The European Charter of Fundamental Rights: the Commission's Strategy for Implementation

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The European Charter of Fundamental Rights is a catalogue of human rights guarantees based on the European Convention on Human Rights and various UN and ILO human rights treaties. It was 'proclaimed' at Nice in 2000 and was granted legal status by the Treaty of Lisbon which came into force in December 2009.

During the discussions on the relationship between the Charter and the Lisbon Treaty the UK Government secured a clarifying Protocol on the application of the Charter to the UK (Poland later joined), which states that neither the national courts of these countries nor the Court of Justice may declare UK law incompatible with the Charter. The exact meaning of this has continued to be of concern in the UK.

In October 2010 the European Commission published a communication called "Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union". The Government says the strategy is compatible with the Coalition Agreement. The European Scrutiny Committee reported on the document in January 2011, recommending that it be debated in European Committee - and that the application of the UK/Poland Protocol be included in the debate.

The strategy and the UK Protocol were debated in March 2011 on a motion which stated "that the Charter does not give national or European courts any additional grounds on which to find that the laws of the United Kingdom are incompatible with the law of the European Union".

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1.1 Introduction

The European Charter of Fundamental Rights (the Charter) is a catalogue of human rights guarantees based on the European Convention on Human Rights and various UN and ILO human rights treaties. The Charter was 'proclaimed' at Nice in 2000 but was not enforceable by the European Court of Justice, although it informed the judgments of that Court on several occasions between 2000 and 2009, when its status changed.[1] It was also referred to explicitly in recitals to European legislation, generally in the form of a statement that the proposal complied with fundamental rights and the principles recognised in the Charter.[2] In addition, the EU established a Fundamental Rights Agency, based in Vienna, to monitor the EU Institutions and Member State governments for compliance with EU law and human rights obligations and to issue opinions to the institutions or governments concerned.

The Charter formed Part II of the 2004 *Treaty Establishing a Constitution for Europe*, which was never implemented, following negative referendum results in 2005 in France and the Netherlands. The inclusion of the Charter in the proposed EU Constitution had been accepted by the British Government on condition that the 'Explanations' of Charter Articles were given sufficient legal status to prevent the Court from increasing Union competence and overruling or amending national law.[3] The Charter was 'solemnly proclaimed' at a plenary session of the European Parliament on 12 December 2007 by the Presidents of the Parliament, Council and Commission and published in the EU Official Journal.

1.2 The *Treaty of Lisbon*

In the *Treaty of Lisbon*,[4] which came into force in December 2009, human rights have become central to the EU's internal and external policy-making. Charter rights are not reproduced in full but a
re "recognised" in Article 6 of the *Treaty on European Union* (TEU – the intergovernmental part of the EU Treaties), which states that the Charter "shall have the same legal value as the Treaties". Thus, the Charter now has legally binding value, even though it is not reproduced in the Treaties.

There is also now a Commissioner with specific responsibility for the promotion of justice, fundamental rights and citizenship (Viviane Reding), and EU Commissioners have pledged in a solemn undertaking before the Court of Justice to uphold the Charter. In December 2009 the EU Council established a permanent working party to deal with matters relating to fundamental rights, citizens' rights and the free movement of persons (the so-called FREMP Working Party).

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1 See, for example, cases C-540/03, *Parliament v Council* [2006], Case C-411/04 P, *Mannesmannröhren-Werke AG v Commission* [2007], Case C-432/05, *UNIBET (London) LTD v Justitiekanslern* [2007] and Case C-303/05, *Advocaten voor de Wereld* [2007].

2 For example, in proposal on criminal penalties for intellectual property infringements and recital 3 of draft Decision to establish the Culture 2007 programme

3 The original Explanations are contained in CHARTE 4473/00, 11 October 2000.

4 Consolidated versions of the *Treaty on European Union* and the *Treaty on the Functioning of the European Union* - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon - Tables of equivalences, Official Journal C 115 , 9 May 2008

Article 51(2) of the Charter of Fundamental Rights

"The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties".

2 The Charter and domestic law

One of the issues during the negotiations on the reform treaty was the status of the Charter in relation to EU and domestic law, and whether competence could be accrued through its application ("competence creep"). The then Labour UK Government was particularly anxious that the Charter should not be able to overturn national law, and to this end negotiated a Protocol (later adopted also by Poland) exempting the UK from such an effect (see below).

The final text of the Lisbon Treaty specified:

> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

A Declaration specified the scope of application of the Charter and its relationship with the European Convention on Human Rights. The Declaration confirmed Article 51 of the Charter, emphasising that the Charter does "not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties".

A clarifying Protocol (No. 30) on the application of the Charter to Poland and the UK states that neither the national courts of these countries nor the ECJ may declare UK law incompatible with the Charter. The protocol refers to the requirement that the Charter be applied in accordance with Title VII of the Charter itself and applied and interpreted by the national courts "strictly in accordance with the Explanations referred to in that Article". Reaffirming amongst other things that the Protocol is "without prejudice to the application of the Charter to other Member States" and without prejudice to other UK obligations under the two Treaties, it states:

> **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.
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> **Article 2**

> To the extent that a provision of the Charter refers to national laws and practices, it shall only apply in 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.

Chapter IV of the Charter contains provisions on the right to strike, which UK trade unions hoped, and UK employers feared, could be used to effectively overturn reforms of trade union law if they became directly effective in UK law. The Labour Government was confident that the Protocol would protect the UK against unwanted interference from the Charter and exempt the UK from all its chapters.[5] The White Paper on the Government's approach to the reform treaty Intergovernmental Conference (IGC) stated that the protocol was "legally binding and sets out clearly that the Charter provides no greater rights than are already provided for in UK law, and that nothing in the Charter extends the ability of any court to strike down UK law".[6]

However, some believed the effect of the UK exemption was questionable. The *Daily Telegraph* reported on 12 July 2007 that senior EU officials thought the UK opt-out from the Charter was not worth the paper it was written on. The report cited Margot Wallström, then vice president of the European Commission, who thought the Charter would apply to huge swathes of UK law and that EU citizens would be able to claim before the courts the rights enshrined in the Charter. The Charter would be binding on the European institutions and Member States when they implemented EU law, "even if it did not apply to all of them".[7] On 12 July 2007 the European Scrutiny Committee questioned Margot Wallström about her assertions, and after a series of questions which revealed confusion as to the meaning of her statement on the previous day, she rejected the interpretation adopted by the media that the opt-out was "worthless" and suggested it might have been her "bad English".[8]

In September 2007 the EP Constitutional Affairs Committee was highly critical of the UK Government's position on the Charter. They feared that it would "contaminate" the EU legal system, already partly evidenced by Poland's request to join the UK Protocol. The Committee wanted the new Treaty to make provision for the UK and Poland to opt in again later. MEPs also raised the issue of the legal protection of non-UK EU citizens living and working in the UK jurisdiction and whether they would be able to claim their rights under the Charter.

There were serious issues as to how the Court of Justice would interpret measures which applied in some but not all Member States. It would be difficult to validly or legally waive human rights issues in some States. The possibility of the Court doing this would appear to undermine fundamental principles about the obligation of Member States to adhere to the *acquis communautaire*.[9] It has been suggested that the Charter could still have an indirect impact on UK law, particularly in cases where the Court ruled on Charter-related issues in other EU Member States.[10] The Protocol also raised questions about whether citizens of other Member States living and working in the UK jurisdiction could claim legal protection under the Charter. The Commission's Opinion on the Intergovernmental Conference (IGC)

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5 HC Deb 11 July 2007 c 483 WH

6 "The Reform Treaty: the British Approach to the European Union Intergovernmental Conference", July 2007

7 SPEECH/07/484, 11 July 2007

8 See Oral Evidence, 4 July and 12 July 2007, HC 862-i-ii, 8 October 2007 pp.13-14

9 EU law, the Treaties and the case-law of the European Court of Justice. See Standard Note 5944, The EU's Acquis Communautaire, 26 April 2011, for information on the *Acquis Communautaire*

10 *EUObserver* 27 June 2007

Mandate did not clarify its view of the legally binding nature of the Charter when combined with the obligation to apply EU law uniformly in all Member States. It stated:

> The Charter of Fundamental Rights will offer Europeans guarantees with the same legal status as the treaties themselves, bringing together civil, political, economic and social rights which the Union's action must respect. Its provisions will also apply in full to acts of implementation of Union law, even if not in all Member States.[11]

The Government wrote to the European Scrutiny Committee (ESC) on 13 July 2007 in reply to questions about possible inconsistencies between the requirements of the amended Protocol and the amended Treaties, stating:

> The UK-specific Protocol which the Government secured is not an 'opt-out' from the Charter. Rather, the Protocol clarifies the effect the Charter will have in the UK. The UK Protocol confirms that nothing in the Charter extends the ability of any court to strike down UK law. In particular, the social and economic provisions of Title IV give people no greater rights than are given in UK law. Any Charter rights referring to national law and practice will have the same limitations as those rights in national law. The Protocol confirms that since the Charter creates no rights, or circumstances in which those rights can be relied on before the courts, it does not change the status quo.[12]

The Committee was concerned about the possibility that, following a reference to the ECJ from some other Member State, the Court might find that, in the light of the Charter, the derogation from the Directive allowing such waivers had to be interpreted more restrictively than before the Charter had legal effect.[13] The Committee also referred to Article II-81 of the Charter, prohibiting discrimination "on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation", commenting:

> **We would be concerned that, following a reference to the ECJ from some other Member State, the Court might find that a measure adopted at EU level (such as Council Directive 200/43/EC) had to be given an extended interpretation in the light of the wide grounds[14] for prohibiting discrimination under the Charter.**
> 60. If the Member States have indeed agreed in the IGC Mandate that a ruling from the ECJ in such cases should have no effect in the UK, then this ought to be made clear. 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.[15]**

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11 COM (2007) 412, "Reforming Europe for the 21st Century". See Commission press release, 10 July 2007

12 ESC 35th Report 2006-07 para. 57

13 Ibid para. 58: The Committee gave the example of the Working Time Directive, which contains provisions limiting the weekly hours of a worker to 48 hours per week, but with the possibility of agreements to waive those limits.

14 FN 47: The grounds of social origin, language, political or any other opinion, property and birth are not mentioned in Article 13 EC.

15 ESC 35th Report para. 60

The then Foreign Secretary, David Miliband, told the ESC on 16 October 2007 that the Charter would not "extend the reach of European courts into British law", continuing:

> The first point is that the Charter, of course, only records existing rights; it does not create any new rights: it is a record of existing rights under domestic and international law. Secondly, the Protocol is important because it has legal status as much as an Article, and the Protocol is absolutely clear that there can be no extended reach before the ECJ or anyone else, and that is why, in the case of working time or anything else, any judgment of the court cannot have reach into changing the laws that apply in this country. So, it is a generic answer and it goes to the heart of what the Charter is about. As I say, the Charter records existing rights but there is a double-lock, because the Protocol records that the Charter shall not be used to extend the reach of the Court of Justice.[16]

The FCO Legal Adviser, Mike Thomas, set out to clarify the position, insisting on a holistic approach rather than a simple "will it or won't it" question in the abstract.[17] Bill Cash thought the UK would nevertheless be "in the position where, despite what you put in by way of a protocol, there will still be a requirement for the national judges and an opportunity for them to, effectively, give effect to this Charter as part of English law?" Mr Thomas's view was that nothing had changed: "the Charter is sourced in the existing rights and principles, so the content has not grown" and "as to content, I think the ability of the European Court to interpret laws is effectively unchanged".[18]

Many of these issues were revisited in March 2011, when European Committee B debated the Commission's strategy for implementing the Charter (see below).

3 The Commission's strategy for implementing the Charter

The Commission issued a communication on a "Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union",[19] on 21 October 2010. This came at a time when the subject of human rights was particularly relevant and to some extent controversial (the Council of Europe Court of Human Rights ruling on prisoner voting rights and the EU's condemnation of the French expulsion of Roma). The Commission's strategy is based on the objective that the EU must "set an example to ensure that the fundamental rights provided for in the Charter become a reality". To achieve this, the Commission will:

- Strengthen the assessment of the impact of its proposals on fundamental rights
- Encourage the EU institutions to ensure full respect of the Charter in their legislative processes
- Remind Member States of the importance of complying with the Charter when they implement EU law
- Develop communication actions targeted on the needs of the public
- Implement the strategy in a continuous, determined and transparent manner, involving all interested parties

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16 Uncorrected evidence 16 October 2007
17 ESC Uncorrected Evidence Q110
18 Ibid, Q131 and Q112
19 EU doc. 15319/10

- Submit an annual report on progress in the application of the Charter and provide for an annual exchange of views with the European Parliament and Council.[20]

4 EU Council conclusions on the strategy

On 26 January 2011, after a discussion at an informal Justice and Home Affairs Council on 21 January, the EU Council published draft conclusions "on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union". These were adopted by the Justice and Home Affairs Council on 24 and 25 February 2011.

The Council reaffirmed its commitment to ensuring that fundamental rights would be respected in its own internal decision-making procedures and in legislative drafting (6) and recognised that this needed to be done "in an as visible and transparent way as possible, for the benefit of the citizens and other relevant stakeholders" (7). The Council's emphasis in the January draft Conclusions of the need to "avoid the creation of ... burdensome, long and inefficient new procedures for that purpose and should rather rely on the existing structures within the European Union" was not in the final Conclusions. The Council considered it important to involve human rights experts in the Member States, recalling that it is in the first instance the responsibility of national administrations to guarantee ("scrutinise" in the earlier version) compliance with Charter obligations, constitutional traditions and common internal obligations. The Council invited the FREMP Working Party to cooperate with the Council Legal Service in drawing up guidelines on the main elements of fundamental rights scrutiny to guide the legislative work of the Council.

5 UK Government view of the strategy

The Government's Explanatory Memorandum of 4 November 2010 on the strategy considered it in the context of the Coalition Agreement and Programme, stating that the strategy was "consistent with the Government's stated policy in the Agreement section on civil liberties" and that it did not involve any transfer of powers to Europe. The Government agreed that EU legislation should be reviewed and evaluated for its compatibility with human rights and welcomed the Commission's strategic approach, which "rightly sees fundamental rights as a limit on European legislation rather than a reason for producing new legislation".

The Government noted that the UK already carried out a number of the processes in the strategy (e.g. regulatory impact assessments) and welcomed the emphasis on better regulation. The Government welcomed the inclusion of statements confirming that the application of the Charter to Member States was "limited to when they are implementing Union law" and emphasised the importance of interpreting the Charter "with due regard to the accompanying Explanations, which set out the sources of the rights and principles that it restates". It also supported the use of "targeted recitals which refer to any specific rights and principles which are potentially engaged by the draft legislative proposal", continuing:

> Any reference to fundamental rights should have inherent meaning and utility, and should not be reduced to the level of a formula repeated automatically without regard to its relevance to the subject matter of the instrument. The Government notes, however, the importance of ensuring that references to the Charter in recitals to proposed European legislation accurately reflect the Government's position that the Charter is a reaffirmation of rights and principles

[20] COM(2010) 573 final 21 October 2010. Background information on the strategy for effective implementation can also be found on the Commission website.

> drawn from other sources and that the appropriate distinction between rights and principles is clearly presented.

6 UK Parliament views

6.1 European Scrutiny Committee view

The European Scrutiny Committee reported on the Commission Communication in its Thirteenth Report on 12 January 2011. The Committee praised the aim of the Commission's strategy but had doubts about its achievement in practice, citing the example of the dispute with the French Government over its expulsion of the Roma. The ESC also noted the Commission's "tough language" in stating it would use "all the means at its disposal to ensure that the Charter is adhered to by the Member States when they implement Union law". The ESC recommended that the document be debated in European Committee and that the application of the UK/Poland Protocol should be included in the debate.

> **European Committee B** resolved:
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> That the Committee takes note of European Union Document No. 15319/10, Commission Communication on Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union; supports the Government in welcoming the Commission's work to ensure that EU legislation is compatible with fundamental rights; and notes the Government's support for the principle behind Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, that the Charter does not give national or European courts any additional grounds on which to find that the laws of the United Kingdom are incompatible with the law of the European Union

6.2 European Committee B

The Strategy was debated in European Committee B on 14 March 2011. Penny Mourdant, a member of the ESC, asked the Government to:

- confirm the understanding that the UK's protocol is not an opt-out from the charter;
- say whether the Charter rights are existing principles of EU law and therefore binding on the UK, irrespective of the charter and protocol;
- say, with respect to the Commission's three practical examples about when it would take enforcement action against any Member State, whether Protocol 30 would prevent the Commission from taking such action against the UK if similar circumstances arose in the UK.

The Lord Chancellor and Justice Secretary, Ken Clarke, said in response to the first question that the Protocol was "not an opt-out but a clarification of the position":

> It clarifies it in a most important way. It sets out the boundaries around the charter by confirming that it neither creates nor extends any rights to EU citizens outside those that had existed pre-Lisbon, and it emphasises that member states are required to comply only when giving effect to EU law. It makes it quite clear that it does not apply any new rights or have any impact on existing UK or Polish law. So I would describe the protocol as a belt-and-braces approach to the underlying principles of the charter of fundamental

> rights. I have explained what the Government believe the charter of fundamental rights does, which is to restate existing principles.[21]

On the second point he said "The whole thing is based on fundamental rights that existed pre-Lisbon. They were applied pre-Lisbon and they have now been codified in the charter" and "The Government's position is that the whole thing is a codification of the pre-existing situation and makes absolutely no difference either to the fundamental rights of citizens or to the obligations of member states under EU law. On the third point, he confirmed that Protocol 30 "states in the clearest possible terms that it can confer no new rights or have any new impact on UK law over and above that which existing European law applies".

Helen Goodman asked whether Poland and the UK would be in a different situation from the other Member States, to which Mr Clarke replied: "If some sudden surprising judgment were made, I have no doubt that the British and Polish Governments would rely strongly on the protocol ... So far the European Court has not produced any unexpected or startling judgments, and I do not expect it to" (C 8).

On the question of how the Charter applied to pre-existing EU law, Mr Clarke said that "all existing legislation, including that which pre-dates Lisbon, should comply with the fundamental rights and principles that have guided the European Union", continuing:

> If legislation has survived so far, it presumably has either not been challenged on the grounds of any breach of fundamental rights or it has survived the challenge. If anybody wanted to have another go at any pre-existing law, I have no doubt they would now invoke the charter, as well as go back to the Strasbourg court or judgment, or convention on human rights ruling on which they wish to rely.

There was some discussion of the effect of the UK/Polish Protocol. Bill Cash, Chair of the ESC, cited the previous Lord Chancellor, Lord Goldsmith, who in 2008 "accepted that the protocol was not an opt-out, but said that were the courts to 'seek to conjure new or extended rights out of the Charter…the UK's Protocol would indeed have teeth'" (C 10). In reply, Ken Clarke cited Alan Dashwood, a Professor of European Law at Cambridge University, who had said that as long as the Charter were interpreted

> in accordance with the horizontal principles and with due regard to the Explanations, there would not be any need for the Protocol. It has been provided just in case the paper tiger should acquire teeth, by an aberrant interpretation treating provisions of the Charter as capable of giving rise directly to enforceable rights. In that unlikely event, the United Kingdom would be able to invoke the clear language of the Protocol, to resist any challenge to its law or practices based on such a right.

In Mr Clarke's view, the Protocol gave the UK "an added protection, in case the Court should try to go in that direction in the future". He did not think the Court would go in that direction, but acknowledged the fears of those who feared the Court was "constantly trying to enlarge its jurisdiction and the competence of the Union". He was confident that such a move "would be flatly defying the charter itself and not only the British and Polish protocol" (C 11). He insisted the Charter the charter made no difference to the UK obligations under the European Convention on Human Rights and other human rights instruments, that the Charter rights

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[21] C 5

“have been accepted by the British for years and years” (C 14). Bill Cash raised further concerns about the role of the Court of Justice, what would happen as a result of implementation of the Commission’s Strategy and its effect on how the courts apply the Charter provisions (Cs 17-20). In spite of the many assurances that the Charter would not lead to an extension of EU competence, Mr Cash thought the Court of Justice would “use the powers in its usual fashion and extend, despite the apparent restriction or prohibition on doing so” (C 19). He did not dispute the Charter’s inability to extend the competencies of the Union; the issue, in his opinion, was the Court, which “has a tendency to, and a track record of enlarging its previous interpretations of provisions contained in the enormous list of matters that I referred to. That is the manner in which it extends, not by adopting a completely new competence” (C 21). Mr Clarke confirmed that the Charter “is of more political and public presentation importance than it is of deep significance, because it does not actually change anything”, concluding that the Commission’s strategy was not “of deep political significance or any threat to our constitution” (C 22).