, the UK Government could not allow the Charter to be incorporated into EU law under the new constitutional treaty or made legally binding because it would be an obvious retreat from the Government’s earlier promises:

“Our case is that it should not have legal status and we do not intend it to”  
- Tony Blair, 11 December 2000

“It will not be legally enforceable”  
- Former Europe Minister Keith Vaz, 22 November 2000

The attempt to include “safeguards” to stop the Charter affecting national laws as a fallback strategy would be unlikely to be effective. The fact that EU judges are already prepared to suggest that the Charter would also change national laws – despite the political sensitivity of such statements – is significant.

If ECJ judges' interpretation of the restrictions is that they will not prevent challenges to national law (and their decision is final), then safeguards would, *de facto*, not prevent challenges to national law.

For this reason we believe that the UK and other member states are unlikely to accept that the Charter should be made legally binding in any way. The most likely scenario is that other member states will agree to remove it and the UK Government will claim that this is a "triumph".

In reality it should never have been under discussion, and the time and leverage the UK has wasted on it should have been deployed trying to win various other battles which the UK seems to have conceded – e.g. over the role of the EU Foreign Minister and the EU President.

This analysis argues that "The history of the Charter, from 2000, when the UK reluctantly allowed it to be drawn up, to the present negotiations, is a good example of the danger of simply going with the flow in Europe, in order to gain "influence".

The Government is now facing both the revival of the constitution and having to spend diplomatic effort getting the Charter deleted. Instead of being clear about what it wanted and saying no to the Charter in 1999, the Government tried to "go with the flow" in order to gain "influence" in Brussels. This strategy has been a failure.

*"[The Charter] is part of the process of federalising the EU. The consequence of the Charter installing a fundamental rights regime within the treaties is part of the federalising process, and I think everyone apart from the Brits seems to be quite clear about that."*

**- Andrew Duff, Liberal Democrat MEP, 29 March 2000**

## **(1) What effects would the Charter have if made legally binding?**

The Charter would mean new powers for both the ECJ and the Commission.

### **(a) New powers for the ECJ**

The Charter is likely to affect national law and give the European Court of Justice substantial new powers. Although the debate in Britain has focused on the Charter's effect on business, it does, in fact, cover a very wide range of topics.

The Court will have substantial new powers to review and change national laws. But how the court will use these powers is difficult to predict. The only thing which is certain is that the European Court will have more power.

For example, Italian judge Antonio Tizzano, Advocate General at the European Court of Justice, has stressed the social rights in the Charter, and argued that it would move the UK economy towards the continental model. He said:

"The problem for the UK is that the social rights of the Charter could make it obligatory for the UK to accept some rights that they don't accept in the same way as other European countries. What makes a problem for the UK is the Charter of social rights. Because in the UK the system of relations between the social partners is different than in other countries. There are some worker protection differences, they want to keep this particularity, these specificity, they are afraid that because of the social rights in the charter the Court and the EU would extend the practice of other member states to the UK."

He added, "I'd say that it's more [like] a continental model, than an English model of social relations. So in this sense I understand that the companies' owners are worried because you could have the exportation of the continental model on them."

However, on the other hand, the First Advocate General of the Court, the Dutch judge Leendert Geelhoed, said that he believed the court would employ a "restricted" approach to the social rights in the charter, but an "expansive" approach to the more liberal rights in the Charter:

"The Court will be rather restricted in its interpretation, just in the case of the social and economic rights – whereas the court could be a little bit expansive in the classical and fundamental rights"

### **b) More power for the European Commission**

As well as a basis for the Court to rule on the legality of member states laws, the Charter will also provide a basis for the Commission to propose legislation in new areas.

A good example of how far the Commission will stretch the Charter is the directive on free movement. In a series of logical leaps, the Commission admits that it was proposed on the basis of a right which it "deduced" from a right in the Charter, which was in turn "deduced" from "member states traditions" – even though it is not in the existing treaties:

*“While it is true that the right of movement and residence of family members of Union citizens is not explicitly referred to by the Treaty, the right does flow from the right to preserve family unity, which is intrinsically connected to the right to the protection of family life, a fundamental right forming part of the common constitutional traditions of the member states, which are protected by Community law and incorporated in the Charter of Fundamental Rights.”*

The Commission is already using the Charter as a justification for legislation before it is even made legally binding. Making the Charter legally binding would let the Commission stretch its remit even further. The ECJ’s Advocate General Geelhoed has argued that the incorporation of the Charter would lead to “a lot of implementing legislation”:

Q: Would you say that the Charter, as a part of the Constitution will give rise to a lot of new law, a lot of new legislation?

Geelhoed: Yes. That will be the consequence of those values, especially the third part of the Charter – that will require a lot of implementing legislation.

## **(2) Controversial aspects of the Charter**

There are a variety of controversial proposals in the Charter, covering everything from limitations over sentences for criminals to freedom of expression:

### **Article 3: Right to the integrity of the person**

Anti-abortion groups have said they believe this will allow the restriction of certain types of abortion. The “Pro-Life alliance” argued that aspects of this article would restrict abortions carried out because of handicaps. Scientists have also argued that aspects of this article will restrict scientific research.

### **Article 8: The right to protection of personal data**

Data protection rules have a big impact on police investigations – with some arguing that they make it harder for the police. Under the Charter the Court would be able to define rules on data protection. It would also have big implications for the ongoing series of cases on passenger data sharing with the US. In May 2006, in Joined Cases C-317/04 and C-318/04, the Court annulled the decision authorising the conclusion of the agreement between the US and the EU on the transfer of personal data. But the EU and US are still keen to have an agreement, and have set July this year as a deadline for a deal. As soon as a new agreement is concluded it is likely to face a new legal challenge. The Charter would almost certainly be used to rule on such agreements.

### **Articles 7 and 9: The “Right to family life” and the “Right to marry and found a family”**

These rights could tip the balance in various cases relating to immigration and family reunification. In Case C-540/03, *Parliament v Council* [2006] the court rejected an attempt by the European Parliament to overturn limits on family re-unification, because, as it argued, existing pieces of EU legislation “do not establish any absolute right regarding family reunification. Nor should the application be examined in light of the Charter given that the Charter does not constitute a source of Community law. “Making the Charter legally binding could clearly mean that future cases of this kind could go the other way.

### **Article 11: Freedom of expression and information**

This article could mean that in future EU judges would rule over controversies such as the BNP’s right to advertise during elections, which is currently tightly controlled. This article would also have commercial implications - the Court would be able to rule over the press and the extent to which public broadcasters have to be opened up to commercial competition, as well as issues like tobacco and junk food advertising.

### **Article 16: Freedom to conduct a business**

This is controversial with trade unions and the left, who fear the Court may use this to apply internal market rules to public services. The “in principle” freedom to conduct a business could reverse the sorts of decision made by the Court for example in *Sodemare v Regione Lombardia*. In this case the Court ruled that Italy would still be allowed to specify that only non-profit organisations could get public contracts to run old people’s homes. It could also tip the balance in cases such as *Eyssen*, in which the Court ruled that the Netherlands was entitled to ban food preservatives it believed to be dangerous.

### **Article 17: Right to Property**

This article was promoted by the European Landowners Organisation (ELO), and was controversial with environmental groups because the ELO was hoping to get exemptions from nitrate regulations. This article also requires “fair compensation being paid in good time for loss” of property. For example, this might have meant that the UK Government would have had to pay compensation after it brought Railtrack under public ownership. It would also have implications for the Mayor of London’s attempt to bring London Underground under public ownership. While there are political arguments on both sides about such decisions, it is unclear why they should be made by the ECJ.

### **Article 21: No discrimination on grounds of nationality**

The UK Government made several attempts to delete this idea from other parts of the original constitution. While the idea of no “discrimination” obviously sounds uncontroversial in some ways, in legal terms the inability to make any decisions which affect nationals of non-EU member states differently to EU member states would have significant implications for social security and border policy. In an amendment to the European Convention the UK Government said that such an article “would have very wide-ranging consequences if applied to all nationalities, as opposed to only those of the Union.” However, it remains in the Charter.

### **Article 28: The right to collective bargaining and action**

The Charter’s best known feature is its seemingly open ended right to take industrial action. “Workers and employers, or their respective organisations, have, in accordance with Community 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.” Some fear this might conflict with UK laws restricting, for example the right to secondary picketing. The Court has already made reference to this right in its rulings in the controversial *Vaxholm* and *Viking* cases – although it could not decide these cases as long as the Charter is non-legally binding.

### **Article 31: Fair and just working conditions.**

The UK Government is currently fighting to protect its opt out from the EU maximum working week. Because part two of this article covers working hours, some businesses fear it could be used by the Court to by-pass the UK’s opposition.

### **Article 49: Principles of legality and proportionality of criminal offences and penalties**

This article states that, “The severity of penalties must not be disproportionate to the criminal offence.” In the UK the Home Secretary currently has a wide margin of discretion to recommend prolonged sentences for particularly serious criminals. This could be challenged if the Charter were made legally binding.

### **Article 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence**

The UK Government has tried to amend double jeopardy rules to allow for just such a possibility. This has been sparked in particular by the ongoing attempt to bring the killers of Stephen Lawrence to justice, but this would clearly not be possible under the Charter. Critics argue that regardless of whether one agrees with this, it should be decided at national rather than EU level.

### **(3) Expert opinion: Would 'safeguards' be enough to limit the power of the Charter if made legally binding?**

We interviewed ECJ judges, and looked at expert legal opinions commissioned by other groups. We also looked at what others said about the Government's original plan to include the Charter in the constitutional treaty but have "safeguards" to stop it affecting national law.

#### **a) European judges' opinions**

European Court judge George Arestis told us, "The EU Charter includes provisions that amongst others are fundamental trade union rights. **It has the potential to renew labour law in the Member States and at EU level.** The potential of the trade union and labour rights in the EU Charter will be apparent when they are compared with Member State laws which restrict or inhibit the rights of workers and their representatives."

He said that "The incorporation of the EU Charter into the primary constitutional law of the EU will have an impact on the Member States, bound by the Charter through the doctrine of supremacy of EU law. Case law seems certain to evolve over the years ahead.... The EU Charter could be used to deliver rights at work: (i) as a legal source, by itself, through the doctrines of 'direct' and 'indirect' effect, (ii) **as a basis for challenging national law** which incorrectly or inadequately transposes EU law."

He concluded that, "The Court will decide disputes where Member States are charged with failing to implement, or allegedly violating rights in the EU Charter."

European Court judge Jean-Pierre Puissochet told us, "The ordinary citizen could engage in procedures before their national judges, and they could invoke legal means derived from violation of fundamental rights as conferred by the Charter." Asked "Will the Charter have an impact on industrial relations?" He said, "It is very early to say, but I assume that it should have some impact."

Puissochet also warned, "This Court has always been innovative in the interpretation of certain fields ... You have to keep this in mind when you assess the possible impact of the constitutional treaty on the role of this Court."

Asked, "Do you think that Charter will give the ECJ more power?" he replied, "**I think it could well be the case** ... competencies would be enforced in those fields in which for the time being - even in customary law - there is no provision, and there is no guarantee. That goes for the two or three or four social provisions, which are, or will be, absolutely a new thing."

Judge Tizzano, Advocate General at the European Court, has suggested that the failure of previous safeguard clauses in EU treaties implies that the attempt to limit the impact of the Charter will not stand the test of time. He asked, "Will they be able to limit and to safeguard, and to maintain the limits of the application of the Charter as the people who suggested this clause wanted, or not? **I guess not, because I saw what was the destiny of other safeguard clauses in the treaty.**"

Asked whether the Charter means "more powers for the ECJ?" Tizzano said, "**Yes, more powers and more work.**"

Vassilios Skouris, President of the European Court of Justice, stated that the Constitution “will bring new areas and new subjects under the Court's jurisdiction”, and has refused to confirm that the Charter would not change national laws. In an interview with the Financial Times Skouris was asked, “Is the ‘horizontality’ of the Charter stable? The idea that the Charter would affect only EU institutions, not national jurisdictions?” Skouris replied: **“It’s difficult to say what is going to happen.”** (FT, 17 June 2004)

Fidélma Macken, another ECJ judge, has said that it is **“foolish”** to argue that the Charter will not affect national laws.

The Government’s own legal advisor, Professor Alan Dashwood, has admitted that **“you don’t know what will happen”** with cases referring to the Charter and that there is “no hard and fast answer” to whether the Charter will affect national laws.

Roger Errera, the head of the French Administrative Supreme Court, has said that, “If the Charter is left where it is, that is fully incorporated in the Treaty, it will have full legal value as any clause of the Treaty.”

## **b) The UK Government’s view**

Even the Government has admitted that the incorporation of the Charter is ‘not ideal’. Peter Hain has said, **“Well, in an ideal world, we would not have gone down the route of incorporating the Charter. We would have preferred it as a statement of declaratory rights.”**

When the Government was opposing the inclusion of the Charter in the treaties Baroness Scotland said making the Charter binding was “not desirable because a text incorporated into the treaties requires legal precision,” she said. “The Charter uses a breadth of language well suited for a political declaration.”<sup>1</sup>

Even during the European Convention in 2002 the Government was still promising that the Charter would not be included in the Constitution. Peter Hain said:

*“The people who say that it is a great idea to have a charter of rights do not seriously appreciate what the implications would be if it were incorporated wholesale in the treaty. My right hon. Friend the Foreign Secretary has made it absolutely clear that we shall not do that ... people want a charter of motherhood and apple pie at one level, but are not willing to recognise what full incorporation would signify.”<sup>2</sup>*

The Government tried to have it both ways. The Government has told business groups that the Charter would not affect our laws, but has also suggested the opposite to trade unions. Denis MacShane, the Minister for Europe, told trade unions in July 2004 that if they “read the small print” of the Constitution they would see it was good for them.

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<sup>1</sup> Hansard, 29 November 2000

<sup>2</sup> Hansard, 18 June 2002

### c) Trade union opinion

TUC leader Brendan Barber has said that, “much of the macho talk of red lines has been bogus.”

A legal opinion drawn up for the TUC by Professor Brian Bercusson of King’s College London concludes that, “The attempt by the New Labour government to ‘protect’ the UK’s restrictive labour laws from the fundamental rights proclaimed in the European Constitution failed. The fallback of reliance on the ‘explanations’ to mitigate the consequences of the Charter is similarly unlikely to have the effect desired. There will be no ‘protecting’ UK labour laws, frequently condemned by the supervisory bodies of the ILO and the Council of Europe for violations of international labour standards, from the impact of the fundamental trade union rights guaranteed by the EU Charter.”

The report for the TUC also states, “The Charter would be part of a European constitution with potentially powerful legal effects, including direct effect and supremacy. The incorporation of the EU Charter into the primary constitutional law of the EU will have an impact on the Member States, bound by the Charter through the doctrine of supremacy of EU law. Two specific methods of using the EU Charter to deliver rights at work may be indicated: (i) as an independent legal source of rights at work (e.g. through the doctrines of “direct” and “indirect” effect); (ii) **as a basis for challenging national law** which incorrectly or inadequately transposes EU law providing rights at work.”

### d) Other opinions

The forty-first report of the Lords European Union Select Committee argued that the safeguards intended to stop the Charter affecting national laws were insufficient, and were unlikely to stand the test of time.

The report noted, “These safeguards are indeed stronger than was the case with earlier drafts. We welcome these changes to the provisions regarding the Charter. We have, however, some concern whether these safeguards will be sufficient formally to bind the Commission.”

“In view of concerns expressed in debate in the House we seek a specific assurance that the safeguards applied to the Charter in the draft Treaty are indeed binding on the Commission. **We also question how far the efficacy of the provisions of the commentary will withstand the development of case law by the ECJ.**”

Tony Blair’s former Europe advisor Roger Liddle has argued that the rights in the Charter do extend beyond existing rights, and will lead to court cases. “The Charter contains a range of economic and social principles, **in addition to** the political and human rights that were a feature of the ECHR and are now incorporated in UK domestic law ... **the Charter is not neutered** as it affects the exercise of EU competence. It gives individuals, trade unions and other civil society groups **a legal right to go to court** if they believe their fundamental rights are being breached in acts for which the European Union is responsible, or where Member States are acting on the Union’s behalf.”

Liddle argued that the Charter and the constitutional treaty as a whole would, “achieve an irreversible shift towards a more social-democratic Britain.” Even if this was true, is it really appropriate for a constitution treaty to have party political content? Dominique Straus Kahn, the former French Justice Minister, has argued, “The history of this Charter [of Fundamental Rights], is very much the history of a battle against the United Kingdom. Our British friends had several beliefs. First, a Charter was not necessary. Then, if there had to be a Charter, it should be limited to political and human rights. Then, and above all, it was not to be integrated into the Constitution.

“At first they were defeated on the first two points. There was a Charter. And this Charter drew up a very large catalogue of rights, some of which do not feature in existing texts. But the Brits didn’t lose everything: they succeeded in limiting the Charter to a simple declaration with no legal value. **It is this line of defence which is crossed with the constitutional treaty.** The Charter constitutes the second part of the treaty. What does that change? Everything! Because these dispositions will have a binding legal force.”

“What does that mean? That the Court of Justice of the European Communities, or the national courts, will control its correct application ... That citizens, trade unions or associations will be able to ask for its application. It is a major change that will have many practical consequences.” “Then, obviously, having had to abandon one by one their lines of defence, the Brits tried a last manoeuvre. They asked for and got their “explanations” attached to the constitutional treaty, which explain the value of the Charter, and got a reference to these ‘explanations’ included in the final clauses of the Charter. It’s a shame, but it’s not a serious problem! Because the explanations themselves do not have legal value. They are only a tool for interpretation among many others. **No-one doubts that this line of defence will fall like its precedents.**”<sup>3</sup>

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<sup>3</sup> Oui! Lettre ouverte aux enfants d’ Europe’, Dominique Strauss-Kahn, 2004

#### **(4) In detail: why the safeguards won't work**

##### **The Government's case in summary**

During the row over the original version of the constitution the UK government cited several possible restrictions on the power of the Charter to affect national law. The Government's two central arguments were that:

- i) A new reference to a "text of explanations" had been inserted into the constitutional treaty, which the Government claimed will tie the interpretation of the Charter to the existing rights it is supposedly based on.
- ii) Extra "horizontal clauses" were to be inserted into the Charter when it was added into the constitutional treaty to stop it affecting national law. These called on the Charter to be interpreted "in harmony" with member states' traditions, and to be applied to member states only when they are "implementing" EU law.

##### **The problems with the Government's case in summary**

**The text of explanations.** The problem with the text of explanations is that it shows that the Charter is largely "derived" from ECJ case law, rather than copied from previous agreements, as the Government implies. The problem with this is that case law itself evolves and shifts over time. The text of explanations also says on its front cover that the explanations "*do not as such have the status of law*" – and so the text would be up for the interpretation of the ECJ just like everything else.

**Implementing EU law.** The limitation that the Charter applies when member states are implementing EU law is also unlikely to be effective, as the ECJ has already developed in its jurisprudence a very broad understanding of what "implementing EU law" means, which widens its scope to include many supposedly "national" laws. The European Court has already struck down national laws which were neither implementing EU law nor derogating from it, simply on the grounds that the national law in question could "affect EC law". As one ECJ judge has noted "**It is difficult now to find a field of national law which is not affected in any way with Union law, and that will increase with the Constitution.**"

**The ECJ would decide for itself how to interpret the limits on its own powers.** This is like the classic problem of "who guards the guards?" The fundamental problem with both the text of explanations and the "horizontal" articles is that the ECJ will be able to decide for itself how to interpret both. This means that the ECJ is effectively being asked to guard itself. Historically, the ECJ has tended to advance integration and gradually increase its own powers. As one current judge of the European Court of Justice put it: "Well yes, sometimes it's [a case of] making law, I have to admit that."<sup>4</sup>

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<sup>4</sup> Judge Leendert Geelhoed, interview, 2005

## The arguments in detail

### (a) Why the text of explanations won't tie the Charter to existing rights

When the Charter was drawn up in 2000, the Convention which drafted it drew up a text of "explanations", which purport to show how the rights in the Charter are derived from existing treaties. In fact, several of the explanations are based on an interpretation of European Court of Justice case law.

The text of explanations shows how many of the articles of the Charter are justified in this way. Thirteen articles of the Charter were derived at least in part from interpretations of the ECJ's own case law. *Because the ECJ will be able to decide for itself how to interpret its own case law, this makes the text of explanations a weak defence against gradual ECJ expansion of the rights in the Charter – it is effectively built on shifting sands.*

Even where the articles of the Charter are based on previous agreements the scope is often wider. The explanations note that seven of the articles which are supposedly "based on" the European Convention on Human Rights, have had their scope or meaning widened in the Charter.<sup>5</sup>

The European Commission noted in its response to the Charter that it included "certain new rights which already exist but have not been explicitly or formally protected as fundamental rights".

Advocate General Geelhoed has argued that the text of explanations will become less important over time as the ECJ's case law moves on:

**Q:** Would you say then that the explanations won't necessarily stand the test of time against further ECJ case law?

**Geelhoed:** There is a general rule, and that's a rule of experience, that the older a fundamental right of legal disposition becomes, the less important its legal history...so you have to interpret and apply it in a way somewhat different from the way the original authors, drafters of this constitution foresaw.

**Q:** So it will continue to be up to the judges to interpret case law?

**Geelhoed:** Yes, of course, and they will take into account the official comments to the original text, but as time goes by, well, these comments will lose some of their importance. That's an inevitable process.

**Q:** You mean the explanations?

**Geelhoed:** Yes, the explanations will become less important.

Some of the "sources" from which the rights are derived are treaties to which the UK is not currently party to at all. For example, the explanations state that Articles 5 and 50 of the Charter are derived in part from the Schengen Convention and its acquis.

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<sup>5</sup> See explanation 52.2

Several of the articles are said to be derived from the revised (1996) version of the European Social Charter, to which the UK and various other member states are not signatories. Although the UK is a signatory to the original 1961 European Social Charter, the revised version added a set of new articles numbered 20 – 31, which do not currently bind the UK. The explanations state that seven of the articles of the Charter are based on this source.<sup>6</sup>

Even the UK Government's own Commentary on the Constitution admits that certain of the Charter rights have no previous basis in the treaties or previous agreements. Its note on Article II-73 (on "freedom of the arts and science") notes that this article "has no equivalent in the current treaties" and has in fact been "deduced" from other rights.

This point led to the following exchange at a recent meeting of the Commons European Scrutiny Committee:

**Mr Heathcoat-Amory:** Article 13 of the Charter, Part II, says that scientific research shall be free of constraint ... your commentary against that Article says that it has no equivalent in the current Treaties or in other parts of the Constitutional Treaty and also does not exist in a separate European Convention on Human Rights ... This is a new right. Why are you saying that the Charter creates no new rights?

**Mr Straw:** It is a declaration of rights that already exist. Those rights certainly already exist and they would exist here and elsewhere across Europe.

**Mr Heathcoat-Amory:** Can you tell me where they exist?

**Mr Straw:** In practice, they exist. (Hansard, 8 February 2005)

During the original IGC a reference to the explanations was inserted into the last article of the Charter: "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."

But this does not say that the Charter's rights will only be interpreted within the bounds of existing case law – only that the explanations will provide "guidance" to the Court.

Sir David Edward, Professor of Law at Edinburgh University, told the Commons Scrutiny Committee, there is "[a] distinction between 'due regard' and 'shall be bound by' or 'shall interpret in terms of the explanations'. 'Due regard' - I think means - first of all, you shall look at them, and you shall look at them seriously but you are not bound by them if your interpretation of the principal text in a given situation leads you to a different conclusion... In French it is "shall take duly into consideration" actually. It is perhaps even slightly weaker than in English."

The Government's own lack of confidence in the power of the explanations to act as a brake on the Court can be judged from the fact that it felt it necessary to impose further

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<sup>6</sup> In the old version of the Constitution these are numbered: II-83, II-85, II-87, II-90, II-91, II-93, and II-94

safeguards.

If the Charter plus the explanations implied no changes, the Government would never have argued that it must be non-binding, and would not have been so concerned about trying to stop it from affecting national law.

### **(b) Why the horizontal articles would not stop the Charter affecting national law**

The Government's main argument was that changes made to the so-called "horizontal articles" of the Charter would stop it affecting national law. However, the wording of the supposed legal safeguards that were proposed had several obvious flaws, and EU judges believed they would not stop the Charter affecting national laws.

The amendments to the Charter proposed in the 2004 IGC would have made the following three changes:

Article II-111: *"This Charter **does not extend the scope of application of Union law beyond the powers of the Union**".* Also added are two new paragraphs to Article II-112 of the Charter:

*"II-112(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.**"* "II-112 (5) The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions and bodies 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."

However, there are problems with all three of these lines of defence:

#### **i) "does not extend the scope of application of Union law"**

This is the least significant of the changes. As the Charter will itself be part of EU law if incorporated into the EU Constitution, this is self-evidently true, but insignificant.

This reassurance is effectively the same point as the argument that the Charter does not go beyond existing EU law – again, the UK Government would have not sought other safeguards if this really was adequate protection.

#### **ii) "In harmony with those traditions"**

The European Court of Justice will be able to decide for itself what counts as being "in harmony" with member states' traditions. Moreover, the article does not talk about the tradition of the *individual* member states affected by any given ruling – instead the ECJ simply has to take into account the traditions of the member states as a *whole*. These are often very divergent. And ECJ judges do not see them as anything stronger or more binding than a source of creative "inspiration."

As the President of the ECJ, Judge Vassilios Skouris, explained to the European Convention working group on the Charter on 17 September 2002:

“It should be borne in mind that common constitutional traditions do not form a direct source of community law and the Court of Justice is not bound by them as such; they constitute a source of inspiration for discerning and defining the scope of the general principles of law that apply in the Community legal order. It follows that it is not the Court’s duty to discern and, as it were, mechanically transpose into the Community legal order *the lowest common denominator* of constitutional traditions common to the Member States. The Court draws from those traditions in order to determine the level of protection appropriate within the Community legal order and for that very reason *appreciates them more freely*.” [italics added]

Indeed, the Working Group of the European Convention which drafted this article expressly instructed the Court to carry on using this approach, and their view was incorporated into the explanations. The explanation to Article 112 says: “Rather than follow a rigid approach of a ‘lowest common denominator’, the Charter rights concerned should be interpreted in a way offering a high standard of protection.”

The First Advocate General of the Court, Judge Leendert Geelhoed, has argued that this limitation will be “redundant” in cases where national traditions are divergent.

**Q:** One of the explanations to one of the articles – II.112 – says that rights shall be interpreted in tradition with the traditions of the member states, but how is that going to be implemented when the traditions of the member states are probably very divergent?

**Geelhoed:** That’s very easy. You don’t take into account the traditions of member states.

**Q:** So this is redundant, then, this explanation?

**Geelhoed:** In that situation it is redundant. Then you inevitably have to fall back on the wording of the original.

### iii) “When they are implementing Union law”

It will be possible for the ECJ to argue that almost all cases involving Social and Economic regulations involve “implementing Union law” in some respect.

As Antonio Tizzano, Advocate General at the European Court of Justice argues: “It is difficult now to find now a field of national law which is not affected in any way with Union law, and that will increase with the Constitution.”

Professor Erich Vranes, a Professor of EU law at Vienna University, notes that ECJ case law uses a very broad interpretation of the concept of “implementing Union law”.

He argues that this clause, “seemingly restricts the binding effect of the Charter’s provisions for Member States to cases where the latter *implement* Community law. This is not in line with the constant jurisprudence of the ECJ according to which Member States are bound not only when they implement Community law – among others directives – but also when they *derogate* from Community law, in particular the internal market freedoms.

He argues that, “Hence, the notion of the scope of *application* of EC law – as well as the corresponding binding effect of EU fundamental rights for Member States – is broader than the notion of the scope of *implementation* of EC law.” [italics added]

In the famous *ERT* case in 1991 the Court found that EU human rights law applies to the member states not just when they are when they are implementing EU law, but whenever they are “acting within the scope of Community law”.

In fact, the text of explanations to the Charter also uses this wider formulation: “As regards the Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they *act in the scope of Union law*”. This is effectively a “translation” of the Charter formulation into the existing jurisprudence of the ECJ.”

The European Commission’s report on the legal effect of the Charter uses a still wider formulation. It notes that the Charter binds the member states “when they give effect to Union law”.

Paolo Carroza, Professor of EU Law, notes that it is “far from certain that [the horizontal articles] would claw back the current scope of Union law unless the Constitutional Treaty were to incorporate a much clearer intent to be more restrictive than current law.”

Professor Gráinne de Búrca, a Professor of European Law, told the Commons European Scrutiny Committee, “If the literal meaning were to be taken as the intended meaning by those who drafted the Charter *that would be a change*. It would be a restriction of the current situation of the position of fundamental rights according to the European Court of Justice, which raises the question: was that intended to be a change?”

He argued: “What is interesting is that the Explanatory Memorandum interprets it as not being a change but simply using language taken out of a European Court of Justice judgment, but if it is read in the context of the judgment it was taken from it is clear that it was meant to be ‘within the scope of Union law’, which is considerably broader than ‘implementing Union law’. It includes where a state is derogating from Union law, in other words, where it deliberately does not intend to implement it, and also other situations.”

He noted, “**There have been some recent immigration cases involving the UK which were neither derogations nor implementations but where the Court found that this could affect EC law** in its application in a case involving Community services, for example, and said that therefore they were bound by the requirements of fundamental rights, including the Convention. My sense is that the fact that that is how the Explanatory Memorandum reads the clause ... My guess is that it would be the broader, not the narrower, meaning if this comes into effect.”

The former Dutch ECJ judge, Kapteyn, has argued that the idea of a European citizenship combined with the principle of non-discrimination set out in the EU Constitution will make it very difficult to maintain the distinction between EU and national law. He argued that the distinction will not have a long life, such as in the USA, where a comparable distinction was gradually dropped by the Supreme Court.

## **(5) How the Government mismanaged the Charter**

The safeguards on the Charter of Fundamental Rights are even less satisfactory in the light of the Government's failed attempts to gain stronger safeguards. During the Convention the Government called several times for the Charter not to be included in the body of the Constitution. UK Government negotiator Peter Hain wrote that, "The Charter should be included only as a Protocol." In the weeks before the final agreement of the Constitution the Government unsuccessfully sought a much stronger safeguard on the Charter.

A UK spokesman confirmed to the FT that the UK was seeking a "further technical amendment" to the Charter (18 May 2004). According to reports of the meeting, the UK proposed that the ECJ's jurisdiction over the Charter be limited to basic rights which are part of the EU *acquis* already, and that only national courts should be able to make reference to case law and derived rights in their use of the Charter. However, the Government abandoned this in the face of opposition from other member states.

Apart from anything else, the UK Government can not allow the Charter to be incorporated into EU law under the new constitutional treaty or made legally binding because it would be an obvious retreat from the Government's earlier promises:

"Our case is that it should not have legal status and we do not intend it to"  
**- Tony Blair, 11 December 2000**

"It will not be legally enforceable"  
**- Former Europe Minister Keith Vaz, 22 November 2000**

"It is certainly not the intention of this Government to see it as anything other than a political declaration."  
**- Baroness Jay, 11 December 2000**

The attempt to include "safeguards" to stop the Charter affecting national laws as a fallback strategy would be unlikely to be effective. The fact that EU judges are now already prepared to suggest that the Charter will also change national laws – despite the political sensitivity of such statements – is significant.

If ECJ judges' interpretation of the restrictions is that they will not prevent challenges to national law (and their decision is final), then safeguards would, *de facto*, not prevent challenges to national law.

**For this reason we believe that the UK and other member states are unlikely to accept that the Charter should be made legally binding in any way. The most likely scenario is that other member states will agree to remove it and the UK Government will claim that this is a "triumph".**

In reality it should never have been under discussion, and the time and leverage the UK has wasted on it should have been deployed trying to win various other battles which the UK seems to have conceded – e.g. over the role of the EU Foreign Minister and the EU President. The history of the Charter, from 2000, when the UK reluctantly allowed it to be drawn up, to the present negotiations, is a good example of the danger of simply going with the flow in Europe, in order to gain "influence".

The Charter of Fundamental Rights illustrates how the Government have been dragged, by a gradual series of concessions, to having to fend off something they never wanted.

When the German government took over the Presidency of the EU in January 1999 it proposed the creation of a Charter of Fundamental Rights, which was intended to act as a stepping stone towards a Constitution.

Initially the Government opposed creating a Charter of Fundamental Rights. When it became obvious that the Charter was going to be created the Government u-turned to support the idea to save face. But they said it should not be incorporated into the EU treaties and made legally binding.

In June 1999 EU leaders agreed to create the Charter, and instead of drawing it up themselves they set up a "convention" to write it – a group consisting of MEPs, national MPs, and European Commission officials. In between December 1999 and October 2000 this group met and drew up the Charter of Fundamental Rights.

A Home Office memo "leaked" to the Independent early in 2000 said, "A legally binding charter risks conflicting with or undermining the existing human rights architecture in Europe. Whatever one thinks of the Convention (the ECHR), a parallel Charter could make the human rights picture less clear. Luxembourg and Strasbourg could pull in different directions." (8 February 2004)

The Government denied again and again that the Charter was a step towards a Constitution. Keith Vaz, then Europe Minister said in Parliament, "the hon. Member for Ludlow said that the charter represented the beginning of a European constitution. If a telephone directory were published in Brussels, the hon. Gentleman would believe that it was the forerunner of a European Constitution. We are not going to have such a constitution" He said that the suggestion that there would be a European Constitution was "the last euro myth". (Hansard, 22 November 2000)

As the row over the Charter escalated in November 2000, BBC reporter Andrew Gilligan reported on the Today Programme that many people in Brussels saw the Charter as the first step towards a European Union "constitution". Downing Street responded by saying the story was old and dubbing the reporter "gullible Gilligan". Alastair Campbell described the story as "bollocks"

The Government is now facing both the revival of the constitution and having to spend diplomatic effort getting the Charter deleted. Instead of being clear about what it wanted and saying no to the Charter in 1999, the Government tried to "go with the flow" in order to gain "influence" in Brussels. This strategy has been a failure.