

ALBA conference 2010

IMPACT OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

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Content of the Charter

1. Contains 54 Articles -divided into six titles:
 - (a) Dignity (Arts 1-5)
 - (b) Freedoms (Arts 6-19) – includes majority of the rights derived from the ECHR
 - (c) Equality (Arts 20-26)
 - (d) Solidarity (Arts 27-38). UK Protocol applies.
 - (e) Citizens' rights (Arts 39-46)
 - (f) Justice Arts 47-50).
2. Accompanying Explanations relating to the Charter of Fundamental Rights (OJ 2007 C303/17). Explains the sources of the rights. These include:
 - (a) ECHR (eg, Art 2 – right to life; Art 5 – prohibition of slavery and forced labour; Art 7 – respect for private and family life)
 - (b) Other international agreements (eg, Art 18 – right to asylum – based on the Geneva Convention; Art 26 – integration of persons with disabilities – based on European Social Charter; Art 28 – right of collective bargaining and action – based on Community Charter of the Fundamental Social Rights of Workers)
 - (c) EU treaties (eg, Art 23 – equality between men and women; Art 37 – environmental protection; Art 38 – consumer protection).
 - (d) ECJ case-law (eg, Art 16 – freedom to conduct a business; Art 41 – right to good administration)
 - (e) National constitutional provisions (eg, Art 14 – right to education; Art 20 – equality before the law).

3. Important horizontal provisions:
 - (a) Art 51(1) concerns the field of the application of the Charter and provides that it applies to the institutions, bodies, offices and agencies of the Union and to the Member States *“only when they are implementing Union law”*.
 - (b) Article 52 (1): general derogation provision. Any limitation on rights must be *“provided for by law”* and may only be made if *“they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”*.
 - (c) Article 52(5): distinguishes between *“rights”* and *“principles”*. This is a difficult distinction which is not clear on the face of the Charter. The Explanations give three examples of principles (Arts 25, 26 and 37) yet Art 25 is headed the *“rights of the elderly”*. The Explanations also say that, in some cases, an Article of the Charter may contain both elements of a right and of a principle (eg, Arts 22, 33 and 34).
 - (d) What is different about principles? Art 52(5) says that they *“may be implemented by legislative and executive acts taken by institutions...of the Union and by acts of the Member States when they are implementing Union law... They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality”*. Explanations say that the principles *“do not give rise to direct claims for positive action by the Union’s institutions or Member States authorities”*.

Legal effect of the Charter

4. Charter was proclaimed by EU institutions in Nice in December 2000. Question of legal effect was deferred at that stage.
5. Treaty of Lisbon: Charter given binding force.
6. Article 6 TEU:
 - (a) Charter is given *“the same legal value as the Treaties”* (Art 6(1))
 - (b) Provisions of the Charter *“shall not extend in any way the competences of the Union as defined in the Treaties”* (Art 6(1))
 - (c) Charter shall be interpreted in accordance with the general provisions in Title IV and with due regard to the Explanations (Art 6(1))
 - (d) The EU *“shall accede”* to the ECHR (Art 6(2))

- (e) Fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States “*shall constitute general principles of the Union’s law*”.
7. TEU thus provides for three sources of fundamental rights in the EU legal order:
- (a) The EU Charter
 - (b) The ECHR
 - (c) General principles developed by the ECJ.

Case-law

8. Pre-Lisbon:
- (a) Charter rarely referred to by the ECJ, though increasingly by Advocates General and the CFI (now General Court)
 - (b) Referred to as a source for the content of the general principle of protection of fundamental rights
 - (c) Eg, Case C-438/05 *Viking* [2007] ECR I-10779, at [41]: right to strike is a fundamental right “*which forms an integral part of the general principles of Community law*” and which is “*reaffirmed by Article 28 of the Charter*”
9. Post-Lisbon:
- (a) Charter much more frequently drawn upon by the ECJ as a source of fundamental rights. Eg, Joined Cases C-317-320/08 *Alassini*, 18 March 2010, at [61]: principle of effective judicial protection “*is a general principle of EU law... which has also been reaffirmed by Article 47 of the Charter...*”.
 - (b) Directly relied upon as informing the interpretation of EU legislation. Eg, Joined Cases C-175 etc/08 *Abdulla*, 2 March 2010. Also Case C-403/09 PPU *Detiček*, 23 December 2009, paras 53-54: Regulation cannot be interpreted in such a way that it disregards the fundamental right contained in Article 24(3) of the Charter.
 - (c) Directly relied upon as binding upon Member States. Eg, Case C-555/07 *Kükükdeveci*, 19 January 2010.

Binding on whom?

10. On EU institutions:

- (a) Ground for action for annulment
 - (b) Interpretation of legislation. See, eg, Commission Communication on compliance with the Charter in Commission legislative proposals, COM (2005) 172 final.
11. On Member States:
- (a) Article 51(1): “*only when they are implementing Union law*”
 - (b) Explanation, p. 32: “*...only binding on Member States when they act in the scope of Union law*”
 - (c) Plainly covers interpretation of national legislation implementing EU rules such as directives
 - (d) But also covers Member State action when they are derogating from EU law
 - (e) Potentially very broad sphere of application.

The Charter in the UK

- 12. Is the Charter applicable in the UK at all? At the summit which agreed the Lisbon Treaty in June 2007, Tony Blair said that it was “*absolutely clear that the Charter of Fundamental Rights is not going to be justiciable in British courts or alter British law*”.
- 13. Article 1(1) of the Protocol: “*The Charter does not extend the ability of the Court of Justice of the European Union, or of any court or tribunal of Poland or the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*”
- 14. Art 1(2) of the Protocol: “*nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom*”.
- 15. But see 8th and 9th recitals to the Protocol which refer to “*clarifying*” the application of the Charter.
- 16. See also the Preamble to the Charter which speaks in terms of “*reaffirming*” rights. Also Art 51(1).
- 17. Protocol simply confirms that Charter does not extend judicial powers.

Impact on domestic judicial review

18. Charter now directly applicable.

19. What does it add to the HRA?

(a) Substantive rights not contained in ECHR

(b) Potentially better remedies – certainly where primary legislation is under challenge.