



People's Movement  
Gluaiseacht an Phobail

## 'Charter of Fundamental Rights'





*People's Movement  
Gluaiseacht an Phobail*

People's Movement campaigns against any measures that further develop the EU into a federal state and to defend and enhance popular sovereignty, democracy and social justice in Ireland.

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Alderman Declan Bree,  
Raymond Deane, Tony Gregory TD,  
Professor John Maguire,  
Terence P McCaughey,  
Finian McGrath TD, Patricia McKenna,  
Dervla Murphy

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# 'Charter of Fundamental Rights'

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Photograph Courtesy Paula Geraghty.

# Universal Declaration of Human Rights 1948

## **Article 29.**

- (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
- (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
- (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

## **Laval judgement issued by the European Court of Justice.**

"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 . . .

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 . . .

# Introduction

People's Movement/Gluaiseacht an Phobail presents this critique of the "Charter of Fundamental Rights" as a contribution to the debate on the Treaty of Lisbon. The Charter was "solemnly proclaimed" by the European Parliament, the European Council and the European Commission on December 7th 2000. It was subsequently adopted in Strasburg in 2007 ahead of the signing of the Treaty of Lisbon and is given the same legal status as the Treaty in one of the Treaty's opening Articles.

Should the Treaty of Lisbon be ratified, the European Court of Justice (EJC) will become the final arbitor on matters relating to the Charter in the event of disputes regarding its interpretation or application. The EJC has already set legal precedents when it has ruled that the interests of the market are superior to the rights of citizens or workers. Some of these precedents can be found in the copious Explanations attached to the Charter. These Explanations, "though they do not have the status of law, are to be taken into account in interpreting or clarifying the provisions of the Charter".

The EJC has made it clear that citizens or workers rights are inferior to those of the market and has unambiguously 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". Consequently we would be reduced in status to mere consumers in an 'internal market' rather than citizens of a nation state.

The EJC will be the Court of last resort and will be superior to our own Supreme Court in matters of EU law. It is also argued that it will be superior to the European Court of Human Rights. Paradoxically, the Union will seek to accede to the European Convention on the Protection of Human Rights and Fundamental Freedoms but the Treaty then clearly indicates that EJC rulings will take precedence over those of the European Court of Human Rights, should their findings "diminish the powers or competences of the Union".

The proponents of the "Charter" make many exaggerated claims about its content and proclaim that it is as a significant step forward in the protection and acknowledgement of our rights. The EJC has already ruled that workers have the "fundamental right to strike" while also finding, in line with case law as spelled out in the Explanations that, "restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of the market"

So clearly, our rights are not fundamental but rather conditional on what the "market" requires at any given moment in time. One must ask the question, 'Are the rights granted under our own constitution so defective that we need this Charter? The aspirational nature of many of its Articles will facilitate 'competence creep' by the EJC as it seeks to govern even more parts of our lives.

The recent *La val* judgment has subordinated worker's fundamental rights to strike and to bargain to the unqualified freedom to provide services and the free movement of labour. This document sets out in particular, the measures in the Charter that will affect our working lives. It has been vetted by legal experts attached to the European Parliament and to the best of our knowledge is legally accurate. We hope that you find it both interesting and informative.

**Frank Keoghan** secretary People's Movement/ Gluaiseacht an Phobail

*The Explanations referred to may be found at: [http://www.europarl.europa.eu/charter/convent49\\_en.htm](http://www.europarl.europa.eu/charter/convent49_en.htm) or at <http://www.google.com/search?sourceid=navclient&ie=UTF-8&rls=GGLR,GGLR:2005-44,GGLR:en&q=explanations+charter+of+fundamental+rights>*

# Trade union rights may be limited in the interests of the market

Should the proposed Lisbon Treaty 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 . . .<sup>1</sup>

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 . . .<sup>2</sup>

It is clear from these precedents that the “fundamental rights” that would be conferred on us by the Lisbon Treaty 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.<sup>4</sup>

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

In *General Provisions Governing the Interpretation of the Charter*<sup>5</sup> (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.<sup>6</sup> 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,<sup>7</sup> 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.”<sup>8</sup> This constitutionally binding condition would require courts to take the Explanations into account in formulating judgments.<sup>9</sup> 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.<sup>10</sup>

“General interests” are presented in the Explanations<sup>11</sup> 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.<sup>12</sup>

Elsewhere the Treaty records the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms,<sup>13</sup> 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.

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.<sup>14</sup>

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.”<sup>15</sup> “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 . . . ”<sup>16</sup> This means that unpalatable 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.<sup>17</sup> 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.”<sup>18</sup> 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,”<sup>19</sup> 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.”<sup>20</sup> And, 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.<sup>21</sup>

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.<sup>22</sup>

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

## Thompsons Solicitors’ reaction to European Court of Justice decision in the Laval case

A European Court of Justice (18th December 2007) ruling that the right to take industrial action is restricted because of an employer’s freedom to provide services in other member states rides roughshod over the trade rights which have been recognised across the European Community for decades.

Thompsons Solicitors, the UK’s leading trade union law firm, say today’s decision in Laval is absurd.

As in the ruling in the Viking case last week, the ECJ emphasises the “fundamental” nature of the right to take industrial action. But it then balances that right against the employers competing EU law rights. In Laval this is specifically the right to freedom of provision of services.

The court said an objective of protecting workers is justified, and industrial action taken to prevent “social dumping” can also be justified. But industrial action in support of union demands in member states to which workers are posted will not be justified where the demand exceeds the extent of the protections provided to workers under the Posted Workers Directive and clearly defined national legal requirements.

In other words, a union can only take action to achieve minimum terms and conditions which are prescribed by law.

Richard Arthur, Head of Trade Union Law at Thompsons Solicitors, the largest firm of personal injury and trade union lawyers, in the UK said:

“The ECJ’s ruling run roughshod over trade union rights which have been almost universally recognised throughout the European Community, and in numerous international treaties and instruments, for many decades.

“It is absurd for the ECJ to say that the right to take industrial action is a “fundamental” right forming an integral part of the general principles of Community law, and then to rule that the right is superceded where an employer complains that the union is seeking terms and conditions in excess of the minimum provided by the Posted Workers Directive. The Posted Workers Directive is intended to set the minimum level of protection for workers posted to separate states. It is

ludicrous to suggest that a union is not entitled to take industrial action in support of demands in excess of that minimum level.

"In the last week, in the Viking and Laval rulings, trade unions have seen their international recognised rights to take industrial action relegated in priority by the ECJ below the business interests of employers. The rulings are poorly reasoned and inconsistent, and completely fail to recognise the dual purpose of promotion of social policy as well the optimisation of business conditions, which the ECJ says lies at the heart of the European Community.

#### Editor's Notes:

A Latvian company, Laval, posted workers from Latvia to work on building sites in Sweden. It was unable to reach agreement with the Swedish building and public workers union, which began a blockade of Laval's sites in Sweden. The Swedish Electricians Union, none of whose members were employed by Laval, joined in with sympathy action.

Laval brought proceedings to the European Court of Justice to have the industrial action declared unlawful, arguing that its freedom to provide services in another member state was infringed in circumstances where the rates sought by the Swedish unions exceeded those protected by the Posted Workers Directive.

The European Court of Justice, in a judgement delivered on 18th December, ruled;

- 1 The right to take industrial action is a "fundamental right";
- 2 Businesses have freedom to provide services across the EU;
- 3 Industrial action represents a restriction on that right;
- 4 Industrial action to prevent social dumping may amount to an overriding reason of public interest, which falls within the scope of protection workers;

5 In the context of posted workers, industrial action can not be justified where the pay level sought exceed any prescribed by national or European law; and

6 Rules on industrial action in member states to which workers are posted which fail to take into account collective agreements in the original state of establishment of the business discriminate against that business.

## Links

### **People's Movement – Gluaiseacht an Phobail**

<http://www.people.ie/gaeilge1.html> <http://www.people.ie>

### **Trade Unionists Against European Union Constitution** <http://www.tuaeuc.org/>

**Corporate Watch** <http://www.corporatewatch.org>

**Statewatch** <http://www.statewatch.org>

**Treaty of Lisbon (And other treaties)** <http://eur-lex.europa.eu/en/treaties/index.htm>

**European Parliament** <http://www.europarl.eu.int>

**euobserver** <http://www.euobserver.com>

**'Arming Big Brother'** <http://www.tni.org/reports/militarism/bigbiosummary.htm> - a report by  
**the Transnational Institute** <http://www.tni.org/reports/militarism/bigbiosummary.htm>

# **Manifesto**

# **People's Movement Gluaiseacht an Phobail**

**The People's Movement campaigns against any measures that further develop the EU into a federal state and to defend and enhance popular sovereignty, democracy and social justice in Ireland.**

## **Statement of Aims**

- 1 To defend and enhance Irish democracy and sovereignty and the primacy of Bunreacht na hÉireann and its institutions over EU supranational institutions and treaties.
- 2 To oppose the development of the EU into a federal super state with its own institutions and constitution (or any proposed constitutional treaty giving the EU legal personality and primacy over Bunreacht na hÉireann).
- 3 To foster support in Ireland and abroad for the transformation of the EU into an international Europe-wide treaty based association of Nation States co-operating in an open economic area and in other matters of common concern, while respecting the sovereignty and rights of member states.
- 4 To advocate reform of current EU institutions and the repatriation of powers to national parliaments and other national or local democratic institutions.
- 5 To develop and campaign for a policy of military neutrality and non-alignment to be inserted into Bunreacht na hÉireann. In addition, to maintain our current foreign policy regarding the primacy of the UN as the body empowered to resolve international, diplomatic and humanitarian crises and the sole body for the deployment of our defence and security forces in such crises.
- 6 To advocate the fostering of co-operation with other non-aligned nation states in Europe and throughout the world on UN operational matters and the reform of the UN security council and other UN institutions. Also to renegotiate the PFP, so that all operations will be under joint command (i.e. non-aligned and NATO) and with UN approved.
- 7 To advocate reform of our laws, democratic institutions and constitution, where necessary, to maintain and extend civil liberties.
- 8 To inform and develop the knowledge and awareness of people on EU matters.
- 9 To maintain the position of being attached to no political party and to oppose all forms of sectarianism, racism and sexism.

**For sovereignty, democracy and social justice**

# I WOULD LIKE TO SUPPORT PEOPLE'S MOVEMENT CAMPAIGN



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