

The Charter, the ECJ and national courts

P. P. CRAIG*

It is axiomatic that national courts must apply EU law when construing national legislation. This has always included the primary Treaty, EU legislation made thereunder and general principles of EU law fashioned by the Community courts. The ratification of the Lisbon Treaty now poses new challenges for national courts when interpreting EU and national legislation, because it rendered the Charter of Fundamental Rights legally binding, thereby resolving an issue that had been left open since the Charter was initially drafted almost a decade earlier. The Lisbon Treaty in addition imposed an obligation on the EU to join the ECHR, thereby resolving another issue that had been on the agenda for even longer.

This chapter addresses some of the legal issues raised by this development, more especially those that are relevant to national courts in the overall scheme of the Charter.¹ The chapter begins with a brief overview of the EU's fundamental rights' jurisprudence and the genesis of the Charter. This is followed by analysis of the Protocol that limits the application of the Charter in the United Kingdom and Poland. The discussion then turns to the ambit of the Charter and the extent to which it applies to Member State action. The ensuing sections address the divide between rights and principles contained in the Charter and the relationship between the ECHR and the Charter. The chapter concludes with reflections on the more general impact of the Charter on judicial review and the role of the ECJ.

* Professor of English Law, St John's College, and the University of Oxford.

¹ This paper is taken from P Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford University Press, 2010) chapter 6, which addresses a broader range of interpretive issues raised by the Charter.

1. Charter of fundamental rights

A. Fundamental rights: Origins and development

The evolution of the fundamental rights' jurisprudence is well known.² The original Treaties contained no express provisions concerning the protection of human rights. This may have been a reaction to the failure of the ambitious attempts to create a European Political Community (EPC) in the mid-1950s, which convinced advocates of closer integration to scale down their plans. The 1957 EEC Treaty focused on economic integration and contained no mention of human rights. The absence of human rights may also have been because the framers did not realise that the EEC Treaty, with its economic focus, could encroach on traditionally protected fundamental human rights. This was belied by subsequent events. It quickly became apparent that Community action could affect social and political, as well as economic, issues. The expansion of Community competences attendant upon successive Treaty amendments reinforced this.

It was the ECJ that developed what amounted to an unwritten charter of rights.³ The ECJ's early approach was unreceptive to rights-based claims.⁴ It was, however, *Internationale Handelsgesellschaft* which secured

- 2 M Dausies, 'The Protection of Fundamental Rights in the Community Legal Order' (1985) 10 ELRev 398; A Cassese, A Clapham and J Weiler (eds), *European Union: The Human Rights Challenge* (Nomos, 1991); A Clapham, 'A Human Rights Policy for the European Community' (1990) 10 YEL 309; K Lenaerts, 'Fundamental Rights to be Included in a Community Catalogue' (1991) 16 ELRev 367; J Weiler, 'Thou Shalt not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-Community Nationals – a Critique' (1992) 3 EJIL 65; J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 12 Legal Studies 227; G de Búrca, 'Fundamental Human Rights and the Reach of EC Law' (1993) 13 OJLS 283; P Twomey, 'The European Union: Three Pillars without a Human Rights Foundation' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (Wiley, 1994) 121; J Weiler and N Lockhart, "'Taking Rights Seriously" Seriously: The European Court and its Fundamental Rights Jurisprudence' (1995) 32 CMLRev 51, 579; S O'Leary, 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32 CMLRev 519; N Neuwahl and A Rosas (eds), *The European Union and Human Rights* (Kluwer, 1995); P Alston, with M Bustelo and J Heenan (eds), *The EU and Human Rights* (Oxford University Press, 1999).
- 3 B de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Alston (n 2) Chap 27.
- 4 Case 1/58 *Stork v High Authority* [1959] ECR 17; Cases 36, 37, 38, and 40/59 *Geitling v High Authority* [1960] ECR 423; Case 40/64, *Sgarlata and others v Commission* [1965] ECR 215.

fundamental rights within the Community legal order.⁵ The applicant, a German import-export company, argued that a Community regulation which required forfeiture of a deposit if goods were not exported within a specified time was contrary to principles of German constitutional law. The ECJ's response was a mixture of stick and carrot. It forcefully denied that the validity of a Community measure could be judged against principles of national constitutional law. It then held that respect for fundamental rights formed an integral part of the general principles of Community law protected by the ECJ. The ECJ would decide whether the deposit system infringed these fundamental rights. In subsequent case law, the ECJ emphasised that it would draw inspiration from the constitutional traditions of the Member States, international human rights treaties,⁶ and the European Convention on Human Rights (ECHR).⁷ The early case law was concerned with the compatibility of Community norms with fundamental rights. The ECJ later confirmed that these rights could be binding on the Member States when they acted within the sphere of Community law.⁸ The ECJ did not, however, allow fundamental rights to be pleaded against a Member State where there was no real connection with EC law.⁹

It would nonetheless be mistaken to think that the ECJ made the sole contribution to the evolution of human rights within the Community. The Treaty itself contained certain provisions that would find a place

5 Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

6 Case 149/77 *Defrenne v Sabena* [1978] ECR 1365.

7 See, eg, Case 4/73 *Nold v Commission* [1974] ECR 491; Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Case C-235/99 *The Queen v Secretary of State for the Home Department, ex p Kondova* [2001] ECR I-6427; Case C-25/02 *Rinke v Ärztekammer Hamburg* [2003] ECR I-8349; Cases C-465/00, 138 and 139/01, *Rechnungshof v Österreichischer Rundfunk and others* [2003] ECR I-4989.

8 Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; Case 5/88 *Wachauf v Germany* [1989] ECR 2609; Cases C-74/95 and 129/95, *Criminal Proceedings against X* [1996] ECR I-6609; Case C-260/89 *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925, [43]; Case C-368/95 *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-368, [24]; Case C-60/00, *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279, [40]-[41]; Cases C-482 and 493/01 *Orfanopoulos v Land Baden-Württemberg* [2004] ECR I-5257, [97]-[98].

9 Case C-144/95 *Maurin* [1996] ECR I-2909; Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629; Case C-309/96 *Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR I-7493.

in any modern Bill of Rights. Non-discrimination on the grounds of nationality was secured by Article 12 EC, and also in the Treaty provisions on free movement. Gender equality was protected by Article 141 EC.¹⁰ The Amsterdam Treaty was especially important in this respect. Article 6(1) EU was strengthened so as to provide that the Community was founded on the principles of liberty, democracy and respect for human rights and fundamental freedoms. Article 6(2) EU stipulated that the Community should respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions of the Member States as general principles of law. It was made justiciable by Article 46(d) EU. Article 7 EU enabled the Council to suspend certain Member State rights, where it committed serious and persistent breach of the principles set out in Article 6(1) EU. The Amsterdam Treaty also added an important new head of legislative competence, Article 13 EC, to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.¹¹

B. Charter: Genesis and Drafting

Still, prior to the Charter, the protection of rights was fragmented and piecemeal, thereby making it more difficult for the citizenry to understand the legal status quo.¹² Moreover, the very fact that the scope of Community power had increased considerably made the promulgation of some form of Community bill of rights more pressing. It is a basic tenet of liberal democratic regimes that a quid pro quo for governmental power is the existence of rights-based constraints on the exercise of that power. This fundamental idea is just as applicable to the EU as to traditional nation states. Thus even if the ECJ had not been 'pressed' into recognising fundamental rights by the threat of revolt from the German and Italian courts, it would, in all likelihood, have realised the necessity for such limits on governmental power of its own accord, more especially

10 C Barnard, 'Gender Equality in the EU: A Balance Sheet' in Alston (n. 2) chapter 8.

11 L Flynn, 'The Implications of Article 13 – After Amsterdam Will Some Forms of Discrimination be More Equal than Others?' (1999) 36 CMLRev 1127; G de Búrca, 'The Role of Equality in European Community Law' in S O'Leary and A Dashwood, (eds), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell, 1997) 13–34.

12 A Vitorino, *The Charter of Fundamental Rights as a Foundation for the Area of Freedom, Justice and Security* (Centre for European Legal Studies, Exeter Paper in European Law, No. 4, 2001) 12–14.

because it was at that time developing administrative law controls on Community action.

While the ECJ laid the groundwork for rights-based protection, the decision to draft a Charter meant that consideration could be given to the range of rights which should be recognised, and enabled a spectrum of views to be taken into account when doing so, thereby enhancing the legitimacy of the resulting document.¹³

The immediate catalyst for the Charter of Fundamental Rights came from the European Council. In June 1999, the Cologne European Council¹⁴ decided that there should be a Charter of Fundamental Rights to consolidate the fundamental rights applicable at Community Level and to make their overriding importance more visible to EU citizens.¹⁵ The Charter was to contain fundamental rights and freedoms, as well as the basic procedural rights guaranteed by the ECHR. It was to embrace the rights derived from the constitutional traditions common to the Member States that had been recognised as general principles of Community law. It was also made clear that the Charter should include economic and social rights.

The institutional structure for the discussions about the Charter was laid down in the Tampere European Council in October 1999.¹⁶ It was decided to establish a body called the Convention. It consisted of representatives of the Member States, a member of the Commission, members of the European Parliament, and representatives from national Parliaments. The first meeting took place in December 1999. The Convention was instructed to conclude its work in time for the Nice European Council in December 2000. The discussion in the Convention was therefore conducted in parallel with the Intergovernmental Conference concerning the institutional consequences of enlargement that led to the Nice Treaty.

13 See, however, J Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' (2000) 6 ELJ 95.

14 3–4 June 1999.

15 J Dutheil de la Rochere, *La Charte des droits fondamentaux de l'Union européenne* (2001) ; G de Búrca, 'The Drafting of the European Charter of Fundamental Rights' (2001) 26 *ELRev* 126; M Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union' in T Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart, 2003) 272–276; G de Búrca and J Beatrix Aschenbrenner, 'European Constitutionalism and the Charter' in S Peers and A Ward (eds), *The EU Charter of Fundamental Rights, Politics, Law and Policy* (Hart, 2004) Chap 1; J Schonlau, *Drafting the EU Charter, Rights, Legitimacy and Process* (Palgrave, 2005).

16 15–16 October 1999.

The draft Charter was submitted by the Chairman of the Convention, Roman Herzog, to President Chirac, who held the Presidency of the European Council, on 5 October 2000.¹⁷ It was considered at an informal meeting of the European Council at Biarritz on 14 October 2000.¹⁸ The Charter was accepted, and this was reinforced at the Nice European Council. The Charter was drafted so as to be capable of being legally binding. The precise legal status of the Charter was however left undecided in Nice. The Charter is now legally binding as provided by Article 6(1) TEU of the Lisbon Treaty.

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

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.

The Charter itself is not therefore incorporated in the Lisbon Treaty, but it is accorded the same legal value as the Treaties. The Lisbon Treaty is premised on the version of the Charter as amended by the IGC in 2004,¹⁹ and this version has been reissued in the Official Journal.²⁰ The United Kingdom and Poland negotiated a Protocol designed to limit the application of the Charter in certain respects,²¹ and its impact is considered later in the chapter. Article 6(2) TEU stipulates that the Union shall accede to the ECHR, and that such accession shall not affect the Union's competences as defined in the TEU and TFEU. Although Article 6(2) TEU does not specify a time, the Stockholm Programme is framed in terms of rapid accession by the EU to the ECHR.²²

17 Charte 4960/00, Convent 55, 26 October 2000.

18 Charte 4955/00, Convent 51, 17 October 2000.

19 Ibid 25, n 21.

20 Charter of Fundamental Rights of the European Union, [2007] OJ C303/1; Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C303/17. The Charter has been reissued with the Lisbon Treaty, [2010] OJ C83/2.

21 Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

22 The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizen, Council 16484/1/09, Brussels, 25 November 2009, [2.1]; Delivering an area

2. UK/Poland Protocol and the Charter

A. Protocol: Content

The impact of the Charter within the United Kingdom is markedly affected by the interpretation of the Protocol negotiated by the United Kingdom and Poland,²³ and extended to the Czech Republic, designed to limit the application of the Charter in certain respects. The interpretation of the Protocol is a matter of EU law, and therefore the ECJ will have the final word on its meaning.

The Protocol contains a lengthy preamble, which, *inter alia*, reaffirms that Article 6 TEU requires the courts of the United Kingdom and Poland to interpret and apply the Charter in accord with the explanations referred to in that Article. The preamble, moreover, 'notes' the wish of Poland and the United Kingdom to clarify certain aspects of the application of the Charter.

The Protocol contains two substantive articles. Article 1(1) states that the Charter does not extend the ability of the Union courts, or any court or tribunal of Poland or of 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. Article 1(2) further states that for the avoidance of doubt, nothing in Title IV of the Charter, which concerns solidarity rights, creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law. Article 2 provides that in so far as a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

B. Protocol: Political background

In political terms, the United Kingdom's insistence on the Protocol is problematic. The United Kingdom had, two years earlier, signed the Constitutional Treaty, which included the Charter, and did so without

of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme, COM(2010) 171.

23 Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

any such reservations of the kind found in the Protocol attached to the Lisbon Treaty. It can therefore be assumed that had the Constitutional Treaty ratification process not been stopped as a result of the negative referenda in France and the Netherlands, the UK government would have campaigned for the Constitutional Treaty, including the Charter, notwithstanding the absence of any opt-out or reservation. The relevant terrain had not altered in the ensuing two years, and the rationale for the Protocol is in that sense unclear.

The 'official view' is that the government engaged in some rethinking of the possible impact of the Charter on UK business, in particular relating to the solidarity rights contained in Title IV, although in so far as this was so, it is of course highly contestable whether Charter rights should be limited in this manner. It is difficult, however, to avoid the conclusion that the inclusion of the Protocol was motivated as much, if not more, by the government's desire to show that the Lisbon Treaty differed in certain respects from the Constitutional Treaty, and that therefore a referendum on the former was not necessary.

C. Protocol: Legal effect

We need to tread carefully when considering the legal effect of the Protocol, and to distinguish between a broad and a narrow view.

The broad view of Article 1(1) of the Protocol would be that the Charter creates no legally enforceable rights that can be pleaded against the United Kingdom or Poland, either before Union or national courts. This view is not sustainable, however, when read in the light of the Protocol as a whole. If the intent had been for the Protocol to create a complete opt-out for the United Kingdom and Poland in relation to the entire Charter, then this could have been simply done. It would only have required a single article, suitably and simply worded to achieve this result. If this had been the intent behind Article 1(1) of the Protocol, then Article 1(2) and Article 2 would have been legally redundant. There would, by definition, have been no need for anything to have been said about, for example, solidarity rights not being enforceable against the United Kingdom and Poland if Article 1(1) constituted a complete opt-out from the entirety of the Charter. It should further be noted that the very wording of Article 2 assumes that the Charter applies to the United Kingdom and Poland. The broad view is also inconsistent with the wording of the preamble to the Protocol, in which the contracting parties 'note' that the United Kingdom and Poland wish to clarify 'certain aspects of the application of the Charter',

and 'reaffirm' that 'references in this Protocol to the operation of specific provisions of the Charter are strictly without prejudice to the operation of other provisions of the Charter'. These extracts from the preamble, and especially the latter, contradict a reading of the Protocol as a complete opt-out.

The narrow view focuses on the precise wording of Article 1(1), which states that the Charter does not 'extend the ability' of Union or national courts to find that national laws etc are inconsistent with rights reaffirmed by the Charter. On this view Article 1(1) has less impact. The Community courts could, prior to the Charter, consider the legality of Community measures, and Member State action where it fell within the sphere of EU law, for violation of fundamental rights. The matter would often arise in the context of a preliminary ruling from a national court, which had the duty to consider the legality of, for example, Member State action for compliance with Community law, including fundamental rights. Viewed from this perspective, the Charter does not 'extend the ability' of Union or national courts to find that national laws etc are inconsistent with Charter rights. Thus Article 1(1) affirms established orthodoxy and reaffirms the injunction in Article 51(2) that the Charter does not extend the field of application of EU law. It also fits with the statement in the preamble that the United Kingdom and Poland wish to clarify certain aspects of the application of the Charter. This view has not been confirmed by the ECJ.²⁴

Article 1(2) is, by way of contrast, a substantive limit which reduces the impact of Title IV of the Charter concerning solidarity rights.²⁵ So too more generally is the stipulation in Article 2 that in so far as a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of those countries. It should nonetheless be noted that the crucial wording is 'recognised in the law or practices' of the United Kingdom and Poland, and that this wording provides the ECJ with interpretative discretion as to when a Charter right might be regarded as recognised by the law or practice of that country.

It also should be remembered that the Protocol does not in itself affect the *acquis communautaire*, including the fundamental rights' jurisprudence that preceded the Charter. It would therefore still be open to

24 Cases C-411 and 493/10 *NS v Home Secretary*, 21 December 2011.

25 C Barnard, 'The "Opt-Out" for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in S Griller and J Ziller (eds), *The Lisbon Treaty, EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008) 257–283.

claimants to rely on this body of established law if they could not rely directly on the Charter because of the limits imposed by the Protocol.

3. Reach of the Charter

A. Union institutions: Verticality and horizontality

(1) Textual argument: Literal and radical interpretation

Charter rights seem only to have a vertical impact. The governing provision is Article 51(1) of the Charter, which stipulates that

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

Treaty articles can by way of contrast have direct effect, which can be horizontal and hence bind private parties, as well as vertical, binding the state. The same is true for regulations and decisions. Directives by way of contrast can lead to vertical but not horizontal direct effect, although doctrines such as indirect effect and the like can produce similar results.²⁶

The importance of this difference can be exemplified in the context of equality. Article 23 of the Charter stipulates that equality between men and women must be ensured in all areas, including employment, work and pay. In accord with Article 51(1) of the Charter it will have a vertical impact and bind the Union institutions and the Member States when they are implementing Union law. It will not bind private parties such as employers. The most proximate Treaty provision is Article 157 TFEU, which has both vertical and horizontal direct effect, with the consequence that it can be relied on against the state and private parties.²⁷

Whereas the Charter appears to have only a vertical dimension, we should pause to consider a more radical reading of Article 51(1). The second sentence thereof provides that Charter rights are addressed to, *inter alia*, Union institutions, which must respect the rights, observe the

²⁶ P Craig and G de Búrca, *EU Law, Text, Cases and Materials* (Oxford University Press, 5th ed, 2011) Chap 7.

²⁷ There are differences in the wording between Art 157 TFEU and Art 23 of the Charter, but they do not alter the point being made in the text.

principles and promote the application thereof. The paradigm is Union legislation or executive action that infringes a right, with a subsequent annulment action brought by the aggrieved individual. This is the classic vertical application of constitutional rights to protect private autonomy.

It should be noted, however, that the Union courts are Union institutions²⁸ and are bound to ‘respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties’. There is nothing that expressly limits this obligation to cases brought against public authorities, whether at the Union or national level. It might therefore be argued that this obligation is equally applicable where an individual seeks to rely on a Charter right against another private individual, provided that the subject-matter falls within EU law. If this were the case, the Charter would have horizontal direct effect or something close thereto.

This reading might, however, seem too radical. It could be argued that if this were the intent, the Article could have been drafted explicitly to make this clear. There is nothing in the explanatory memorandum to give the impression of horizontal direct effect.²⁹ This analysis might nonetheless be accepted in a somewhat weaker form, as the justification for indirect horizontal effect, in the manner discussed later in the chapter.

(2) Normative argument: Choice and tension

Any legal system that protects fundamental rights has to decide how far those protections are to apply. The view that protection of rights should only apply vertically is premised, as Hunt has argued, on a ‘rigid distinction between the public and private sphere and presupposes that the purpose of fundamental rights protection is to preserve the integrity of the private sphere against coercive intrusion by the state’.³⁰ Legal relations between individuals are, by way of contrast, seen as part of private autonomy, with the consequence that the choices individuals make about how to live their lives and deal with each other should not be dictated by the state.

The view that rights-based protections should apply even as between private parties is premised ultimately on the hypothesis that all legal

28 Art 13 TEU.

29 Charte 4473/00, Convent 49, 11 October 2000, 46; CONV 828/03, Updated Explanations Relating to the Text of the Charter of Fundamental Rights, 9 July 2003, 45–46; Explanations Relating to the Charter (n 20) 16.

30 M Hunt, ‘The “Horizontal Effect” of the Human Rights Act’ [1998] PL 423, 424.

relations are constituted by the state, in the sense that the law itself is constructed and supported by the state.³¹ Viewed from this perspective, choices are constantly being made and expressed through legal rules as to the limits on private freedom of action. Legal rules frequently impose limits on private choice whether in the sphere of contract, tort, property or restitution.

When the matter is viewed in this light, the formal divide between the public and private sphere begins to crumble. The issue becomes which types of restraint on private action are felt to be normatively warranted. It becomes more difficult to argue that rights-based protections should have no application in the private sphere, more especially since power which is nominally private may be just as potent as power which is formally public. Even if constitutional rights are applied horizontally does not mean that there would be no difference in the way in which they would be interpreted in public and private contexts.

The Charter embodies a choice in this respect, and the choice seems to be to accord the rights only a vertical dimension, subject to the possible more radical reading considered earlier. This is readily explicable in 'political' terms. There is little doubt that agreement on the Charter would have been considerably more difficult if its scope of application had been horizontal as well as vertical. This is especially so given the broad range of rights included in the Charter. The 'solution' embodied in Article 51(1) does, however, give rise to tensions if it is read as being restricted to the vertical dimension.

There is an uneasy tension in normative terms between the solely vertical scope of the Charter rights when compared to the vertical and horizontal scope of some Treaty articles. The very fact that the comparable Treaty article is thought suited to a horizontal as well as a vertical application sits uneasily with the proposition that the analogous Charter right is limited to a vertical impact. It could be argued by way of response that the distinction is justified given that a Treaty article will only have horizontal direct effect if it satisfies the requirements of that doctrine: It must be intended to confer rights on individuals and must be sufficiently clear, precise and unconditional. There are, however, many Charter rights that would satisfy these criteria and they could in any event be made a condition for horizontal application of Charter rights.

31 A Clapham, *Human Rights in the Private Sphere* (Oxford University Press, 1993); P Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005).

There is, furthermore, a strain between those Charter rights that do have some readily identifiable provision in other parts of the Treaty and those that do not. Where there is some comparable provision with horizontal direct effect, the individual can rely on it in an action against another private party. This is perforce not possible where there is no readily identifiable provision in the Treaty that deals with the same subject matter as the Charter right.

There is, moreover, an uneasy practical tension between the vertical scope of the Charter and the wording of some of the rights contained therein. Thus Article 24(2) of the Charter provides that 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'. The Article imposes a substantive obligation, *inter alia*, on private institutions, even though the general field of application of the Charter is limited to Union institutions and Member States when implementing Union law. This tension might be reconciled by allowing an action to compel a public body to ensure that the private institution complies with the obligation contained in this Article. The issue might be addressed more generally by considering ways in which Charter rights might have an impact on private parties, notwithstanding the limits imposed by Article 51(1). It is to this issue that we now turn.

(3) Indirect horizontal effect: Textual and normative dimensions

It is clear that a legal system might decline to afford 'direct horizontal effect' to rights contained in a constitutional document, but be willing nonetheless to give them some limited 'indirect horizontal effect'. Canadian, German and UK jurisprudence indicate that the values and principles enshrined in the protection of rights may have an influence on the rules applicable as between private parties.³²

It would, therefore, be possible in principle for courts to use Charter rights as interpretative guides when construing the rules applicable as between private parties. It should be noted that Article 51(1) states that the Charter provisions are addressed to, *inter alia*, Union institutions

32 Hunt (n 30); B Markesinis, 'Privacy, Freedom of Expression and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' (1998) 114 LQR 47; A Young, 'Remedial and Substantive Horizontality: The Common Law and *Douglas v Hello! Ltd*'. [2002] PL 232; G Phillipson, 'The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper' (1999) 62 MLR 824.

which must 'respect the rights, observe the principles and promote the application thereof. The Union courts are clearly Union institutions and are therefore bound by this precept. Moreover, there is nothing to suggest that this precept is only relevant when a case involves a public authority.

It could be argued that giving Charter rights a degree of indirect horizontal effect fits with the injunction that Charter rights should be respected, observed and promoted. A similar argument could be made in relation to national courts. Member States are bound by the Charter when implementing Union law. This includes national courts, which would therefore also be subject to the injunction to respect, observe and promote the application of Charter rights, irrespective of whether the case involves a public authority or not.

B. Member States: Verticality and horizontality

(1) Implementation: Text and interpretation

Article 51(1) states that the Charter provisions are addressed to the Member States only when they are implementing Union law. Various formulations of the circumstances in which Member States would be bound by Charter provisions were put forward in the Convention that drafted the Charter.³³ The meaning of the word 'implementing' is crucial in the current formulation.

The narrow interpretation would be that Member States are only bound by the Charter when they are acting as agents in the application of EU law in the classic *Wachauf* type of case³⁴ concerning shared administration,³⁵ and where they are implementing an EU directive. The Charter would not be applicable in other instances where the Community courts had held that the fundamental rights' jurisprudence bound the Member States, such as when Member States attempted to derogate from EC law. There is some support for a narrow interpretation in the literature, although commentators differ as to how narrow it should be.³⁶

33 de Búrca (n 15) 136–138.

34 Case 5/88 *Wachauf* (n 8).

35 P Craig, *EU Administrative Law* (Oxford University Press, 2006) ch 3.

36 L Besselink, 'The Member States, the National Constitutions and the Scope of the Charter' (2001) 8 MJ 68; D Thym, 'Charter of Fundamental Rights: Competition or Consistency of Human Rights Protection in Europe?' [2002] *Finnish Yearbook of International Law* 11; A Arnulf, 'From Charter to Constitution and Beyond: Fundamental Rights in the New European Union' [2003] *PL* 774, 780–781.

The broader construction of Article 51 would be that Member States are bound by the Charter whenever they act within the scope of EU law. There are four arguments that can be adduced to support this conclusion, which accords with the views of a number of academic commentators.³⁷

First, there is a textual argument. The ECJ has, in the past, tended to use the phrase ‘implementing Community rules’ as synonymous with Member State rules that fall within the scope of Community law.³⁸ This view can be reinforced by analysing more precisely the legal scenario in a case such as *ERT*.³⁹ Advocates of the narrow view contend that such cases would not fall within Article 51 because the Member State is derogating from, rather than implementing, EU law. This view does not, however, capture the strict legal reality of such cases. The Member State in a case such as *ERT* is *prima facie* caught by a violation of free movement law, and is then seeking to act on a power given by EU law to provide a defence to that violation. It is in that sense implementing a power of defence or derogation provided by EU law, which only operates when certain conditions, including compliance with rights, are satisfied. The better view is, therefore, that the wording of Article 51(1) covers the existing corpus of ECJ jurisprudence.

Secondly, the broader interpretation is supported by the explanatory memorandum, which must be given due regard when interpreting Charter rights.⁴⁰ The original explanatory memorandum stated that ‘as regards the Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the *context of Community law*’.⁴¹ This reading was reinforced by the updated explanatory memorandum on the Charter of Rights produced by the Convention on the Future of Europe when drafting the Constitutional Treaty. This memorandum stated in relation to Article 51 that ‘it follows unambiguously from the case law of the Court of Justice that the

37 J Schwarze, ‘A German View on the European Charter of Fundamental Rights: Effect on the *Bundesverfassungsgericht*’ (2001) 3 CYELS 407, 410; R Alonso Garcia, ‘The General Provisions of the Charter of Fundamental Rights’ (2002) 8 ELJ 492, 495–496; Maduro (n 15) 290–291; P Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 CMLRev 945.

38 Case C-442/00 *Caballero v Fondo de Garantía Salarial (Fogasa)* [2002] ECR I-11915, [29]–[30].

39 Case C-260/89 *ERT* (n 8).

40 Art 6(1) TEU.

41 Charte 4473/00, Convent 49, 11 October 2000, 46. Emphasis added. The EP took the same view, http://www.europarl.eu.int/comparl/libe/elsj/charter/art51/default_en.htm.

requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act *in the scope of Union law*.⁴² This formulation was retained in the version of the explanatory memorandum endorsed when the Charter was re-issued in 2007 at time of the signing of the Lisbon Treaty.⁴³ The memorandum cited established case law for this proposition, including jurisprudence on the application of fundamental rights when Member States attempted to ‘derogate’ from EU law.⁴⁴ Thus the message from these explanatory memoranda is that Member States are bound by fundamental rights when they act in the scope of Union law, and that the phrase ‘implementing Union law’ is intended to capture the various senses in which Member States could be said to be acting in the scope of Union law. If the narrow view had really been intended, then the Member States had ample opportunity over the last decade to cast the explanatory memorandum in those terms, but did not do so. To the contrary, the formulation in the later versions of the memorandum reinforces the broader reading of Article 51(1).

Third, the broader interpretation is preferable in normative terms. The narrow view would lead to formalistic distinctions between situations where Member States would be bound by the Charter, and those where they would not, which make little sense in terms of principle. It is difficult to think of sound normative argumentation for the consequences that would follow from the narrow view. The normative arguments for Member State action of the *ERT* kind to be subject to fundamental rights review are equally strong, if not stronger, than those that pertain in relation to other types of Member State action. Thus in the *ERT* type of case, the Member State has *prima facie* broken one of the four fundamental freedoms that lie at the heart of EU substantive law. There is, therefore, good reason to condition its ability to rely on such exceptions by requiring compliance with fundamental rights.

Fourthly, if the narrow view were to be taken, the Member States would in all likelihood continue to be bound by the ECJ’s prior jurisprudence, including the *ERT* case, independently of the Charter. It is certainly possible in principle for the Treaty to overrule prior case law. This might be argued by those who subscribe to the narrow view, so that in so far as implementation bears the narrow meaning for which they contend, this

42 CONV 828/03, Updated Explanations (n 29) 45, emphasis added.

43 Explanations Relating to the Charter (n 20) 16.

44 Case 5/88 *Wachauf* (n 8); Case C-260/89 *ERT* (n 8); Case C-309/96 *Annibaldi* (n 9); Case C-292/97 *Kjell Karlsson* [2000] ECR I-2737; Cases C-411 and 493/10 (n 24) [69]–[83], AG Trstenjak.

must then mean that prior case law entailing a broader application of fundamental rights against Member States has been implicitly overruled. There are, however, considerable difficulties with this argument: there is nothing in the Lisbon Treaty that expressly overrules this case law; the Charter is repeatedly said to be declaratory of existing law; and the very authorities that are said to be overruled are expressly cited in the Explanatory Memorandum. If the narrow view of implementation were taken, it should then still be possible to rely on the rights-based protections contained in prior case law against Member State action independently of the Charter. The effect of the narrow view would then be a complex world whereby Member States were caught by the Charter in some instances and by the Court's prior case law in others. We should not subscribe to such a conclusion unless forced to do so, and there is no such imperative.

(2) Implementation: Scope and application

The following should be regarded as merely examples of the general precept that Member States are bound by Charter rights when acting in the scope of EU law.

The Charter will be applicable when the Member States act as agents for the EU in the context of shared administration,⁴⁵ and when they seek to take advantage of a defence to what would otherwise be the applicable EU norm.⁴⁶ The Charter should apply to Member States when their action falls within the bounds of a Treaty article, regulation or decision. Thus if a Member State acting in the area of free movement of goods has national provisions that arguably infringe, for example, the right to protection for personal data, then this Charter right should be capable of being raised by the affected individual. The claimant would have to show a sufficient connection between the Charter right allegedly infringed and the particular area of EU law in order to justify the conclusion that the Member State action fell within the scope of Union law.⁴⁷

The Charter should also be applicable when a Member State implements a directive. Member States have an obligation to implement directives, and thus if the choice of form and methods are felt to violate a Charter right, then this should be capable of being raised in the national or Community courts. It is, as de Witte rightly states,⁴⁸ difficult to argue

45 Case 5/88 *Wachauf* (n 8).

46 Case C-260/89 *ERT* (n 8).

47 Case C-299/95 *Kremzow* (n 9); Case C-309/96 *Annibaldi* (n 9).

48 de Witte (n 3) 873.

that the choice of form and methods of implementation should include the choice of whether to violate a fundamental right, and natural by way of contrast to argue that respect for fundamental rights should be regarded as an implicit part of the result to be achieved under the directive. There is direct support for this view in the ECJ's jurisprudence.⁴⁹

(3) Implementation: Verticality and horizontality

The preceding discussion about verticality and horizontality is relevant in relation to Member States as well as Union institutions. It is clear in principle that the obligation on Member States in Article 51(1) applies to central authorities, regional and local bodies, and the explanatory memorandum is cast in these terms.⁵⁰ The obligation must also be incumbent on national courts, which would have the duty to 'respect the rights, observe the principles and promote the application thereof in accordance with their respective powers'. An individual could argue in an action against a national public body that it had breached a Charter right in the way that it had implemented a directive.

Whether a Charter right could be invoked in an action against another individual before a national court in circumstances where EU law was applicable raises the same issue about horizontality considered earlier. The 'radical reading' of Article 51(1) would countenance this, but the objections to this reading would be equally pertinent here. The argument in favour of some measure of indirect horizontal effect would, however, be equally applicable.

4. Rights and principles

A. *Rights and principles: Rationale for the divide*

The classic form of rights-based action is for an individual to rely on a provision in the Charter in order to challenge the legality of a legislative, executive or administrative norm, and to do so via judicial review either directly or indirectly. This will be the paradigm for many cases where reliance is placed on the Charter. Certain Charter provisions have, however, been held to embody principles rather than rights, and this may have consequences for judicial review.

⁴⁹ Case C-442/00, *Caballero v. Fondo de Garantía Salarial (Fogasa)* [2002] ECR I-11915, [29]-[32]; Cases C-465/00, 138 and 139/01 *Rechnungshof* (n 7).

⁵⁰ Explanations Relating to the Charter (n 20) 16.

The catalyst for discussion of the rights-principles dichotomy was the broad range of rights – political, social and economic – enshrined in the Charter, in accord with the remit given to the Convention established to draft the Charter by the European Council in Cologne and Tampere. Not surprisingly, there was much discussion within the Convention about the structure of the Charter as a whole⁵¹ and the particular place of social and economic rights therein.⁵²

The issue was addressed directly by Commissioner Vitorino, the Commission representative to the Convention that drafted the Charter.⁵³ He distinguished between rights enforceable in the courts and principles that could be relied on against official authorities, and said that this was the basis for a consensus in the Convention, particularly as regards social rights. The Commissioner argued that rights could be pleaded directly in the courts. Principles, by way of contrast, were mandatory in relation to the authorities which had to comply with them when exercising their powers, and could be used as a basis for censuring their acts. Private individuals would not, however, be able to bring a legal action to enforce them.

Vitorino admitted that the Charter did not, at that time, state explicitly what was to be regarded as a right and a principle. He concluded, however, that there is 'a right where the holder is clearly designated and that there is a principle where the Union is referred to as having to respect or recognize a specific value such as a healthy environment or protection of consumers'.⁵⁴ Future practice and case law would, he said, refine this dichotomy.

This issue was addressed, albeit indirectly, by the Convention in two explanatory memoranda.⁵⁵ Thus health care and access to services of general economic interest were, for example, said to be principles and not rights. This issue was considered again in Working Group II of the Convention on the Future of Europe, which considered the issue of rights. It recommended a modification to the effect that provisions of the Charter that contained principles might be implemented by legislative and executive acts taken by the EU institutions, and by acts of the Member

51 See, eg, Charte 4428/00, Contrib 282, 20 July 2000; Charte 4423/00, Convent 46, 31 July 2000; Charte 4470/00, Convent 47, 14 September 2000.

52 See, eg, Charte 4383/00, Convent 41, 3 July 2000; Charte 4401, Contrib 258, 4 July 2000.

53 Vitorino (n 12) 25–26.

54 Ibid 26.

55 Charte 4423/00, Convent 46, 31 July 2000, 24; Charte 4473/00, Convent 49, 11 October 2000, 31–32.

States when implementing EU law. They were, however, to be judicially cognisable only in the interpretation of such acts when ruling on their legality.⁵⁶

The suggestions of Commissioner Vitorino and the Working Group were taken up in the final version of the Constitutional Treaty and in the Lisbon Treaty. Article 52(5) of the Charter now provides that:

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

B. Rights and principles: Nature of the divide

This necessarily raises the issue as to which Charter articles will be regarded as rights and which as principles. Commissioner Vitorino and the Working Group believed that it would for the ECJ to decide on this. This must be correct in terms of principle, although the Explanatory Memorandum has provided some guidance in this respect.⁵⁷ It specifies as principles the ‘rights’ of the elderly (Article 25), integration of those with disabilities (Article 26) and environmental protection (Article 37). The Memorandum also acknowledges that in some instances, an Article of the Charter may contain elements of a right and of a principle, giving as examples gender equality (Article 23), family and professional life (Article 33) and social security and social assistance (Article 34). It will then be for the ECJ to delineate the divide between rights and principles, taking into account this guidance. We should, however, resist falling into two common errors when thinking about this divide.

It is tempting to think that there is an equation between rights and the civil and political Charter provisions, and principles and the social/economic provisions of the Charter. This would be a mistake. The matter is more complex.⁵⁸ Many of the Charter provisions dealing with social matters can be properly thought of as rights, capable of individual legal enforcement. The following are merely examples. The injunction in

56 CONV 354/02, Final Report of Working Group II, 22 October 2002, 8.

57 Explanations Relating to the Charter (n 20) 19.

58 P Alston, ‘The Contribution of the EU Fundamental Rights Agency to the Realization of Economic and Social Rights’ in P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU, The Contribution of the Fundamental Rights Agency* (Hart, 2005) 161–165.

Article 29 that everyone has the right to a free placement service provides one such example. There is no reason why an individual should not be able to bring a legal rights-based claim against a state that sought to charge for such services. The same is true for the right to working conditions which respect the health, safety and dignity of the worker (Article 31). This is amenable to an individual rights-based legal claim by a particular worker that, for example, the conditions of his employment by the Union were unsafe. The injunction against unfair dismissal in Article 30 provides a further example. This provision, like a number of others, stipulates that this protection operates in accordance with 'Union law and national law and practices'. This does not however preclude interpretation of the relevant article as an enforceable right. Thus if a Member State agency was implementing Union law and dismissed a worker in breach of relevant Union legal norms and national law, it would violate the article. There is no reason why this should not be cognisable by a court as a legal right.

It is equally tempting to think in terms of an equation between rights and prohibition, and principles and positive action. This too would be a mistake. It is true that the classic response to an individual-rights claim is to prohibit the state or Union from intruding on the protected sphere of private autonomy defined by the right. It is equally true that there are principles that require positive action, by the legislative or executive branch of government, such that failure to take the requisite action is a cause for censure, but not the basis for a legal action. It is nonetheless clear that a right can be infringed by inaction as well as action,⁵⁹ and that protection of a right can require positive action by the state or other public body. The ECHR jurisprudence provides ample examples of the derivation of positive obligations from Convention rights.⁶⁰ The positive obligation imposed on the state may be designed to ensure the effective exercise of the right.⁶¹ It may require the state to act so as to prevent a third party from interfering with the right.⁶² The Strasbourg case law has

59 Human Rights Act 1998, s 6(6).

60 A Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, 2004); S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008).

61 *Airey v Ireland* (1979–80) 2 EHRR 305; *Markcx v Belgium* (1979–80) 2 EHRR 330.

62 *X and Y v Netherlands* (1986) 8 EHRR 235; *Lopez Ostra v Spain* (1995) 20 EHRR 513; *Plattform 'Ärzte für das Leben' v Austria* (1991) 13 EHRR 204; *Young, James and Webster v United Kingdom* (1982) 4 EHRR 38.

been mainly concerned with positive obligations in the context of civil or political rights because that is the principal remit of the ECHR. The same arguments could readily be made in relation to the civil rights in the Charter, and there is no reason why positive obligations could not attach to Charter social rights. The argument would have to be considered on its merits in relation to the particular social right in question, but there is no reason in principle why it should not be accepted. If, for example, an employer were to dismiss employees for seeking to conclude a collective agreement, the state could, pursuant to Article 28, have a positive obligation to secure this right against the actions of the private party,⁶³ provided that the relevant action fell within the scope of Union law.

C. Rights and principles: Consequences of the divide

We should tread carefully when considering the legal consequences of the distinction between rights and principles.

Charter provisions that are deemed to be rights will be judicially enforceable by individuals. This can arise in two kinds of case. On the one hand, there may be instances where the individual claims that the EU has provided insufficient protection for the right, and this may be so even in the absence of Union action. This is borne out by the Explanatory Memorandum, which states by implication that rights may give rise to claims for positive action by the Union or Member States when implementing Union law.⁶⁴ On the other hand, the majority of cases will be those where the Union has taken action and the individual argues that it is inconsistent with a Charter right, and hence should be annulled, or that it should be interpreted in a particular way because of a Charter right.

Charter provisions characterized as principles differ in two respects in terms of legal consequences. An individual cannot claim that the Union must take positive action in the absence of Union legislation or executive action. This follows directly from the wording of Article 52(5), which provides that Charter principles may be fulfilled through legislative or executive action and are judicially cognizable only when Union courts

63 The converse argument succeeded before the Strasbourg Court in *Young, James and Webster* (n 62) where the Court accepted that the state could be required, under Art 11, to take action to prevent an employer from dismissing employees who did not wish to join a union.

64 Explanations Relating to the Charter (n 20) 19.

interpret such acts and rule on their legality.⁶⁵ The other legal difference that flows from characterization as a principle rather than a right is that where the Union has taken legislative or executive action to implement the Charter principle, there may be more room for argument as to whether such action respects the principle of, for example, integration of those with disabilities.

It should be noted, however, that there is an ambiguity latent in Article 52(5). A narrow interpretation would dictate that the courts can only take cognizance of such principles when interpreting or ruling on the legality of acts that directly seek to implement such principles. If this view were to be adopted, such cognizance could only be taken when a Union or Member State act could be said to implement directly the Charter principle on, for example, the integration of those with disabilities. However, this reading does not fit with the Explanatory Memorandum, which exemplifies the judicial role in relation to Charter principles by analogy to existing jurisprudence on the precautionary principle and principles used in agricultural law.⁶⁶ These principles, however, do not only apply when the challenged act is designed directly to implement those principles.

Thus the precautionary principle was used to contest the legality of, for example, a Community act withdrawing the authorisation of a particular product;⁶⁷ to challenge the legality of the regime for genetically modified foods;⁶⁸ and to assess the legality of Member State action concerning marketing requirements for vitamins.⁶⁹ The challenged acts in these cases were not designed to implement the relevant principle directly, but this principle was nonetheless used to test the legality of the measure. This is surely the better view, which would mean that Charter provisions regarded as principles could be taken cognizance of when interpreting or ruling on the legality of Union acts, irrespective of whether or not the Union act was directly implementing the relevant principle.

65 Explanations Relating to the Charter (n 20) 19; CONV 828/03, Updated Explanations (n 42) 51.

66 Explanations Relating to the Charter (n 20) 19.

67 Cases T-74, 76, 83–85, 132, 137 and 141/00 *Artegodan GmbH v Commission* [2002] ECR II-4945.

68 Case C-236/01 *Monsanto Agricoltura Italia SpA v Presidenza del Consiglio dei Ministri* [2003] ECR I-8105. See also, Case C-6/99 *Association Greenpeace France v Ministère de l'Agriculture et de la Pêche* [2000] ECR I-1651, [40]–[44].

69 Case C-95/01 *Criminal Proceedings against John Greenham and Leonard Abel* [2004] ECR I-1333.

If this is so, then the legal consequences of the divide between rights and principles may be less clear-cut and dramatic than might initially be thought. In both instances, the paradigm claim will be one where an individual seeks to challenge Union norms, whether of a legislative or executive nature. Where such a norm violates a Charter right, this will constitute the individual's cause of action in the judicial review claim. Where a Charter provision is characterised as a principle, the individual will still be able to argue that the legislative or executive norm should be interpreted in the way best designed to enhance the relevant principle, even where there was little in the way of ambiguity in the challenged measure.

It should, moreover, be noted that Article 52(5) of the Charter countenances taking cognizance of Charter principles when ruling on the legality of Union acts or Member State acts when implementing Union law. A claimant who felt that the challenged action gave insufficient protection to the Charter principle could then contest its legality on that ground, or on the basis of, for example, proportionality. This is supported by the Explanatory Memorandum, which exemplifies the judicial approach to Charter principles by reference to existing case law on the precautionary principle and certain principles in agricultural law.⁷⁰ This jurisprudence enables the Union courts to assess conformity with, for example, the precautionary principle either in a direct action for judicial review or indirectly via a preliminary reference, with the consequence that if the Union or Member State action fails to comply with the relevant principle, that action is annulled.⁷¹

5. ECHR and Charter

A. Approach: Charter rights that correspond to ECHR rights

The relation between the Charter and the ECHR was an issue that occupied much time in the drafting process.⁷² The result is encapsulated in

70 Explanations Relating to the Charter (n 20) 19.

71 Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305; Cases T-74, 76, 83–85, 132, 137 and 141/00 *Artegodan* (n 67); P Craig, *EU Administrative Law* (Oxford University Press, 2006) Chap 19.

72 See, eg., SN 3340/00, 29 June 2000; Charte 4423/00, Convent 46, 31 July 2000; Charte 4961/00, Contrib 356, 13 November 2000; P Lemmens, 'The Relationship between the Charter of Fundamental Rights of the EU and the ECHR: Substantive Aspects' (2001) 8 MJ 49.

Article 52(3), which provides that Charter rights that correspond to rights guaranteed by the ECHR shall have the same scope and meaning as those in the ECHR. This is subject to the caveat that Union law can provide more extensive protection.⁷³

Article 52(3) requires the identification of those rights which ‘correspond’ to those guaranteed by the ECHR. The task is facilitated by guidance from the drafting process, and was addressed by the Explanatory Memorandum. It concluded that the right to life, the prohibition of torture, the prohibition on slavery and forced labour, the right to liberty and security, respect for private and family life, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association, right to property, protection in the event of removal, expulsion or extradition and the presumption of innocence and right of defence had the same meaning and scope as the corresponding Articles of the ECHR.⁷⁴

There are, however, Charter articles in which the relationship with ECHR rights is more complex,⁷⁵ albeit for different reasons. Some Charter rights, such as Article 5 dealing with slavery and forced labour, are based on an ECHR right in part, but go beyond it by expressly prohibiting trafficking in human beings. Other rights, such as Article 8 dealing with personal data, are based on more than one source, in this instance a Treaty article plus directive, as well as an ECHR right. Yet other Charter rights modify the analogous ECHR right. This is exemplified by Article 9, which countenances the possibility of marriage by those of the same sex where this is permitted by the relevant national law. There are also instances where the Charter article is based on more than one source and modifies the relevant ECHR right. This is so for the right to education, and for the important right to equality. This complexity is recognised by the Explanatory Memorandum, which lists Charter articles where the meaning is the ‘same’ as the corresponding ECHR right, but the scope is wider.⁷⁶

73 This was reconfirmed by CONV 354/02, Final Report of Working Group II, 22 October 2002, 7.

74 Explanations Relating to the Charter (n 20) 17–18; Charte 4473/00, Convent 49, 11 October 2000, 49.

75 Explanations Relating to the Charter (n 20) 18.

76 Ibid 18. The list contains Arts 9, 12(1), 14(1), 14(3), 47(2)–(3), 50 and the case law on aliens.

B. Consequence: Same meaning and scope

The other major injunction in Article 52(3) is that the meaning and scope of Charter rights that correspond to ECHR rights should be the same as those laid down in the ECHR.

It should be noted that earlier versions of the Charter were crucially different in this respect, requiring only that the meaning and scope of such Charter rights were 'similar' to the corresponding ECHR right.⁷⁷ This would have given rise to significant problems of interpretation. Although the present formulation does not refer expressly to the case law of the Strasbourg court, this must be implicit in the injunction that the meaning and scope of Charter rights corresponding to rights contained in the ECHR should be the same.

It should be recognised, however, that the present formula, requiring the interpretation of corresponding rights to be the same, may still be problematic. This is especially so in areas where the ECHR jurisprudence on the point is unclear, or where the point is a novel one, as emphasised by comments from the Council of Europe observers' on the drafting of the Charter.⁷⁸ They expressed concern that the Charter would generate a large increase in the number of preliminary references, and that this would raise the risk that ECJ decisions would be at variance with those of the Strasbourg Court. This in turn would lead to courts of Member States being under mutually inconsistent Treaty obligations. Harmony between the Charter and the ECHR could, they said, only be secured if the EU acceded to the ECHR.⁷⁹

However, accession will not, as is sometimes claimed, obviate the need for the EU to have its own Charter. This is so for both substantive and jurisdictional reasons.

In substantive terms, a political entity with the power of the EU should, as a matter of principle, be subject to rights-based constraints on the exercise of that power. The absence of such constraints was the source of the initial revolt by the German and Italian courts, which served as the catalyst for the introduction of the ECJ's fundamental-rights jurisprudence. The Charter has enhanced the political legitimacy of the EU by furnishing

⁷⁷ Charte 4423/00, Convent 46, 31 July 2000, 36.

⁷⁸ Charte 4961/00, Contrib 356, 13 November 2000, 3.

⁷⁹ *ibid* 3–4. This view was echoed by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, Charte 4499/00, Contrib 349, 4 October 2000.

its citizens with a comprehensive, transparent document that includes a broad range of rights. The Charter was premised on the political choice made by the heads of state in the European Council that it should cover social and economic, as well as more traditional civil and political rights. The ECHR covers only some of the rights included in the Charter, and for that reason accession would not obviate the need for the EU's own document enshrining the rights that it believes are worthy of protection. Moreover, the Charter protection accorded to certain civil rights differs from that in the ECHR, as exemplified by the broader remit of the Charter protection for equality.

In jurisdictional terms, accession to the ECHR would not render moot the choices open to citizens as to how they protect their human rights. This point would hold true even if the EU's Charter had been an exact copy of the ECHR. This is because of the differing impact of the EU and ECHR Treaties in at least some states, as exemplified by the United Kingdom. The supremacy doctrine is a central principle of EU law. The UK courts have held that even primary legislation that is inconsistent with EU law can be declared inapplicable to the instant case. Such legislation will be 'disapplied' by the national court.⁸⁰ The status of the ECHR is different. Under the Human Rights Act 1998, where primary legislation is incompatible with Convention rights, the court can issue a declaration of incompatibility.⁸¹ This declaration does not, however, affect the validity of the legislation. It serves to send the legislation back to the political forum, with the expectation that Parliament will remove the offending provision. Therefore, there is an incentive for those minded to challenge primary legislation to do so through EU rights where that is possible.

6. Judicial review, legitimacy and the Charter

It is fitting to conclude this chapter by reflecting more generally on the impact of the Charter on judicial review.

A. Charter: The profile of judicial review

The fact that the Charter is rendered binding by the Lisbon Treaty may well alter the profile of judicial review within the EU and pose new challenges

80 *R v Secretary of State for Transport, ex p Factortame Ltd (No.2)* [1991] 1 AC 603; *R. v Secretary of State for Employment, ex p. Equal Opportunities Commission* [1995] 1 AC 1.

81 Human Rights Act 1998, ss 2–4.

for the Union courts. They have hitherto fashioned the fundamental-rights jurisprudence and been required to adjudicate on complex and contentious issues. The role of rights-based claims within judicial review may nonetheless expand considerably, forcing the Union courts to adjudicate on an increasing number of complex claims relating to both Union and national action.

An analogy with developments in the United Kingdom is interesting. The United Kingdom enacted the Human Rights Act in 1998, which came into effect in 2000. Prior to that, the UK courts had made it clear that fundamental rights were embedded in the common law and would be protected by the UK courts in judicial review actions. The advent of the Human Rights Act 1998 nonetheless transformed judicial review in the United Kingdom. There has been a significant expansion in the number of cases that raise rights-based arguments in the context of judicial review actions. The 'message' or 'lesson' from this is that enshrining fundamental rights in statutory form has a marked impact on the extent to which they will be relied on in legal actions. This is not surprising. Claimants are likely to feel on more secure foundations when relying on a statute that clearly lists rights and has received Parliament's imprimatur.

In the EU, there has been a 'common law style' development of fundamental rights by the Community courts since the 1970s. The number of such cases has nonetheless remained limited. Claimants, Advocates-General, the CFI and more recently the ECJ relied on the Charter for interpretative guidance even prior to the Lisbon Treaty. The fact that the Charter is now rendered legally binding by the Lisbon Treaty will in all likelihood increase the profile of rights-based claims within judicial review actions. Claimants will be able to point to a clear set of rights, which are legally binding on EU institutions and Member States when they act within the sphere of EU law. The Union courts will then be faced with a change in the profile of judicial review actions, with an increasing number of such claims having a strong rights-based component.

The analogy between the United Kingdom and the EU cannot be pressed too far. There are obstacles to bringing actions within the EU whether directly or indirectly, and these obstacles serve to limit the number of actions that can be brought. This can be accepted, but even if there is no net increase in the number of judicial review actions in the EU legal order, the nature of the claims raised in such cases is nonetheless still likely to change, with an increasing number of such cases having a strong rights-based component. There are, however, three reasons to

think that the overall number of cases will increase, and that many will entail rights-based arguments in reliance on the Charter.

First, this is because of modification of the standing rules for direct actions, whereby the Lisbon Treaty, following in this respect the Constitutional Treaty, has loosened the grip of individual concern that has been such a block to actions hitherto, although the significance of this change remains uncertain.

Secondly, it is because of the very breadth of the Charter. The developments in the United Kingdom occurred in the context of incorporating provisions of the ECHR into UK law. The list of rights in the ECHR is considerably narrower than that included in the Charter, and that is so notwithstanding the fact that some of the Charter provisions are deemed to be principles rather than rights. The very breadth of the Charter provisions will therefore fuel claims testing their meaning, scope and interpretation.

Thirdly, the number of rights-based claims involving complex issues is likely to increase because of the 'de-pillarization' of the Third Pillar. The Area of Freedom, Security and Justice is brought within the general framework of EU law, including judicial control. Many AFSJ measures involve conflicts with classic civil and political rights. The Community courts, prior to the Lisbon Treaty, did their best to maintain control over measures enacted under the Third Pillar, but even this teleological interpretation of their jurisdictional capacities left gaps in judicial protection. The fact that the AFSJ is, subject to transitional provisions, brought within the general framework of the EU legal and political order, including the applicability of the Charter, is therefore likely to generate rights-based claims before the Union courts and require them to grapple with complex issues concerning the interplay between civil and political rights and the needs of a political order seeking to impose controls over matters ranging from asylum to terrorism.

B. Charter: The legitimacy of judicial review

The Charter may also have a 'second order' impact. The fundamental rights' jurisprudence of the Community courts has generally been regarded in positive terms. Some commentators criticised the ECJ for not taking rights seriously, but the fact that the ECJ articulated a fundamental rights' case law was generally regarded as legitimate in enhancing the accountability of the EC. The fact that the ECJ thereby struck down

Community legislation was not regarded as especially problematic, primarily because such legislation was often democratically deficient, because there was little, if any, input from the European Parliament. The maxim that the 'Commission proposes, the Council disposes' captured the legislative process prior to the SEA.

Thus the counter-majoritarian objection voiced against rights-based constitutional review in some legal orders – such as, that a court is replacing its judgment over the meaning of contestable rights for that of the democratically elected legislature – did not apply in the EC when the fundamental rights' jurisprudence was developing, given that the legislation subject to review had limited democratic credentials.

We should note the change that the Lisbon Treaty has made in this respect. Many of the provisions challenged before the Union courts will be made in accord with the ordinary legislative procedure with input from the Commission, Council and European Parliament. The extension of the ordinary legislative procedure, and the symbolic change in name from that of co-decision, has strengthened the European Parliament's role in the EU political order and further enhanced the democratic legitimacy of EU legislation. The interpretation of Charter rights may well be contestable and there will inevitably be cases in which the Union courts substitute their view for that of the legislature on the meaning and interpretation of such a right. The counter-majoritarian aspect of constitutional review will therefore be more apparent than hitherto.

There are various responses that could be made to this point, and there is a veritable wealth of literature on this theme.⁸² It could be argued that courts are justly accorded the ultimate role in the protection of rights within a democratic polity, which should be conceived not just in simple majoritarian terms. It could be maintained that the preoccupation with the legitimacy of constitutional review is a peculiarly common-law phenomenon and that it does not feature prominently within the academic or judicial discourse in civil-law countries. On this view the fact that under the Lisbon Treaty the Union courts will ever more frequently be reviewing legislative acts that have received considered input from

82 See, eg, R Dworkin, *Law's Empire* (Fontana, 1986); R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996); J Waldron, *Law and Disagreement* (Oxford University Press, 1999); J Waldron, 'The Core Case against Judicial Review' (2006) 115 Yale LJ 1346; R Bellamy, *Political Constitutionalism, A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

the players in the ordinary legislative procedure will have little if any impact on the legitimacy of judicial review. This may be so; time will tell. Nonetheless, we should at the very least be aware of the changed circumstances in which fundamental rights review will take place under the Lisbon Treaty.