

## **Briefing Paper:**

## **Human Rights**

*with particular emphasis on the Charter of Fundamental Rights*

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With reference to the European Union (Amendment) Bill Debates – House of Commons

- **Charter of Fundamental Rights, originally annexed to the Nice Treaty, will have “the same legal value as the Treaties” within the EU**
- **The Charter has major implications for social and employment policies and includes the ‘right to strike’.**
- **The Protocol provides no protection**
- **The Protocol, which was once an actual opt-out, is now just a clarification of no substance**

The Treaty (Article 6 TEU) recognises the Charter of Fundamental Rights (CFR) as having “*the same legal value as the Treaties*” within the EU, setting out a wide range of ‘rights’ that extend to employment, economic, family and social policy. At the time the Constitution was being discussed, the Government expressed concern that a legally binding Charter would provide the basis for the European Court of Justice (ECJ) to interfere in UK domestic policy in these areas – for example over the provisions for industrial action, or the nature of social benefits.<sup>1</sup>

Some argue that since the provisions of the Charter are drawn from the European Convention on Human Rights and other existing international agreements, the Charter adds nothing to the backdrop to UK court judgements – and can therefore be ignored. However the importance attached to the Charter by its advocates reflects the belief that bringing these rights together in a single EU legal document will make it easier for them to be applied and make it easier to build up a clear base of local case law.

Furthermore the risk comes not just from the Charter language itself but from the opportunity for the ECJ to apply the Charter language to the *extended range of EU competences* defined under this Treaty in ways that extend the scope of its interventions and create new EU case law that is directly or indirectly applicable in the UK.

The Government claims that it has protected the UK from interference through a special UK protocol that states the Charter does not extend the ability of the courts to adjudicate on rights and principles which are not already provided for under UK law. According to the Government, this is not an 'opt-out', but simply a 'clarification'.

Yet the House of Commons Select Committee on European Scrutiny commented that:

*"If, as the Foreign Secretary assured us, every part of the Charter is sourced back to existing rights 'with no right for the ECJ or anyone to extend their reach' it is hard to see why the Protocol is necessary..."*<sup>2</sup>

There are two main reasons for doubting this will provide worthwhile protection.

First, in ratifying the Treaty, the UK would be accepting that all the provisions of the Treaty – and legislation that flows from them – are enshrined as part of 'UK Law'. It is the ECJ which ultimately determines whether and how areas of EU competence apply to the UK – for example on the scope of the EU's shared competences under Article 2C of TFEU to legislate on 'social policy' and on 'economic, social and territorial cohesion', as well as its powers under Article 2D to "*take measure to ensure coordination of employment policies*" and "*take initiatives to ensure coordination of Member States' social policies*". Accordingly the ECJ will have considerable scope, if it chooses, to rule that a grey area under an EU directive does apply to the UK, enabling it to apply its EU-wide interpretation of the related 'right' under the charter. This opens the gate to a more expansive implementation of the Charter rights than the UK courts themselves might implement.

- In the considered legal opinion of Martin Howe QC (Global Vision Fellow), the Protocol:

*"...does no more than reiterate the provision of Article 51(1) of the Charter restricting its application to member states only when implementing Union law, and has no substantive legal effect."*<sup>3</sup>

- Again, the House of Commons Select Committee on European Scrutiny, in their *European Union Intergovernmental Conference: Follow-up Report*, said;

*"It is clear that the Government accepts that the Charter will be legally binding, and it has stated that the Protocol is not an opt-out...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.”* (paragraph 38)<sup>4</sup>

- The Committee also went on to point out that:

*“If the ECJ does interpret a measure of Union law in this way, we believe the resulting interpretation would be binding in the UK, because of the UK's treaty obligations, notably the duty of sincere cooperation under Article 4(3) EU. These obligations are not excluded or restricted by the Protocol. On the contrary, and as the recitals make clear, the Protocol is subject to those obligations”* (paragraph 41).<sup>5</sup>

- The Government's negotiating failure was picked up by the Scrutiny Committee, when it contrasted the outcome the British government achieved with that achieved by the Danish government:

*“In our view, the only way of ensuring that the Charter does not affect UK law in any way is to make clear, as we have already suggested, that the Protocol takes effect ‘notwithstanding the Treaties or Union law generally’. We note that this kind of provision has been made in the Protocol to the EC Treaty on the acquisition of property in Denmark (No. 16) and in the Protocol to the EU Treaty on Article 40.3.3 of the Irish Constitution (No.17), but it has not been made in respect of the Charter.”* (paragraph 42)<sup>6</sup>

- Further evidence from Martin Howe QC suggested that the Protocol did nothing and protected the UK against a non-existent problem;

*“Chairman: ...what is the Protocol doing, in your view?”*

*Mr Howe: “...One possible view is that it does nothing and then it has no substantive legal effect. It is a difficult issue.”*

He went on to comment that Article 1 of the Protocol *“...may be aiming to defeat a problem that was never there...”* (Q283)<sup>7</sup>

Second, given that the UK has previously signed up to the Charter of Fundamental Rights in full as a document in its own right – which already gives it the authority of political intent in the UK – it is likely that ECJ rulings in other EU territories that relate to these rights will be taken into account as precedents in UK court hearings. As a recent House of Lords report made clear, this cross-referencing to incorporate ECJ judgements into UK law is already normal practice.<sup>8</sup> Going forward, this will particularly apply to EU-wide measures to which the UK is party, but could potentially be a factor in

judgements relating to the Area of Freedom, Security and Justice even where we are not opted in to the underlying measure.

- It is clear as well that the ECJ would attempt to sidestep all attempts to limit the Charter's impact. Paragraph 58 of the European Scrutiny Committee Report<sup>9</sup> states that:

*"To take a possibly example, the Working Time Directive contains provisions limiting the weekly hours of work of a worker to 48 hours a week, but with the possibility of agreements to waive those limits. As Article II-91 of the Charter provides that "every worker has the right to limitation of maximum working hours" we have some concern that, in the light of the Charter, the (UK) derogation from the Directive allowing such waivers has to be interpreted more restrictively than before (i.e. before the Charter had legal effect)."*

- Martin Howe QC again pointed out the expansive interpretations of the ECJ in his Memorandum to his evidence to the House of Lords European Union Committee, Sub-Committee E (Laws and Institutions).<sup>10</sup> He wrote:

*"The doctrine of implied external competence is itself an example of the ECJ expanding the powers of the EC under the guise of 'interpretation' of the Treaty when the Treaty itself confers no such power."*

- The House of Commons European Scrutiny Committee also commented on the ECJ that, *"Given the open texture of the drafting of the charter...we doubt if it is possible to guarantee that it will not be developed and amplified by the ECJ."* (paragraph 40)<sup>11</sup>
- Commenting on if and how the Charter will impinge on the UK, Martin Howe QC said:

*"If it does that, this sort of effect by virtue of interpretation of the Community measure, I cannot see that the Protocol, as it were, keeps it out."* (Q295)<sup>12</sup>

- Howe continued:

*"I think the difficult question is whether the Protocol actually does anything more than is done already by the provisions of Article 52(1) of the Charter."* (Q296)<sup>13</sup>

Ultimately it is the acceptance of the ECJ as the definitive EU court that makes it unlikely that the UK can sustain a separate body of law to that which prevails elsewhere in the EU in any area where the ECJ has jurisdiction. Following this Treaty, the only area which is specifically excluded from the ECJ is Foreign and Defence Policy.

The Charter of Fundamental Rights further embeds the concept that EU citizens have rights and responsibilities defined by the EU itself which transcend those of their national citizenship. Indeed it embodies the concept that the EU determines and is the guarantor of those rights across national boundaries.

### ***Footnote on the EPA and implications for human rights:***

#### **Article 21.1 (consolidated Treaty)**

“The Union’s action on the international scene shall be guided by the principles which have inspired its own creation...the universality and indivisibility of human rights and fundamental freedoms...”

- The government is keen to quote Oxfam, yet according to the same Oxfam, the EU Economic Partnership Agreements will seriously put into jeopardy development in African, Caribbean and Pacific states, forcing them to choose between guaranteeing existing imports on the one hand and safeguarding future economic growth on the other.
- According to Oxfam, the EPA’s deals could lead to job losses, loss of tariff revenue, and damage to industrial growth capacity. Oxfam report that the EU negotiations were conducted in an “undemocratic and untransparent” manner<sup>14</sup>.
- Such accusations from Oxfam are thus a serious indictment of the EU’s respect for human rights, and Article 2, 3.5, and 21.1 (consolidated Treaty references) (to name but a few).

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<sup>1</sup> See Blackwell, *Sleepwalking into an EU Legal System*, Centre for Policy Studies, March 2006, for a description of some of these implications. Particular concern has been expressed about Article 28 of the Charter which guarantees the rights of workers “to take collective action to defend their interests, including strike action”; Article 31 which enshrines that “every worker has the right to limitation of maximum working hours”; and Article 34 which recognises “entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment” as well as “the right to social and housing assistance to ensure a decent existence for all those who lack sufficient resources”. While Article 34 is qualified by “in accordance with the rules laid down by Union law and national laws and practices”, the future scope of Union law – and of consequent directives that define national laws – is clearly yet to be established. In 2000, at the time of signing the Charter, Tony Blair gave the assurance, “Our case is that the Charter should not have legal status, and we do not intend it to do so”; and in 2003, prior to agreement on the Constitutional Treaty, Peter Hain (as Minister for Europe) declared “...there are very real legal and practical problems linked to incorporation [of the Charter], which might lead to the European court overturning UK Law. There is absolutely no possibility of us agreeing to this” (*Guardian*, 27 May 2003).

<sup>2</sup> House of Commons European Scrutiny Committee, *European Union Intergovernmental Conference: Follow-up report*, 3<sup>rd</sup> Report of the Session 2007-08, HC 16-iii, November 2007. Accessed at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/1602.htm#a7>

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<sup>3</sup> Martin Howe QC, House of Lords European Union Committee, Sub-Committee E (Law and Institutions). Inquiry on the impact of the Reform Treaty on the area of Freedom, Security and Justice. Memorandum of evidence by Martin Howe QC submitted 22 January 2008, following oral evidence session Wednesday 5 December 2007.

<sup>4</sup> House of Commons European Scrutiny Committee, *European Union Intergovernmental Conference: Follow-up report*, 3<sup>rd</sup> Report of the Session 2007-08, HC 16-iii, November 2007. Accessed at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/1602.htm#a7>

<sup>5</sup> House of Commons European Scrutiny Committee, *European Union Intergovernmental Conference: Follow-up report*, 3<sup>rd</sup> Report of the Session 2007-08, HC 16-iii, November 2007. Accessed at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/1602.htm#a7>

<sup>6</sup> House of Commons European Scrutiny Committee, *European Union Intergovernmental Conference: Follow-up report*, 3<sup>rd</sup> Report of the Session 2007-08, HC 16-iii, November 2007. Accessed at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/1602.htm#a7>

<sup>7</sup> Unrevised House of Lords Minutes of Evidence taken before the Select Committee on the European Union, Sub-Committee E (Law and Institutions), *Impact of the Reform Treaty on the Area of Freedom, Security and Justice*, Wednesday 5<sup>th</sup> December 2007. Evidence provided by expert witness Mr Martin Howe QC. Access at: <http://www.publications.parliament.uk/pa/ld/lduncorr/eue051207ev4.pdf>

<sup>8</sup> See House of Lords, European Union Committee, *Human Rights Proofing EU Legislation*, November 2005.

<sup>9</sup> House of Commons European Scrutiny Committee: European Union Intergovernmental Conference, 35<sup>th</sup> Report of Session 2006-07, HC 1014.

<sup>10</sup> Martin Howe QC, House of Lords European Union Committee, Sub-Committee E (Law and Institutions). Inquiry on the impact of the Reform Treaty on the area of Freedom, Security and Justice. Memorandum of evidence by Martin Howe QC submitted 22 January 2008, following oral evidence session Wednesday 5 December 2007.

<sup>11</sup> House of Commons European Scrutiny Committee, *European Union Intergovernmental Conference: Follow-up report*, 3<sup>rd</sup> Report of the Session 2007-08, HC 16-iii, November 2007. Accessed at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-iii/1602.htm#a7>

<sup>12</sup> Unrevised House of Lords Minutes of Evidence taken before the Select Committee on the European Union, Sub-Committee E (Law and Institutions), *Impact of the Reform Treaty on the Area of Freedom, Security and Justice*, Wednesday 5<sup>th</sup> December 2007. Evidence provided by expert witness Mr Martin Howe QC. Access at: <http://www.publications.parliament.uk/pa/ld/lduncorr/eue051207ev4.pdf>

<sup>13</sup> *see reference 4, above*

<sup>14</sup> [http://www.oxfam.org.uk/applications/blogs/pressoffice/2008/01/oxfam\\_international\\_on\\_economi.html](http://www.oxfam.org.uk/applications/blogs/pressoffice/2008/01/oxfam_international_on_economi.html) , January 9th 2008.