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Fundamental rights may be limited in the interests of the market

Should the proposed Lisbon Treaty or renamed EU Constitution come into force we would rely on the European Court of Justice to rule in favour of citizens or workers if a dispute arose between them and their government regarding the interpretation of any of the measures proposed in the Charter. In this instance the court would become the forum of last resort, and its findings would have force throughout the European Union. However, the European Court of Justice has already made it clear in at least two cases that:

> the fundamental rights recognized by the Court are not absolute, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community …[1]

and in a later case stated that:

> it is well established in the case law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market …[2]

It is clear from these precedents that the 'fundamental rights' that would be conferred on us by the Lisbon Treaty[3] would not be fundamental at all but could be varied or restricted in the interests of a 'common organization of the market' or to advance 'objectives of general interest pursued by the Community'.

In a democratic society, restrictions on the exercise of human rights must be prescribed by law and must be necessary to safeguard the common good. It follows from the reasoning of the European Court of Justice that, as rights are subject to limitations, restrictions on the EU fundamental rights are also legitimate, and that the European Union acts as a state in restricting those rights.[4]

But in this instance the limitations on human rights are justified by reference to the objectives of the Community and in particular the organisation of the common market. national constitutions and the European Court of Human Rights allow those restrictions on fundamental rights that are considered to be necessary in a democratic society. But in a democratic society politics is connected with the contestability of what counts as the common good. On the EU level, however, the common good is identified instead with the good of the market and a fixed idea of utility. The market becomes

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[1] *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft,* C-5/88, summary, para. 2, and grounds, para. 18.

[2] *Kjell Karlsson and Others,* C292/97, grounds, para. 45.

[3] The Lisbon Treaty or renamed Constitution was created by amending the Treaty on European Union (TEU) and the Treaty Establishing the European Community, now known as the Treaty on the Functioning of the Union (TFU). The two documents, with their declarations and protocols, comprise the Treaty.

[4] The statement that the Charter will be legally binding will now be inserted in article 6 (1) of the Treaty on European Union, replacing article 1:9 of the Constitution. This avoids reproducing the text of part II of the Constitutional Treaty in the text of the renamed Constitution while producing the same legal effects.

in effect the substitute for democracy and human rights become marketised.

In *General Provisions Governing the Interpretation of the Charter* [5] (i.e. the Charter of Fundamental Rights), the 'Explanation' associated with Article 52 states explicitly that limitations may be placed on the rights and freedoms recognised by the Charter.[6] Echoing the judgement of the European Court of Justice, it states that these 'limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union'. The important question in these circumstances is: what are 'objectives of general interest' and could they possibly be commercial interests? Could citizens' and workers' rights really be limited in the interests of market forces?

The general interests recognised by the Union are elaborated in Article 2 of the Treaty on European Union (TEU) and assumes a further legal importance in the Charter[7] which makes it clear that 'the Explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the Courts of the Union and of the Member States'.[8] This constitutionally binding condition would require courts to take the Explanations into account in formulating judgments.[9] These Explanations are cleverly presented in a non-binding 'Notice from European Union institutions and bodies' but are then made legally binding through article 52 (7) of the Charter, quoted above.[10]

'General interests' are presented in the Explanations[11] as the objectives set out in Article 2 TEU entitled 'The Union's Values' and 'other interests' protected by specific provisions of the Treaty, as for example Article 3a TEU, which obliges the Union to 'respect … Member States' … national identities, inherent in their fundamental structures, political and constitutional' and 'their essential state functions, including … maintaining law and order and safeguarding national security'. The interpretation of 'identity' in this article is not benign, nor does it aim to foster a sense of cultural or national identity. Instead it looks towards essential state functions, and primary among those under this Treaty would be the smooth functioning of the market. Indeed it stipulates that: 'The Union shall establish an internal market … based on balanced economic growth and price stability'.[12]

Elsewhere the Treaty records the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms,[13] but Protocol 5 Article 3 qualifies this accession by stating that 'the accession of the Union shall not affect the competences of the Union or the powers of its institutions'. This clearly indicates that ECJ rulings will take precedence over those of the European Court of Human Rights should their findings diminish the powers or competences of the Union.

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[5] Now to 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. This is a change of title only.

[6] '… it is well established in the case-law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market …'

[7] At Article 52 (7).

[8] Declaration Concerning the Explanations Relating to the Charter of Fundamental Rights. The declaration covers thirty-five pages.

[9] As it is noted in the preamble to the Explanations: 'Although they do not *as such* have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter' and have been freely used by the ECJ.

[10] Article 6 TEU, grants the charter itself 'the same legal value as the Treaties'.

[11] 2007/C303/02

12 Article 2(3) TEU. This can be compared with 'the Member States and the Union shall act in accordance with the principle of an open market economy with free competition'. Chapter II Article III 69 (1)

[13] TEU, article 6.

It is apparent that the requirement to establish '… balanced economic growth and price stability' imposes a constitutional imperative on the method of organising the market; and should those who seek to change this economic model begin to gain such significant support as to pose a threat to the model, the 'general interests' of the Union could be protected and fundamental rights varied by Union or national legislation. This in turn would be supported by the European Court of Justice. Those who would oppose the privatisation of public services in the Union might suffer similar sanction as they might, for instance, be found to impede the realisation of 'price stability'. It would also be illegal to campaign against any of the measures in the Charter.[14]

Any challenges to the interpretation of these provisions made to the European Court of Justice would be so costly and time-consuming that most rulings would be enforced by default. Nonetheless, it is notable that trade unions throughout the European Union have praised Article 28 of the Charter, which appears to grant the right to strike, and it has been used by many of the affiliates of the European Trades Union Congress as a rationale for supporting the Treaty. However, the operation of repugnant legislation at the national level would not be influenced by the Charter. Though the article states that workers may 'take collective action to defend their interests, including strike action', the Explanation in Declaration 12 qualifies this by stating that **'**the limits for the exercise of collective action, including strike action, come under national laws and practices, including the question of whether it may be carried out in parallel in several Member States'.

But there is a sting in the tail: 'subsidiarity'! The Charter directs that 'the provisions of this Charter are addressed to the institutions, bodies 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'.[15] 'Due regard for the principle of subsidiarity' is spelt out in the case law of the European Court of Justice in the following terms: 'It should be remembered that the requirements flowing from the protection of fundamental rights in the community legal order are also binding on member states when they implement community rules …**'**[16] This means that draconian labour legislation already in force in a member-state can be preserved under the subsidiarity clause, while on the other hand the Union can limit labour rights in order to satisfy the 'objectives of general interest' of the Union – recently demonstrated by the Laval and Viking cases. It's a win-win for business interests and the big corporations.

The Charter guarantees 'freedom to conduct a business in accordance with Community law'.[17] This is qualified in the Union's objective of: '… an internal market … based on balanced economic growth and price stability'. In effect, this imposes a treaty obligation to establish a neo-liberal economic model, something that is normally the subject of contestation between competing political parties or ideologies. This neo-liberal stricture is further strengthened by the Union's commitment to 'the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers',[18] and by the legally binding Protocol 6, which states that 'considering that the internal market as set out in Article 2 of the TEU includes a system ensuring that competition is not distorted … the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 308 of the Treaty on the Functioning of the European Union'.[19] And,

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[14] Charter, Article 54.

[15] Article 51 of the Charter

[16] Case C-292/97, grounds, para. 37.

[17] Charter, Article 16.

[18] TFEU, Article 118.

[19] This was article 1:3 (2) of the Constitution, on the Union's objectives, but was changed at the insistence of M. Sarkozy. It stated: *'The Union shall offer its citizens … a single market where competition is free and undistorted'*. Its removal was

just to ensure undistorted competition, the Council can extend the scope of the Treaties in all areas, with the exception of common foreign and security policy, as long as the European Parliament approves.[20]

When the commitment to 'price stability' is read in conjunction with the right to conduct a business in accordance with community law, great doubt is cast not only on the future of state enterprise but on sections of the civil service. If, for instance, a payroll contractor decided that they would like to compete with public agencies in the provision of tax returns and the Government refused to co-operate, an appeal to the European Court of Justice—especially if the contractor could be shown to provide the service at a lower cost—would ultimately be successful.

ECJ Case 4/73 points to limits to this right, in stating that it should, 'if necessary, be subject to certain limits justified by the overall objectives pursued by the community'. This seems fair enough, but when it is read in conjunction with the Union's objectives outlined above it leads to the inevitable conclusion that our state companies and public services would be at increased risk. Finally, in response to a query on 6 October 2006 the President of the Commission, Jose Barroso, declared that the Charter *had already been used 117 times to adopt legislation in the EU* even though it presently has no legal standing.[21]

Frank Keoghan, People's Movement – Gluaiseacht an Phobail
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lauded as a win for social democracy, but this important statement is now included in a legally binding protocol annexed to the Treaty, where it has precisely the same legal effect while allowing proponents to maintain that it is not in the Treaty.

[20] Article 308 states: 'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.' Furthermore, TFU, article 249B (TEC), empowers the Council of Ministers by majority vote to give the Commission the power to make laws—so-called delegated regulations—supplementing or amending so-called 'non-essential elements' of European laws or framework laws. The catch is that the Commission decides what is 'essential'.

[21] (http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2006-3544&language=DA).

[22] The main references used were the Official Journal of the European Union C303, and C306, Vol. 50; December 2007.