

Open Europe: Parliamentary Debate briefing # 3: The Charter of Fundamental Rights

"It is absolutely clear that we have an opt-out from both the Charter and judicial and home affairs."

- Tony Blair, 25 June 2007

"It is clear that the UK does not have an opt-out on the Charter of Fundamental Rights."

- Jim Murphy, 21 January 2008

"The Charter of Fundamental Rights doesn't create any new rights in the United Kingdom, or in any other member state."

- Jim Murphy, 9 October 2007

"Citizens' rights and Charter of Fundamental Rights: the Treaty of Lisbon preserves existing rights while introducing new ones."

- Commission website on the Treaty of Lisbon¹

Michael Connarty, Labour Chairman of the European Scrutiny Committee, has said that the Government's red line on the Charter will "leak like a sieve."

- 9 October 2007

Summary of the Key Issues

(1) The ECJ gains the right to interpret UK law and decide on whether the Charter is being implemented in the UK

- With the Charter becoming legally binding, the European Court of Justice will have the power to decide whether rights provided for under UK law are in line with the rights outlined in the Charter. If there is a disagreement on whether the rights are respected in the UK, the ECJ will have the ability to interpret UK law and decide, not the Government.
- Ministers know this because of advice from their legal advisers. In response to the following question from a member of the ESC: "Who decides when it gets to the European Court of Justice whether it is an existing right or not?" Mike Thomas, the Foreign Office's legal adviser on the Charter, said, "I think you probably know the answer to that question. Who decides when something goes to court? It is the court." (16 October)

¹ http://europa.eu/lisbon_treaty/glance/index_en.htm

(2) The UK's protocol on the Charter is not remotely watertight

- Huge legal uncertainty remains over the effect of the controversial Charter of Fundamental Rights on national law. The UK Government originally claimed to have an 'opt-out' from the Charter, but this was never accurate. Indeed Europe Minister Jim Murphy has now admitted: "It is clear that the UK does not have an opt-out on the Charter of Fundamental Rights."²
- A senior European Parliament source close to negotiations on the new EU treaty told the Telegraph that MEPs are planning to sponsor early challenges to Britain's opt-outs. "We are going to make sure that this issue is constantly before the European Court of Justice," he said. "There is 30 years of EU jurisprudence to say there can be no two-tier system of European rights." (Telegraph 12 July 2007)
- There is an obvious problem with the idea of trying to create a UK-specific carve-out for a whole area of EU law. 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. Given the nature of EU law, it is hard to see how a carve out could work in practice, and it is likely the UK-specific opt-out deal will quickly unravel.
- British Liberal Democrat MEP Andrew Duff argues that "The Protocol also looks flawed juridically. Regardless of the UK's exclusion clause, the EU Courts will be bound to develop jurisprudence in fundamental rights matters which steadily evolve into general principles of EU law which all member states must respect. Moreover, the European Court of Justice will be blind to the nationality of an EU citizen who chooses to invoke the Charter under EU jurisdiction."³

(3) The Government are isolated in thinking the Charter will not have an impact on the UK

- Professor Sir David Edward of the University of Edinburgh told a Lords' Committee that, "It is a very limited Protocol as I see it. It is not a total opt-out of the application of the Charter. On the contrary, it begins in the preamble by reaffirming Article 6 of the Treaty on European Union. As to where that leaves us - I am not sure that I can either offer elucidation or comfort in that respect."⁴
- Professor Damian Chalmers, Professor in European Union Law at the London School of Economics concluded that "The protocol does not say the Court cannot apply the Charter to the UK: it just says it cannot extend it. If you look at what happens at the moment when the Court refers to the Charter, it then

² House of Commons, 21 January 2008

³ Andrew Duff, *A primer on the EU's reform treaty* (02.07.07)

⁴ House of Lords, 6 December 2007.

relies very extensively for its reasoning on the case law of the European Court of Human Rights. People who think we have some sort of opt-out are going to be in for a surprise in that regard because that is what will happen."

- The Commission's legal experts expect that the British opt-out will be tested in the Courts. (Guardian 26 June 2007) The Commission's legal service estimates that British opt-outs to the Charter are "limited" and one legal source said that "the opt-out is potentially very thin" (Telegraph 12 July 2007).
- Analysis by the Legal Adviser to the Commons European Scrutiny Committee, Michael Carpenter. Has produced similar conclusions. He questioned the claim by Tony Blair that the Charter of Fundamental Rights will not extend the ability of the European Court of Justice to challenge UK laws. He said: "This is a high standard to set, and I doubt if what appears to have been agreed secures this result." He indicated that the Charter could have an indirect impact on UK law, if the Court gave a ruling on the Charter's effect on a given EU law in another member state.

(4) The Government's claim that the Charter does not create new rights is wrong

- The Government claims that the Charter does not contain any new rights. Jim Murphy has said that "The Charter of Fundamental Rights doesn't create any new rights in the United Kingdom, or in any other member state." (9 October 2007), and David Miliband told the European Scrutiny Committee (ESC) that "every single bit of the Charter is sourced back to existing rights." (16 October 2007). The Commission thinks the opposite. As it says on its website about the new treaty: "Citizens' rights and Charter of Fundamental Rights: the Treaty of Lisbon preserves existing rights while *introducing new ones*"⁵
- If the Government's claims were true there would never have been any need for the convoluted safeguards that the Government has attempted to erect. In reality the rights in the Charter go beyond existing rights - particularly in the UK. The Government knows this, which is why Ministers tried for seven years to stop the Charter from being made legally binding.

(5) What will the Charter mean in practice?

- 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. As well as dealing with workers rights, it gives new rights to criminals and deals with diverse subjects such as the freedom of expression, the right to protection of personal data and the right to family life.

The following examples show other areas where the Charter is likely to bite in the UK:

- **Article 49: Principles of legality and proportionality of criminal offences and penalties.**
This article states that, "The severity of penalties must not be disproportionate

⁵ http://europa.eu/lisbon_treaty/glance/index_en.htm

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 amended double jeopardy rules to allow for just such a possibility. This allowed the killers of Damilola Taylor to be brought to justice, but this would clearly not be possible under the Charter. Critics argue that regardless of whether one agrees with the principle of double jeopardy, it should be decided at national rather than EU level.

- **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.

Several articles of the Charter will also have an impact on immigration and asylum cases, for example:

- **Article 15.** Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.
- **Article 19.** Collective expulsions are prohibited. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.
- **Article 2.** Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

(6) The Charter would be made legally binding by Lisbon, despite years of opposition from the Government

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

- When the Charter of Fundamental Rights was drawn up, the UK Government promised that it would not become legally binding. The then Europe Minister Keith Vaz promised that it would be no more legally binding “than the Beano.”

However, despite the Government’s promises, article 6 of the Lisbon Treaty gives the Charter legally binding status. Indeed the Lisbon Treaty would put the Charter on a legal par with the core treaties.

The Charter in detail

**The Government promised the Charter would not be legally binding -
Under the Lisbon Treaty it would be**

When the Charter of Fundamental Rights was drawn up, the UK Government promised that it would not become legally binding. The then Europe Minister Keith Vaz promised that it would be no more legally binding “than the Beano.”

However, despite the Government’s promises, article 6 [6] of the new Constitutional Treaty gives the Charter legally binding status. Indeed the Lisbon Treaty would put the Charter on a legal par with the core treaties. Article 6 states that:

“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted on [... 2007], which shall have the same legal value as the Treaties.”

Even the Government has admitted that the incorporation of the Charter is ‘not ideal’. Peter Hain 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.” (Hansard, 8 July 2003)

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." (Hansard, 29 November 2000)

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."*⁶

Will the protocol stop the Charter from affecting UK law?

The UK doesn't have an opt out - only one part is said not to create new rights

Having allowed the Charter to be made legally binding, the UK Government agreed to a protocol which it argues will prevent the Charter from affecting UK law, or at least reduce its impact.

Initially the Government claimed that the protocol amounted to an "opt out" for the UK. However, now they have admitted that there is no such opt out. In his statement to Parliament on 25 June Tony Blair said, "It is absolutely clear that we have an opt out from both the Charter and judicial and home affairs." However, on 31 July Europe Minister Jim Murphy admitted: "The UK specific protocol which the UK secured is not an 'opt out' from the Charter. Rather, the protocol clarifies the effect that the Charter will have in the UK."

The text of the protocol states that:

Article 1

1. The Charter does not *extend* the ability of the Court of Justice, or any Court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in *Title IV* of the Charter creates justiciable rights applicable to the United Kingdom *except in so far as the United Kingdom has provided for such rights in its national law.*

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to the United Kingdom to the extent that the rights or principles that it contains *are recognised in the law or practices of the United Kingdom.*

⁶ Hansard, 18 June 2002

Interestingly, when Tony Blair presented this protocol to parliament he purported to "read out" the text of this protocol, but - surely by mistake - neglected to mention that only "Title IV" is said not to create new rights. Blair said that:

First, on the charter of fundamental rights, we secured a legally binding protocol, specific to the UK, and applicable both to the British Courts and to the European Court of Justice.

Let me read the terms. "The Charter does not extend the ability of the Court of Justice, or any Court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that the Charter reaffirms. In particular, and for the avoidance of doubt, nothing in the Charter creates justiciable rights applicable to the United Kingdom except in so far as the United Kingdom has provided for such rights in its national law." (Hansard, 25 June 2007)

What effect will the Protocol have?

The Protocol is curiously worded. Only one part of the Charter (Title IV on social rights), is said not to create justiciable rights applicable to the United Kingdom - and even then - "except in so far as the United Kingdom has provided for such rights in its national law" - which is the whole point. The ECJ will be in the business of interpreting the meaning of UK law in the light of the Charter.

The Protocol appears to imply a greater degree of protection against the evolving jurisprudence of the ECJ in this one area. However, the inevitable conclusion of an "avoidance of doubt" clause which only applies to one part of the Charter is that it is clearly *doubtful* whether the other areas covered by the Charter will not be affected by the Charter. Saying that only one section can not be used to create new rights suggests that the others *will*.

While there clearly seems to be a *greater* level of protection against the evolving jurisprudence of the Court in relation to Title IV compared to the other sections, even there, the Court will decide for itself whether the UK has attempted to provide for such rights in its national law. It will then be able to decide whether the attempt to provide such rights is adequate in the light of the Charter.

A UK-specific protocol will quickly be circumvented

The Government sometimes appears to accept that the Charter will have some effect at EU level, but argues that it will not affect "national" law.

Baroness Amos told the Lords that, "On the Charter of Fundamental Rights, I know that it looks as though the Government were seeking to opt out of issues. The charter ensures that the institutions, bodies and agencies of the Union will be bound to recognise rights in exercising any of their powers. The charter should help to ensure

that citizens' basic rights and liberties are protected at EU level, as they are in their own countries. However, we feel absolutely certain that, with our human rights legislation, employment protection legislation and other legislation, we have already secured those rights within current UK domestic law."⁷

This argument effectively begs the question - as it will be the European Court of Justice that has to decide for itself - (a) where the boundary between national law and European law is, and (b) whether the United Kingdom intended to provide for a given right in its national law.

Vassilios Skouris, President of the European Court of Justice, has refused to confirm that the Charter would not change national laws. In an interview with the Financial Times Skouris was asked, "Is the 'horizontal' 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)

There is an obvious problem with the idea of trying to create a carve-out for the UK. 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.

Given the nature of EU law, it is hard to see how a carve out could work in practice, and it is likely the UK-specific opt-out deal will quickly unravel. As the European Scrutiny Committee argue: "If the ECJ gives a ruling in a case arising outside the UK on a measure which also applies in the UK, the duty to interpret the measure in accordance with that ruling arises, not under the Charter, but under the UK's other Treaty obligations. Nothing in the Protocol appears to excuse the UK from this obligation."⁸ These concerns are shared by many others around Europe:

- 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)
- EU Commissioner Margot Wallstrom has said the Charter will apply to large parts of British law, despite UK Government claims that the opt-out will prevent this. She said, "The Charter will be binding for the European institutions, and also for member states when they implement EU law, even if it does not apply to all of them." (Telegraph 12 July 2007)
- Former EU Justice Commissioner Antonio Vitorino has also questioned the legal basis for the British opt-out from the Charter of Fundamental Rights and warned that it would not work. (Guardian 26 June 2007)
- More importantly, the Commission's legal experts take the same view, and expect that the British opt-out will be tested in the Courts. (Guardian 26 June 2007) The Commission's legal service estimates that British opt-outs to the

⁷ Hansard, 25 June

⁸ <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/16iii.pdf>

Charter are "limited" and one legal source said that "the opt-out is potentially very thin". (Telegraph 12 July 2007)

- This has been confirmed through analysis that followed the publication of the draft mandate from the Legal Adviser to the Commons European Scrutiny Committee, Michael Carpenter. He questioned the claim by Tony Blair that the Charter of Fundamental Rights will not extend the ability of the European Court of Justice to challenge UK laws. He said: "This is a high standard to set, and I doubt if what appears to have been agreed secures this result." He indicated that the Charter could have an indirect impact on UK law, if the Court gave a ruling on the Charter's effect on a given EU law in another member state.
- Professor Damian Chalmers, Professor in European Union Law at the London School of Economics has said that "the protocol does not say the Court cannot apply the Charter to the UK: it just says it cannot extend it." He argued that the ECJ could simply profligate about the sources it uses in cases it gets from the UK, as almost all the rights set out in the Charter are also found elsewhere. He concluded that "People who think we have some sort of opt-out are going to be in for a surprise in that regard because that is what will happen."⁹
- Professor Sir David Edward of the University of Edinburgh told a Lords' Committee that, "It is a very limited Protocol as I see it. It is not a total opt-out of the application of the Charter. On the contrary, it begins in the preamble by reaffirming Article 6 of the Treaty on European Union. As to where that leaves us - I am not sure that I can either offer elucidation or comfort in that respect."¹⁰
- A senior European Parliament source close to negotiations on the new EU treaty told the Telegraph that MEPs are planning to sponsor early challenges to Britain's opt-outs. "We are going to make sure that this issue is constantly before the European Court of Justice," he said. "There is 30 years of EU jurisprudence to say there can be no two-tier system of European rights." (Telegraph 12 July 2007)

As the *Economist* explained: "The problem, as freely admitted by the head of the European Commission legal service the other day, is that there is nothing in the opt-out to stop British judges being invited to pay attention to European rulings and case law that involves other countries. In other words, the British opt out from the Charter would be watertight if British Courts were an island unto themselves, with an exclusive, vertical relationship with the European Court of Justice (ECJ)."

"But they are instead affected by all manner of case law generated by the ECJ in relation to other members of the EU. To give an example in plain English: imagine that a Czech trade union takes the Czech government to Court some time in the future, arguing that Czech employment law is in conflict with rights enshrined in the Charter, and the ECJ finds in favour of the trade union.

"That creates jurisprudence that is based on the Charter. Then, there is nothing to stop a British trade union going to a British judge, and asking him or her to consider

⁹ House of Lords, 20 November 2007.

¹⁰ House of Lords, 6 December 2007.

the Czech case as a precedent, that signals that a piece of similar British labour law is in conflict with EU rights." (9 August 2007)

British Liberal Democrat MEP Andrew Duff argues that "The Protocol also looks flawed juridically. Regardless of the UK's exclusion clause, the EU Courts will be bound to develop jurisprudence in fundamental rights matters which steadily evolve into general principles of EU law which all member states must respect. Moreover, the European Court of Justice will be blind to the nationality of an EU citizen who chooses to invoke the Charter under EU jurisdiction."¹¹

The Government ignored the warnings of the European Scrutiny Committee on the protocol

In October last year, the European Scrutiny Committee asked the Government to secure changes to the protocol on the Charter which stop the Charter having an effect on the UK when the Court interprets EU law in the light of the Charter.

They argued: "As the Charter would apply to Member States when implementing Union law, the question arises of whether the UK would be bound by ECJ case law when the latter interprets Union law as implemented in other Member States in circumstances where the same Union law is also implemented in the United Kingdom... In our view, there is here at least an ambiguity which should be resolved and the UK's safeguards made firmer in the course of the IGC if the results claimed by the Government are to be secured. We would wish the Government to show how they have secured the UK from such interpretations and ask that they secure the phrasing 'notwithstanding other provisions in the Treaties or Union law generally' in the text of the Protocol." (Thirty-Fifth Report, 8 October) However, the Government has ignored the Committee's proposal.

Judges of the ECJ are sceptical about the attempt to create "safeguards"

In 2005 we interviewed several judges at the European Court of Justice (ECJ), who said that they believed the Charter would change national laws, despite the various safeguards that the UK had established. Several of them were fundamentally sceptical about the attempt to create safeguards, given the evolving jurisprudence of the Court. This is crucial, as it would be the Court's judges who would ultimately decide on how to interpret the Charter if the Lisbon Treaty is ratified.

- Judge Tizzano, former Advocate General and now a judge at the European Court of Justice, 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.*"

¹¹ Andrew Duff, *A primer on the EU's reform treaty* (02.07.07)

- Former European Court Judge Jean-Pierre Puissechet 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."
- Puissechet 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."
- European Court Judge George Arestis told us, "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."

The Government has potentially created a lawyers' paradise with this messy fudge. It has clearly broken its repeated promise that the Charter would not become legally binding, whilst it is becoming increasingly clear that the so-called safeguards simply will not work.

Commission President Jose Barroso said shortly after the signing of the outline agreement that he was happy that his son was studying law, because under the Constitutional Treaty : "lawyers have a beautiful future." (Süddeutsche Zeitung, 25 June)

The Charter will act as a legal basis for EU legislation

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 (though not a legal base) 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 former Advocate General Leendert 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.

These are clearly new rights

The Government keeps on claiming that the Charter does not contain any new rights. Jim Murphy said on the Today Programme that “The Charter of Fundamental Rights doesn't create any new rights in the United Kingdom, or in any other member state.” (9 October 2007)

If this were true there would be no need for the other convoluted safeguards that the Government has attempted to erect. In reality the rights in the Charter go beyond existing rights - particularly in the UK.

The European Commission has said that the Charter contains “certain new rights which already exist but have not been explicitly or formally protected as fundamental rights”.

Even where the articles of the Charter are based on previous agreements the scope is often wider. The official “text of explanations” which has been produced to explain how the rights have been derived makes it clear that these are new rights:

- 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.
- 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 allows gradual ECJ expansion of the rights in the Charter - it is effectively built on shifting sands.

- 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.
- 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.¹²

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 2005 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)

What will the Charter mean in practice?

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. The Court is neither particularly left or right-leaning, although individuals on the Court clearly have their

¹² 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

own biases. However, the Court does have a clear bias towards the promotion of further European integration.

For example, Judge Tizzano 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... 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 then-Advocate General at the European Court, Leendert Geelhoed, said that he believed the Court would employ a “restricted” approach to the social rights in the Charter, but an “expansionary” approach to the more liberal rights: “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 expansionary in the classical and fundamental rights.”

The net result of giving the Court greater power through the Charter is unlikely to be a clear “left” or “right” outcome. It would, however, mean that the small group of judges on the Court of Justice would be called upon to make contentious and essentially political judgements in a wide range of areas. Some examples of issues the Court would be asked to rule on:

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 British National Party’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.

This might have meant, for example, 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 European Court of Justice.

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 those of 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 amended double jeopardy rules to allow for just such a possibility. This allowed the killers of Damilola Taylor to be brought to justice, but this would clearly not be possible under the Charter. Critics argue that regardless of whether one agrees with the principle of double jeopardy, it should be decided at national rather than EU level.

The Charter's impact on asylum and immigration

Several articles of the Charter of Fundamental Rights will also have an impact on immigration and asylum cases.

Article 4

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

Article 7

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

Article 15

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of

the Union.

Article 16

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

Article 18

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

Article 19

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

Article 21

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

Article 45

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

Article 47

1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Source: S.Peers *European Journal of Migration and Law* 3: 141-169, 2001