

**Healthy Scepticism: Does the Charter Matter? A Study of the
CFREU's Effects on Health Law and Policy in the UK and Germany**

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Abstract

This thesis studies the effects of Articles 1, 3, 20, 21, and 35 of the EU Charter of Fundamental Rights. Many academics assume that the adoption of a binding human rights document such as the Charter improves human rights protection. Such beliefs are also reflected in fears that the Charter will significantly change domestic policies. This thesis investigates these assumptions. Does calling something a 'human right' have notable effects on its implementation? Does the Charter significantly affect national policy? Do EU human rights impose unwanted constraints upon Member States' health systems?

Using an interdisciplinary analysis of the Charter's practical impacts, the thesis studies whether specific Charter rights have caused top-down Europeanisation of health law and policy in the UK and Germany, including: Europeanisation through ECJ judgments; through national courts; and through the legislative process.

The thesis takes process-tracing, an empirical methodology used in political science, and applies it to the legal field. Process-tracing is particularly suitable for assessing the multi-step phenomenon of Europeanisation. By breaking down theoretical literature into individual causal mechanisms, each of which can be tested with empirical evidence, the thesis establishes the reality facing two of the three largest Member States – bringing crucial clarity at a febrile moment in the UK-EU relationship.

Ultimately, the thesis reaches three main conclusions: firstly, that the Charter does increase the significance of fundamental rights, something which manifests across the thesis; secondly, that this increased significance and thus the Charter has few to no policy effects; and thirdly that the Charter, unexpectedly, can reinforce Member States' policy choices within internal market law. These findings not only provide empirical evidence against the prevailing wisdom on fundamental rights, they show the Charter *increasing* Member States' freedom to act as opposed to imposing top-down control.

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Chapter 1 – Introduction and Methodology

How long before the ECJ uses other provisions in the Charter to erode even more of our independence?

Michael Gove (British MP, then Secretary of State for Justice, 2016).¹

On June 23 2016, the population of the UK voted to leave the European Union. No doubt many theses will be written on why this decision was taken, and how. This is not one of them, but it will look at some of the arguments made in the referendum. The quote above comes from Michael Gove, then Secretary of State for Justice and one of the most prominent Tory politicians in the official Vote Leave campaign. It highlights broad fears present amongst the UK population before and during the referendum.² - concerns of unwanted EU overreach, and concerns that the Charter of Fundamental Rights was being used against the will of the population to expand the power and influence of the EU, in contrast to the 'more pragmatic British tradition'.³ This perceived lack of control was reflected by the slogan repeated far and wide throughout the campaign – Vote Leave, Take Back Control. So it is clear that feelings and perceptions of EU influence matter, as they heavily shape national reactions to EU law.

These fears are not only found in the UK.⁴ The Charter, both during its drafting and in the years after, was subject to much speculation in the political sphere as well as the academic community. Converting pre-existing principles into 'fundamental rights', and placing them prominently in a now-binding Charter, seemed like a political and legal act that would have notable effects on actors within Member States. Other Member States feared the effects on their domestic systems would be of the sort envisaged by Michael Gove.⁵ The very purpose of the Charter was to entrench rights protection within

¹ <https://www.scribd.com/doc/309694809/Michael-Gove-pro-Brexit-speech>, first accessed 07/10 2016.

² <https://www.spectator.co.uk/2016/02/the-crucial-missing-part-of-camerons-eu-deal/>, first accessed 08/10/2016.

³ <https://www.spectator.co.uk/2003/05/when-rights-are-wrong/>, first accessed 08/10/2016.

⁴ Jääskinen, 'The place of the EU Charter within the Tradition of Fundamental and Human Rights', in Morano-Foadi, Vickers, *Fundamental Rights in the EU: A Matter for Two Courts*, (Hart, 2015), 11.

⁵ Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights' 8 *EUConst* 3 (2012), 375, 376; Knook, 'The Court, The Charter, and the Vertical Division of Powers in the European Union', 42 *CMLRev* (2005); O'Neill, 'The EU and Fundamental Rights – Part 2' 16 *Judicial Review* 3 (2015), 374.

the EU⁶ – better protecting individual rights against Member States, and therefore limiting their ability to act, so it was not unreasonable to believe it would constrain national governments. These fears were compounded by the Chartering process using constitutionalist language and comparisons to US historical development, raising fears of federalisation and loss of the later much-sought control⁷.

The referendum campaign also focused heavily on the NHS. It will be quite a while before the country forgets the claimed pressure from migrants on the NHS, or the £350 million a week of promised spending. With the health service being famously described as the ‘national religion’⁸, it is clear that health and the health service occupy an important place in the British national conscience. This focus is not entirely out of proportion, as spending on health services makes up a substantial proportion of national budgets.

One purpose of academia is to empirically test the assumptions we make, and the opinions we hold. Whilst previous academic research has focused on the doctrinal consequences of the Charter⁹ or its impact on EU-level laws and institutions¹⁰, little work has been done on its substantive policy impacts for *Member States*. The thesis as a whole strives towards the goal of testing theories and assumptions, but the most important question this chapter answers is ‘how?’. How does the thesis examine fears such as those expressed in the quotation opening the chapter? How does the thesis investigate whether perceptions of the Charter’s influence are exaggerated, or whether as feared by some it actually does influence health and the health system?

Section 1 lays out the precise research question, establishing and beginning to justify the precise scope of inquiry of the thesis. Section 2 elaborates on some of the benefits of the thesis, beyond answering some of the questions posed in the introduction. Section 3 defines the variables of the social science

⁶ See for example, adopted shortly before the solemn proclamation of the Charter, Commission Communication on the Charter of Fundamental Rights of the European Union, 13 September 2000, Com (2000) 559 final.

⁷ O’Neill, *supra* note 5; De Búrca, ‘The Drafting of the European Union Charter of Fundamental Rights’ (2001) *ELRev* 126, 129.

⁸ Eg. <https://www.theguardian.com/society/2016/jan/17/portrait-of-nhs-staff-national-health-service/>, first accessed on 12/10/2016.

⁹ Eg. Peers, Hervey, Kenner, Ward, *The EU Charter of Fundamental Rights* (Hart, 2014); Eeckhout, ‘The Charter of Fundamental Rights and the Federal Question’ 39 *CML Rev* (2002), 945; Lenaerts, *supra* note 5; Peers, ‘The ‘Opt-out’ that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights’ 12 *Human Rights Law Review* 2 (2012), 375.

¹⁰ Eg. Kosta, *Fundamental Rights in EU Internal Market Legislation*, (Hart, 2015); Morano-Foadi, Vickers *supra* note 4; Menéndez, ‘Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union’ 40 *JCMS* 3 (2002), 471.

research design used, as well as justifying the two countries selected for study. The fourth section explains in detail the methodology used, as well the benefits it offers for this specific research question. Section 5 concludes the chapter by laying out the contents of the rest of the thesis.

1. Research Question

Fears and assumptions surrounding the Charter stem from a number of sources.

Looking at the drafting of the Charter, it was designed to ensure that the rights and principles within were taken more seriously than before, something noted by political actors as well as academics and judicial actors.

In the Cologne Council conclusions, the express purpose of the Charter was ‘to make their [fundamental rights] overriding importance and relevance more visible to the Union’s citizens’¹¹. Despite the document being described as a document ‘of revelation rather than creation, of compilation rather than innovation’¹². (playing up to the idea that the Charter was merely consolidating existing rights), the preamble to the Charter stated that ‘To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter’¹³.

The implicit consequences of the increased significance of fundamental rights are Europeanisation for two reasons: firstly, the institutionalist nature of Europeanisation means the Charter’s ‘normative’ element plays an important role; secondly, the pervasive nature of the Charter means it is likely to create misfit, the first step in the Europeanisation process.

Europeanisation is institutionalist, and an important part of what constitutes an institution is a ‘normative element’¹⁴, something that creates binding social obligations, and expectations to follow them. The Charter increasing the significance of fundamental rights increases the normative obligations upon national actors - actors are expected to follow the Charter as it represents a

¹¹ (1999) *Cologne European Council 3-4 June 1999. Presidency conclusions and annexes*, para. 44.

¹² Com (2000) 559, *supra* note 6.

¹³ Charter of Fundamental Rights of the European Union [2012] OJ 326/391.

¹⁴ Greenwood, Royston, Hinings, ‘Understanding Radical Organizational Change: Bringing Together the Old and New Institutionalism’ 21 *Academy of Management Review* 5 (1996), 1022.

normative consensus around the increased significance of fundamental rights. This increased normative pressure leads to Europeanisation, as it increases the adaptational pressure generated by law and the Charter within the institutionalist framework.

Furthermore, the pervasive nature of the Charter is likely to cause misfit, the first step of the Europeanisation process. Misfit represents a difference in content between the EU level and the Member State level.¹⁵ The Charter provides novelty - by altering the 'weight' attributed to fundamental rights, as discussed above, the Charter creates the novelty required for misfit. Even if the relevant principles and rights existed in some form in EU law previously, the increased significance accorded to them by the Charter changes the relationship between these rights and principles and other areas of EU law, creating something new – the misfit required for the Europeanisation process.

There are multiple expectations that increased significance and loss of control will have taken place because of the Charter, with related academic work focusing on the federalising effects of fundamental rights documents.¹⁶ and the expansionist tendency of the ECJ in the area of fundamental rights.¹⁷

An example of similar political discussion on the Charter can be seen in the conversations around the proposed European Constitution. The Confederation of British Industry (CBI) welcomed the eventual opt-out the British government secured from the Charter, amongst previous concerns the Charter would lead to a 'reinterpretation' of British employment law.¹⁸ On the other side of the debate, the Trade Union Congress (TUC) argued in favour of the Charter, as it would increase social rights protection.¹⁹ Importantly, despite one being in favour and one being against, both groups expected the incorporation of a legally-binding Charter would increase the number, or strength, of rights possessed by individual litigants and consequently impact national policy control.

¹⁵ Risse, Cowles, Caporaso, 'Europeanization and Domestic Change: Introduction', in Cowles, Caporaso, Risse, *Transforming Europe: Europeanization and Domestic Change*, (Cornell, 2001), 6; Schmidt, Radaelli, 'Policy Change and Discourse in Europe: Conceptual and Methodological Issues' 27 *West European Politics* 2 (2006), 183.

¹⁶ Eeckhout, *supra* note 9; Knook, *supra* note 5; Lenaerts, *supra* note 5; Lenaerts, Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice', in Peers, Hervey, Kenner, Ward, *The EU Charter of Fundamental Rights*, *supra* note 9.

¹⁷ Muir, 'Fundamental Rights: An Unsettling EU Competence', 15 *Human Rights Review* 1 (2014), 25; Scharpf, 'Perpetual Momentum: directed and unconstrained' 19 *European of European Public Policy* 1 (2012), 127.

¹⁸ <http://www.eurofound.europa.eu/observatories/eurwork/articles/employers-and-unions-highlight-concerns-over-eu-constitution>, first accessed 15/06/17.

¹⁹ *Ibid.*

However despite this conversation, insufficient research has been carried out on the Charter's substantive policy effects. This thesis constitutes an investigation into whether any of the fears about the Charter are grounded in reality.

Health is a significant sector of the economy. Article 35 of the Charter contains an explicit right to preventative healthcare, so the concerns of policy effects surrounding the Charter extend to effects on national health systems. Will the adoption of the Charter mean less national control over health systems?

Top-down Europeanisation is an appropriate framework for measuring the Charter's effects precisely because it represents this sense of lack of control. Top-down Europeanisation involves a 'downloading' of standards or policies from an EU level to a Member State, creating new influences and limitations on actions within Member States²⁰. In order for the thesis to have the greatest practical relevance, it focuses on this 'downloading'. Downloading a policy from an EU level fundamentally affects the level of control a Member State has over a particular policy area – if a Member State is taking policy from an EU level, it is not making that policy itself²¹. Finding out whether this sort of policy formation is taking place is key to testing people's fears around the Charter and the EU. If this sort of policy change is not taking place, Member States actually have greater control over national health systems than people expect. Whilst multiple theories of top-down Europeanisation exist, the methodology used by this thesis, explained below, allows the testing of multiple concurrent theories simultaneously.

Taking into account all these factors, the core research question for this thesis is as follows:

To what extent has the EU Charter of Fundamental Rights caused top-down Europeanisation of the health law and policy of the UK and Germany?

2. Benefits of the Research

There are several specific benefits to investigating whether the effects of Charter are as dramatic as claimed.

²⁰ Börzel, 'Europeanization: How the European Union Interacts with its Member States' in Bulmer, Lequesne, *Member States of the European Union* (OUP, 2007), 63.

²¹ Bulmer, 'Theorizing Europeanization', in Graziano, Vink, *Europeanization: New Research Agendas* (Palgrave MacMillan, 2007), 48-49.

The Charter is a new type of document – having equal value to the Treaties.²² yet different from them. So, what this thesis will do is examine the effects of this new form of binding document on national law and policy – something that has not yet been studied in depth. This is substantively beneficial in that it provides detailed information on how and whether this new type of legal document causes similar Europeanisation to other forms of EU law. This provides information on whether the Charter causes Europeanisation generally (potentially generalisable to other Member States, Charter articles, or areas of EU law), and how other documents of a similar legal status could cause change within the EU through processes of Europeanisation.

Given that fundamental rights have been a significant point of discussion in the ongoing debate about the role²³ and content²⁴ of EU law, it is particularly important to understand how the Charter influences this dynamic. This thesis can clarify these effects and isolate the extent to which the Charter affects this relationship. By doing so, we will have a better understanding of Member States' role and powers. Providing greater legal certainty on this issue has several benefits, including: enabling relevant Member State actors to proceed more confidently, knowing whether or not their activities fall within the scope of EU law; providing greater transparency as to when individuals can rely on the Charter rights; and allowing EU-level actors to understand the scope of EU law and thus its potential policy effects.

As part of studying process-tracing (the thesis' methodology, discussed in section 4) and Europeanisation, the thesis will be divided into step by step analysis. Each core chapter studies the behaviour of a different set of actors. The thesis will therefore provide information on how different national actors in the health policy domain respond to the Charter, by demonstrating their actions as part of studying the causal mechanisms of Europeanisation. This will give us information on how they respond to the Charter in one context, which is potentially generalisable to other concrete policy areas. At the very least it will provide useful information as to how various actors within the health policy sphere respond to the Charter. Even if this does not amount to full Europeanisation, more information will mean greater predictability of actions in the future.

²² Consolidated Version of the Treaty on European Union [2012] OJ C 326/01 (TEU), Article 6(1).

²³ Eg. Muir, 'Fundamental Rights: An Unsettling EU Competence', 15 *Human Rights Review* 1 (2014), 25

²⁴ Eg. Menéndez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' 40 *JCMS* 3 (2002), 471.

Secondly, the thesis can empirically investigate the prevailing academic wisdom on human rights.²⁵ There is a degree of consensus within the academic community that creating prominent, binding human rights documents is an important way to improve protection of those rights.²⁶ This consensus is often translated into policy, with substantial moves being made across the world in creating international human rights protection through adopting binding legal instruments.²⁷ These policies and documents are based upon the assumption (explored further in chapter 2), that calling an entitlement, need, or value a ‘human right’ means that it will be treated with greater significance than a more general statement of policy.²⁸ This increased significance is noteworthy in of itself, but in theory it should also then translate to policy change. These mechanisms *should* be even stronger when combined with the more binding nature of EU law.²⁹ What if this thesis were to find that even *with* these stronger binding mechanisms the Charter’s creation had not led to different treatment or significant change? It would undermine the assumption upon which significant sections of international human rights protection is built. At the EU level, it would also provide some empirical evidence that the Charter was not functioning as intended, undermining one rationale for its existence. It is therefore worth investigating this assumption, something the thesis sets out to do from its inception.

Testing some of the received wisdom in academia is also quite useful. Academic research is based on assumptions – other theses are started, research directed, and choices made based on what people already think about the world. As mentioned above, a substantial body of academics and a substantial body of work functions on the idea that fundamental rights documents increase significance of rights

²⁵ EU law uses the term ‘fundamental rights’ as opposed to ‘human rights’ – these terms are treated as interchangeable throughout the thesis.

²⁶ Discussed in detail in chapter 2, see for example Chinkin, ‘Health and Human Rights’ 120 *Public Health* (2006), 52, 53; Yamin, ‘Our place in the world: Conceptualizing obligations beyond borders in human rights-based approaches to health’ 12 *Health and Human Rights* 1 (2010), 6; Mok, ‘International assistance and cooperation for access to essential medicines’, 12 *Health and Human Rights* 1 (2010) 72; Ruggie, A/HRC/8/5, 7 April 2008, UNHRC; Hervey, ‘The Right to Health in the EU Charter and the ESC’, in De Búrca, De Witte, *Social Rights in Europe* (OUP, 2005); Eide, ‘Economic, Social, and Cultural Rights as Human Rights’ in Eide, Krause, Rosas, *Economic, Social, and Cultural Rights* (Brill, 2001), 23; Gable, Mason Meier, ‘Global Health Rights: Employing Human Rights to Develop and Implement the Framework Convention on Global Health’ 15 *Health and Human Rights* 1 (2013), 19; Pogge, ‘The Health Impact Fund and Its Justification by Appeal to Human Rights’ 40 *Journal of Social Philosophy* 4 (2009), 542.

²⁷ For example: Universal Declaration of Human Rights 1948; United Nations Convention on the Rights of the Child 1989; Convention on the Elimination of All forms of Discrimination against women 1979; UN International Covenant on Economic, Social, and Cultural Rights 1966.

²⁸ Chinkin, *supra* note 26.

²⁹ Established in cases such as Case 2/62 *Van Gend en Loos*, ECLI:EU:C:1963:1; Case C-6/64 *Costa v ENEL*, ECLI:EU:C:1964:66.

and lead to policy change. Undermining this assumption, especially in the context of the EU, an institutional structure designed to be far more binding on Member States than ‘ordinary’ international law, could have significant consequences for future choices within academia. Beyond inspiring new pieces of work, it could be used to reassess existing theorised relationships between national political and legal systems. If the theorised relationship between international human rights and national policy does not exist even in the context of the stronger binding nature of EU law, it is worth increasing the amount of research testing these theorised relationships.

Health policy has been selected as an area in which to test the above theories. It is an area that is primarily a national rather than an EU competence³⁰. As a result, the influence of EU law would be less expected – one reason behind various other studies of top-down Europeanisation of health law and policy³¹. Thus, health law and policy functions as a ‘least-likely case’. If Europeanisation is found in this less likely area of law and policy, we can more safely expect it to be found in other areas³² (so-called ‘most likely’ cases)³³.

One further benefit of choosing health policy is the thesis will also test the assumption that EU fundamental rights law is a relevant consideration for a national health system. Running a health system involves a complex set of policy choices, to be taken within a framework of constitutional law. General perceptions of the Charter lead to fears that it could have a significant effect on national health service in a way that could have budgetary implications. The thesis, and selection of the health law and policy, are designed to investigate whether the Charter *does* have the suggested effects. Any finding that the Charter had not caused significant change would be a weight off the shoulders of a large body of national administrators and politicians.

³⁰ Guy, Sauter, ‘The history and scope of EU health Law and policy’ in Young, Hervey, Bishop, *Research Handbook on EU Health Law and Policy* (Edward Elgar, 2017), 17.

³¹ Eg. Martinsen, ‘The Europeanization of Health Care: Processes and Factors’, in Exadaktylos, Radaelli, *Research Design in European Studies* (Palgrave MacMillan, 2012), 141; Martinsen, Vrangbæk, ‘The Europeanization of Health Care Governance: Implementing the Market Imperatives of Europe’ 86 *Public Administration* 1, (2007), 169; Martinsen, Vasev, ‘A Difficult Encounter – National Health Care Models and the EU’ 49 *Social Policy and Administration* 4 (2015), 427; Martinsen, ‘Judicial policy-making and Europeanization: the proportionality of national control and administrative discretion’ 18 *Journal of European Public Policy* 7 (2011), 944.

³² Beach, Pedersen, *Causal Case Study Methods: Foundations and Guidelines for Comparing, Matching, and Tracing* (UMich, 2016), 45.

³³ Ibid.

Finally, there are questions as to the legal and practical effects of British ‘opt-out’ of the Charter. The opt-out was designed to ‘protect’ UK law from the supposed effects discussed in the introduction.³⁴ However, the opt-out has been called into question by the media³⁵ and the Courts³⁶, with the government seeking to clarify the Charter’s relationship to UK law.³⁷ It has been the prevailing political wisdom that the Charter should have no effect on the formation of British law and policy due to the opt-out. In contrast, the prevailing academic wisdom³⁸ is that politicians are wrong, and the Charter remains a relevant consideration. This thesis empirically tests these opinions, and seeks to establish who is right.

The thesis will return to these benefits in the conclusion, with the empirical findings being used to address the following issues: how correct is the prevailing academic wisdom on human rights; whether the Charter is a significant health policy consideration; the effects of the UK opt-out from the Charter; and what Europeanisation has been caused by the Charter’s presence as a new fundamental rights document.

3. Setting up the Thesis

This section of the chapter explains: case selection; the variables; and the research model. The remainder of the chapter will be devoted to explaining the methodology used in the thesis: its benefits; its appropriateness for this project; the assumptions it makes; and what needs to be done in order to make it effective. The chapter will conclude by outlining the key benefits of the research.

3.1 Case Selection

A case, in the process-tracing methodology being used by this thesis (see section 4), can be defined as

³⁴ For a brief history of the opt-out, see Peers, (2012), *supra* note 9.

³⁵ <http://www.telegraph.co.uk/comment/letters/10768300/EU-Charter-has-precedence-over-UK-law.html>, first accessed 15/10/2016; <http://www.telegraph.co.uk/news/worldnews/europe/eu/10765509/Another-EU-threat-to-national-sovereignty.html>, first accessed 15/10/2016.

³⁶ *Benkharbouche (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant)*, [2017] UKSC 62.

³⁷ <https://www.theguardian.com/politics/2013/nov/19/chris-grayling-clarification-eu-charter-rights>, first accessed 15/10/2016.

³⁸ Eg. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford: Oxford University Press, 2010), 237–40; Barnard, ‘The “Opt-Out” for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?’ in Griller, Ziller, *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008), 244–9.

‘an instance of a causal process playing out, linking a cause (or a set of causes) with an outcome’³⁹. Thus the cases selected in the thesis, and therefore its main subject matter, represent a single iteration of the working of the overall causal theory⁴⁰ (briefly discussed in section 1 and fully elaborated in chapter 3). This is distinct from the overall population of cases where the causal theories *could* be present, to which the individual cases can potentially be compared⁴¹.

This thesis focuses on the health law and policy of the UK and Germany. The selection of two specific countries allows for deeper analysis than if more countries were covered, as more specific details can be analysed in greater depth. Not only is deeper analysis generally preferable as it allows more accuracy and greater understanding, it is a fundamental part of establishing causality using the process-tracing methodology to be deployed in this project. Substantial time and space must be dedicated to mapping out alternatives, and deeply analysing the significance of individual pieces of data, so broadening the number of cases would greatly reduce the rigour of the analysis. Ultimately therefore, the cases selected for the thesis are the health law and policy of the UK and Germany.

The reasons for selecting health policy are outlined in section 2, so why specifically the UK and Germany? The reasons for their selection focus both on the individual significance of those countries, as well as the relationship between their status as individual cases compared to a wider theorised population.

Firstly because they are two of the largest and two of the most significant current members of the EU, so I am investigating the empirical reality facing nearly 150 million people⁴². Furthermore, the assumptions being tested are particularly relevant in these two countries. As mentioned, the 2016 Brexit referendum illustrates some of the potency of the assumptions being tested, so any empirical evidence to the contrary would be particularly relevant to the national debate in the UK. With regards to Germany, the assumptions regarding human rights in general are more important areas of study. The German political and legal system places a great deal of value in its own conception of human rights and their protection⁴³, so a thesis demonstrating this conception of fundamental rights was safer from Europeanisation processes than previously assumed would be most welcome. It is these

³⁹ Beach, Pedersen, *supra* note 32, 5.

⁴⁰ *Ibid*, 6.

⁴¹ *Ibid*.

⁴² <https://data.worldbank.org/indicator/SP.POP.TOTL>, first accessed 26/02/18.

⁴³ Kokott, ‘The Protection of Fundamental Rights under German and International Law’ *African Journal of International and Comparative Law* 8 (1996), 363.

two EU Member States for whom the tested theories and assumptions bear most relevance, and investigating them is the primary goal of the thesis. Furthermore, by testing two countries with differing expectations of the Charter (particularly in terms of the opt-out protocol), the thesis can test whether these different expectations cause variation in outcomes.

If the research is generalisable to other Member States beyond this initial goal, the selection of these two countries should allow for greater modelling of the Charter's effects on other healthcare systems.

Healthcare systems can be placed upon a spectrum alternating from an entirely state-run to an entirely market-driven system.⁴⁴ Further breakdown and classification is also possible⁴⁵, looking at more specific aspects of each case, including: health expenditure; health financing (close to the previous Bismarck/Beveridge classification); privatisation of risk; health service provision; entitlement to healthcare; remuneration of doctors; and patients' access to service providers.⁴⁶ Germany, Belgium, France, Austria, and Luxembourg have similar high expenditure, highly publicly funded systems with a great deal of patient choice⁴⁷, described as a 'health service provision-oriented type'⁴⁸. The UK, Denmark, Sweden, and Italy have highly publicly funded, medium expenditure systems with more limited patient choice and a highly regulated system of providers⁴⁹, referred to as a 'universal coverage controlled-access type'. Portugal, Spain, and Finland can be categorised as low-expenditure systems with high levels of private financing⁵⁰ - a 'low budget-restricted access type'. An alternative description for a similar clustering of systems is the 'Entrenched command-and-control state' of the UK, compared to the 'insecure command-and-control' system of Portugal, and the 'corporatist state' model of Germany⁵¹.

A wider study, bringing in more Central and Eastern European countries, used a different methodology,

⁴⁴ Hervey, McHale, *European Union Health Law: Themes and Implications* (CUP, 2015), 222.

⁴⁵ For a history of classifying health systems, see Freeman, Frisina, 'Health care systems and problems of classification' 12 *Journal of Comparative Policy Analysis: Research and Practice* 1-2, 163.

⁴⁶ Wendt, 'Mapping European healthcare systems: a comparative analysis of financing, service provision and access to healthcare' 19 *Journal of European Social Policy* 5 (2009), 432.

⁴⁷ Ibid, 438.

⁴⁸ Ibid, 441.

⁴⁹ Ibid, 439.

⁵⁰ Ibid.

⁵¹ Moran, 'Understanding the welfare state: the case of health care' 2 *British Journal of Politics and International Relations* 2 (2002), 135.

looking at whether regulation, financing, and services were provided by the state, society, or the private sector.⁵² It divided a larger number of countries into a broader typology, but the categorisation itself remained similar.

To the extent the results of this thesis are generalisable to other Member States, then findings from UK and Germany potentially provide information relevant to a number of other countries, or at least a source for further hypotheses to be investigated through further research or a different country focus. Whilst admittedly this case selection does not cover all countries within the EU, given Germany and the UK fall within separate categories in multiple different healthcare system classifications as demonstrated in the table below, the potential for generalisability is greater than if two more similar states (say Austria and Belgium) had been chosen for analysis.

Using this system-based categorisation fits with the case-selection methods of causal case studies – the methodology used in this thesis (see section 4). In order to generalise from a single case to a wider set of cases, cases must be ‘causally homogenous’ – cases where a given cause can be expected to have the same causal relationship across the whole population.⁵³ Consequently, in order to generalise the selected cases have similar causally relevant factors.⁵⁴ The above-discussed health system classification demonstrates the extent to which the other EU Member States have similar health systems, and thus display a certain degree of causal homogeneity. Additionally, selecting cases where the Charter opt-out both is and is not present assists causal homogeneity. As an apparently causally relevant factor to the effects of the Charter, selecting the UK and Germany increases the number of other EU member states with which the selected cases are causally homogenous. With both of these options covered, there is potential for the findings to be extrapolated to a wider group of countries.

The research in the thesis is limited to studying change taking place at a national as opposed to sub-national level, for several reasons. Firstly, studying the national level focuses the thesis on more significant effects. All of the policy areas selected as part of the dependent variable are covered by national-level legislation. By focusing on this area, the thesis studies substantial effects across all of the studied policy areas. A national focus ensures any effects the thesis finds are more impactful as they affect the entire population, echoing the choice of two of the largest Member States. Furthermore,

⁵² Böhm, Schmid, Götze, Landwehr, Rothgang, ‘Five types of OECD healthcare systems: Empirical results of a deductive classification’ *Health Policy* 113 (2013), 258

⁵³ Beach, Pedersen, *supra* note 32, 50.

⁵⁴ *Ibid*, 51.

finding national-level impacts of the Charter would do more to either assuage or confirm some of the fears discussed in the introduction - national level effects resonate more in countrywide discourse. Overall therefore, a national focus results in the most impactful findings.

Table 1: Traditional Bismarck-Beveridge distinction

<i>Health System Classification</i>	<i>Member States</i>
<i>Beveridge</i>	UK, Denmark, Finland, Sweden, Cyprus, Italy
<i>Bismarck</i>	Germany, Austria, Belgium, France

Source: author describing above-mentioned research

Table 2: Wendt classification based on seven criteria

<i>Health System Classification</i>	<i>Member States</i>
<i>Entrenched command and control</i>	UK, Denmark, Finland
<i>Corporatist state</i>	Germany
<i>Insecure command and control</i>	Greece, Italy

Source: author describing above-mentioned research

Table 3: Moran classification in work on welfare state

<i>Health System Classification</i>	<i>Member States</i>
<i>National health service</i>	UK, Denmark, Finland, Sweden, Portugal, Spain
<i>Social health insurance</i>	Germany, Austria, Luxembourg
<i>National health insurance</i>	Italy, Ireland
<i>Etatist social health insurance</i>	Belgium, France, Netherlands, Czech Republic, Hungary, Poland, Slovakia, Estonia
<i>Social-based mixed type</i>	Slovenia

Source: author describing above-mentioned research

Secondly, for reasons of practicality. National-level judicial and legislative developments are well-documented in extensive, easily searchable databases, whereas regional developments are not. For example, not all of the UK devolved parliaments contain a keyword-searchable database of proceedings, making it impossible to conduct the research conducted on the Westminster parliament. Similarly, databases of German regional court judgments are much less extensive than of national-level courts. In both of these circumstances, it would be prohibitively difficult if not impossible to build the

necessary evidence base required for the thesis, i.e. a list of each reference made by that body to the Charter articles in the independent variable (discussed in the next section). Thus, it is unlikely that any conclusions drawn from this evidence would be reliable, and thus the choice was made to exclude regional parliaments from the thesis.

It is also worth clarifying at this point the process for assembling the various judicial and legislative examples used in the empirical chapters, and to distinguish it from the sort of case selection discussed above. Each individual chapter undertakes this process in a similar way. First, I documented all the references to the studied Charter articles over the selected time period (these lists can be found in the Evidence Base Appendices). Then, I studied these references to see if they or their overall effects fell within the dependent variable of the thesis. If the studied Charter articles were referenced within the context of the dependent variable, the case, reference, and surrounding circumstances were given full analysis. Beyond these direct references to the Charter, the thesis also looked at prominent judgments and legislation covering health law and policy in this period, in order to see if they were affected by the Charter without a direct citation – a possibility, as explained further by the theories outlined in chapter 3. In chapter 7, due to the legislatures' tendency to refer to 'the Charter' more generally as opposed to specific articles, the initial evidence base used that phrase as opposed to citations of specific articles – the same dependent variable but a different manifestation thereof.

The assembling of evidence within each chapter is thus not a 'case selection' in the social science sense – it is not designed to typify and exemplify in the same way as the choice of the UK and Germany does. It is a process which assesses the full range of potential evidence within the selected cases and time period, and then reduces this list using relevant factors to find the evidence. Therefore, the judgments and legislation studied represent the only evidence found after a meticulous process of elimination, rather than a specific selection made by the researcher.

3.2 Variables

Any research project needs to make choices to narrow down the scope of inquiry. Firstly, because a specific focus better allows us to answer the questions posed. For this project, that involves focusing more precisely on the sorts of assumptions and fears surrounding the Charter. Secondly, as will become apparent in section 2, the research needs a clear scope in order to construct sufficiently plausible and detailed mechanisms for analysis using a process-tracing method (see section 4).

The thesis studies the period between the Charter's solemn proclamation in the year 2000 and August 2017, including both before and after the Charter became legally-binding. This timeframe allows the thesis to study the Charter's effects as a mere declaratory statement on fundamental principles and freedoms, as well as a set of potentially justiciable rights. This dichotomy highlights whether making the Charter into a binding document altered the behaviour of actors and thus any subsequent policy consequences. Ending the study in 2017 means that the UK was a Member State for the whole duration of the investigation.

The independent variable in this research (the fixed element whose effects the thesis is studying) consists of multiple rights and principles in the Charter. These rights have been selected as their substantive content has the greatest overlap with health. Article 35 explicitly includes the fundamental right of access to preventative healthcare – this is relevant to health law and policy in that it purports to provide an arguably justiciable right to one of the main areas of health policy - healthcare. Articles 1 and 3(1) are similarly included as they are linked to the right to health care in that they cover similar substantive issues.⁵⁵ - human dignity and autonomy are rights that are frequently discussed in the context of health and health research.⁵⁶ Several Charter Articles deal with non-discrimination – Article 20 guarantees equality before the law, and Article 21 protects from discrimination on specific grounds, with Article 21(2) specifically focusing on nationality. Non-discrimination is a right that may be highly relevant when considering access to and distribution of healthcare, as a ground upon which applicants could challenge decisions denying them healthcare.

Whilst chapters 4, 5, and 6 were able to study direct references to specific Charter articles, this rapidly proved impractical when studying national legislatures. Whilst judges at both an EU and a national level referenced specific articles when discussing the Charter, parliamentarians were overwhelmingly more likely to refer to 'the Charter' as a whole. An evidence base limited to specific articles would be too narrow to gauge the full range of influence of the Charter on these bodies. Therefore, the evidence base of chapter 7 includes every reference to the Charter, regardless of whether it references the specific articles of the independent variable. However, the studied cases reference the content of the articles in the independent variable – the studied variable does not change, merely the manifestation of it in the specific circumstances of chapter 7.

⁵⁵ Peers, Hervey, Kenner, Ward, (2014), *supra* note 9, 952.

⁵⁶ Beyleveld, Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP, 2001); Mossialos, Permanand, Baeten, Hervey, *Health Systems Governance in Europe: The role of European Union law and Policy* (CUP, 2010), 299.

Several substantive areas will be studied as part of the dependent variable – health law and policy. Fitting with the main benefits of the thesis outlined previously, the dependent variable will be focused on the aspects of health law and policy with significant organisational or budgetary implications for the Member States in question. Specifically, the topics for analysis are financing of healthcare, public health, regulation of healthcare, and social care. These are discussed in greater detail in chapter 2.

The thesis is seeking to investigate the assumption that the Charter is of relevance to health systems and policies. Its focus is therefore on whether the Charter has affected the areas that themselves have the greatest impact within health systems. By focusing on the Charter's influence on sectors with significant budgetary implications, the thesis can provide empirical evidence on some of the most significant areas. In a period where politics has been dominated by questions of public spending, and health services in multiple countries are hit by funding crises, knowing whether the Charter is a relevant funding consideration would be of considerable use to policy- and law-makers, as well as to patients and health administrators. This choice of substantive topics covered in the thesis will be further elaborated in chapter 2, which will explain how these variables, and the thesis, fits within existing literature on health law.

At this point, it is worth noting that Europeanisation literature, particularly longer studies such as this one, offers two distinct choices as to dependent variables. The distinction is known as 'first-generation' and 'second-generation' Europeanisation studies.⁵⁷ First generation studies focus on 'more formal, observable consequences' of EU membership, whereas second-generation studies focus on 'less formal and less observable changes'.⁵⁸ The wider behavioural changes are more suited to country-wide studies as opposed to specific policy areas, as researchers can assess a broader range of evidence. Looking at Cowles, Caporaso, and Risse's highly influential Europeanisation collection.⁵⁹ for example, the opening half of the book studies formal changes in specific policy sectors (first-generation), whereas the second half of the book studies system-wide behavioural changes (second generation). Given, as discussed above, the thesis focuses on distinct policy areas as opposed to broader country- or system-wide studies, it limits its dependent variable to specific policy changes. It is thus an example of a first-generation Europeanisation study.

⁵⁷ Bache, Jordan, 'Europeanisation and Domestic Change' in Bache, Jordan, *supra* note 32, 25; Dyson, Goetz, 'Germany and Europe: Beyond Congruence', paper given to British Academy Conference, Germany and Europe: A Europeanised Germany?, 11 March 2002.

⁵⁸ Bache, Jordan, *supra* note 57.

⁵⁹ Cowles, Caporaso, Risse, *supra* note 15.

4. Methodology

The next issue that needs to be addressed is *how* I will answer the research question posed above. What are the analytical tools that will be used to provide answers, how do those tools work, and what exactly will the analysis look like? The following section of the chapter will cover these issues, namely: what case study methods are and how my chosen methodology fits within those methods; how process-tracing works and how it analyses events; and how the methodology empirically demonstrates change, both in terms of analysis and the relative importance of each individual piece of evidence. The section concludes by giving an example of what will happen in each chapter.

4.1 Causal Case Study Methods and Process-tracing

Many methods exist for understanding causation and events whilst studying a large number of cases. These methods select a large number of cases in order to have more significant bodies of empirical data. However, sometimes for practical reasons pieces of research focus more tightly on a smaller number of cases. When doing so, quantitative methods are no longer suitable, as they traditionally require a far greater number of data points, and hence larger numbers of cases.

So this thesis requires a methodology that is designed for and functions well with only a small number of cases. Here the thesis therefore requires what is known as a ‘causal case study method’, something where ‘in contrast, case-based researchers take the individual case as the analytical point of departure’⁶⁰. The methodology focuses on a smaller number of cases, and deeper analysis.

There are multiple different types of causal case study methods, but the one I will be deploying in this piece of research is ‘process-tracing’. Process-tracing is a causal analysis that broadly focuses on causal mechanisms as a means of analysing change⁶¹. Whilst scholars differ as to what constitutes a causal mechanism, process-tracing is dividing events into parts within a causal mechanism, then empirically testing the existence of each part using the evidence gathered during the course of the thesis.

More specifically, the thesis will be engaging in ‘theory-testing’ process-tracing⁶². Theory-testing process-tracing involves assessing whether hypothesised causal mechanisms exist in a single case by

⁶⁰ Beach, Pedersen, *supra* note 32, 6.

⁶¹ Ibid, 304; Bennett, Checkel, *Process Tracing, from Metaphor to Analytical tool* (CUP, 2014).

⁶² Beach, Pedersen, *supra* note 32.

exploring whether the predicted evidence of hypothesized causal mechanisms exist in reality'⁶³. More concisely, this involves testing whether predictions are true at specific mechanistic stages.

There are three main reasons why process-tracing, and specifically theory-testing process-tracing, is particularly suitable for my thesis, even beyond its usefulness as a causal case study method.

Process-tracing breaks down a causal mechanism into individual parts. This step-by-step analysis is especially useful when testing assumptions that exist within popular society. If these assumptions turn out to not be true, the analysis in the substantive chapters of this thesis will detail the precise step at which the assumptions broke down. This allows more accurate conclusions to be drawn, as it clear the exact part which is missing. By comparing and examining these missing parts, the concluding chapters of the thesis can move towards developing a new theory of how the Charter interacts with health policy in Member States. For example, if the first part of the theorised relationship is not present, it is clear that there was never any real prospect of the expected change. A completely different conclusion would be drawn however, if evidence of almost all of all the expected parts is found. Process-tracing also allows conclusions to be drawn as to whether the relationship exists in other cases by examining whether the missing mechanism is or is not present in those other cases⁶⁴.

Additionally, by building relatively complex causal mechanisms and tracing very precisely *how* an independent variable influences the dependent variable, process-tracing provides a strong idea of the precise relationship between the two – thus providing detailed analysis and heavily informed conclusions, or 'deep' analysis.

In research with a small number of cases, process-tracing allows the testing of multiple different sets of expectations⁶⁵. There are multiple competing theories of top-down Europeanisation, based on both rational choice and sociological institutionalism. These are explored in greater detail in chapter 3. In other theory-based research models, multiple competing theories would require a choice as to which theory the researcher finds most valid. However, process-tracing allows us to analyse multiple theories at once, as explained in the next section. This is particularly useful as the thesis can establish Europeanisation regardless of which theory of Europeanisation turns out to be the most accurate or

⁶³ Ibid, 319.

⁶⁴ Ibid, 314.

⁶⁵ Panke, 'Process Tracing: Testing Multiple Hypotheses with a Small Number of Cases in Exadaktylos, Radaelli, *supra* note 31, 136.

appropriate as a frame of analysis in this present case.

4.2 Defining and Finding Causal Mechanisms

As mentioned, process-tracing uses ‘causal mechanisms’ as a means to explain the process linking cause and outcome, often divided into separate parts.

Parts of a causal mechanism are defined in terms of entities, in this thesis various national and supranational judicial and political actors, engaging in activities⁶⁶. The activities move the process of change from a cause, to an outcome, the end result transferring causal forces from a cause to an outcome⁶⁷. No individual part is sufficient to link cause and outcome, but each part is necessary in the process. If any one of the parts of the causal mechanism is absent, the overall process is not present⁶⁸.

When conceptualising causal mechanisms, the researcher needs to ensure ‘productive continuity’ – ensuring each part logically leads to and causes the next part forming one full causal mechanism – a continual relationship between cause and outcome⁶⁹. This continuity ensures the mechanism being searched for and studied accurately reflects the process. A lack of productive continuity negatively affects the validity of the analysis.

Detail is again important, as a causal mechanism must go beyond a mere descriptive narrative of what takes place - without informing the reader of exactly what step of the process is being discussed at any one point, the description of the process provides insufficient detail to safely draw conclusions⁷⁰. The reason the thesis relies upon a systems understanding of causal mechanisms is to go beyond these descriptive analyses to fully demonstrate the relationship between cause and outcome.

Performing process-tracing analysis requires three steps, based around creating and testing causal mechanisms. The starting point is the theoretical level, using logical reasoning and existing theories (in

⁶⁶ Machamer, Darden, Craver, ‘Thinking about Mechanisms’ 67 *Philosophy of Science* 1 (2000), 1; Machamer, ‘Activities and causation, the metaphysics and epistemology of mechanisms’ 18 *International Studies in the Philosophy of Science* 1 (2004), 27; Beach, Pedersen, *supra* note 32, 80.

⁶⁷ *Ibid.*

⁶⁸ Mahoney, ‘Towards a Unified theory of Causality’ 41 *Comparative Political Studies* 4 (2008), 420; Beach, Pedersen, *supra* note 32, 30.

⁶⁹ Beach, Pedersen, *supra* note 32, 80.

⁷⁰ Beach, Pedersen, *supra* note 32, 72.

this thesis both academic theories and prevailing political beliefs), in order to conceptualise the theorised relationship as a causal mechanism. This conceptualisation is found in detail in chapter 3.

The second step is operationalisation – ‘translating theoretical expectations into case-specific propositions about what evidence each of the parts of the mechanism should have left if they actually operating as theorized in the case’⁷¹. This will take place at the beginning of each individual substantive chapter, providing specific detail on the observable implications and evidence. This operationalisation stage allows the testing of multiple branches of theories, merely by operationalising several separate theories at once, before testing them in the third step.

The final step is empirical; is the expected evidence there? However, with case study methods, evidence assessment is more complicated than simply analysing the quantitative weight of evidence, and so requires a further clarification on how it functions, and how it will take place in this thesis.

4.2.1 Evidence

The thesis is interdisciplinary, and hence relies upon a wide range of evidence - both that found in doctrinal law theses as well as from research undertaken in the wider social sciences. Various resources were used to track down evidence: Curia, the database of judgments of the CJEU; Westlaw for UK judgments, and the relevant court’s archives for German courts; and Hansard and official records of the German Bundestag and Bundesrat.

The first type of data used in the thesis is primary legal data. For example: direct citation of cases, specifically the ones in which the Charter had influence; other national and European cases, used in comparison; the EU Treaties and other ‘general principles’ of EU law; national primary and secondary legislation, both as it existed before Europeanisation and after influence from an ECJ judgment; and opinions of Advocates General.

Other types of primary evidence are also used, similarly to in political science. For example: official government responses to ECJ cases; European Commission reports on the application of the Charter; statements from industry bodies and specialist commentators on developments; policy notes from quangos other similar bodies; proceedings of relevant parliamentary committees and plenary proceedings; and formal records of parliamentary motions. A third type of data used is media reports

⁷¹ Ibid, 324.

of various developments and of public opinion, and statements of private organisations' views on their actions.

Substantial secondary data is also used through the thesis. For example, legal analysis including: journal articles; books, both specific and non-specific; blogs written by relevant academics; and to a narrow extent my own explanatory legal analysis.

Importantly, evidence cannot be uncritically relied upon. Throughout the thesis, the 'accuracy' of individual pieces of evidence is critically assessed, both in the text and specific appendices. This assessment will consider any potential motivations and bias behind the evidence that might cloud its significance. This 'accuracy' quality is used to inform the thesis' conclusions. Obviously the higher the accuracy of a piece of evidence, the more one can rely upon it in drawing conclusions – and indeed in potentially generalising those conclusions.

The thesis will provide two forms of analysis. The body of each chapter will provide clear prose analysis using the process-tracing methodologies explained in the following section. Each chapter will also contain an appendix, in which the uniqueness and accuracy of individual pieces of evidence is laid out. This provides transparency, which serves two functions. Firstly, it allows the reader full access to the evidence, meaning there can be no doubt as to my own bias or validity of my analysis. Secondly, the accuracy of the evidence is made open and clear, which bolsters the conclusions as I can highlight when and where I use highly unique and accurate evidence.

4.2.2 Assumptions and Process-tracing

Within process-tracing, there is a multi-stage process for empirical analysis. Rather than a quantitative analysis of evidence and data, causal case studies rely on 'within case inferences'. The key task is to assess the probabilities of individual pieces of evidence compared to the likelihood of the theoretical causal mechanism existing. This analysis relies on three separate qualities - priors, certainty, and uniqueness.

In order to explain how these qualities allow us to demonstrate the existence of causal mechanisms, one must rely on a favoured analogy of academics writing about process-tracing - a prosecutor in a court⁷². Similar to an academic studying a limited number of cases, a prosecutor cannot rely on a large

⁷² Beach, Pedersen, *supra* note 32, 81.

amount of repeated data points – the same crime will not happen again and again. Similarly in the thesis, a limited number of cases means only a limited set of data. However, murderers are still convicted using evidence, and strong arguments can still be built using the evidence in a small number of cases.

Having a theory in advance means one can assess the degree to which evidence supports a theory or counteracts it. The theories and causal mechanisms are discussed above, and this section now moves onto how the evidence proves or disproves these theories. A detective will begin with a theory and then gather their evidence, with new evidence either proving or disproving the theory.

Unfortunately for fans of Poirot, the methodological version is marginally less entertaining. Having established the confidence in the prior, the extent to which the evidence supports these theories, using the qualities of ‘certainty’ and ‘uniqueness’ must be assessed.

The ‘prior’ in this thesis is the theories and assumptions about the Charter. Specifically, it is the theorised causal mechanism taking place at each stage of the process being traced. The first task is assessing the confidence in the prior. The theoretical confidence in the prior affects the sort of evidence one needs to look at. High confidence necessitates looking for evidence that disproves the theory, as confirmatory evidence would merely reassert existing views⁷³. Less confidence requires positive evidence that a theorised mechanism in fact is present⁷⁴.

The ‘certainty’ quality breaks down to the question ‘if the theory is correct, how certain is it that this piece of evidence will be found?’ The more confidence one has that a piece of evidence will be present (should the theory be correct), the higher the ‘certainty’. The value of high-certainty evidence is disconfirmatory. If a piece of ‘high-certainty’ evidence is not found, a piece of evidence whose existence was almost certain, its absence is strong evidence against the ‘prior’ and against the hypothesised causal mechanism.

‘Uniqueness’ can be distilled to ‘how many other explanations are there for the existence of this piece of evidence’ - the greater number of alternative explanations exist, the less unique a piece of data is and therefore the less weight it carries as a piece of evidence proving a theory. If one finds a piece of evidence that is highly unique, i.e. with few other explanations for its existence, it is a piece of evidence

⁷³ Beach, Pedersen, *supra* note 32, 177.

⁷⁴ *Ibid.*

that strongly confirms a theory.

Methodologically, these numbers can be expressed either as a numerical percentage value (30% certainty, 50% uniqueness etc), or using word-based categories (high certainty, low certainty, etc.). Quantifying these values allows for more precise formulae and calculations to be used, and is favoured by some authors⁷⁵. However, critiques of the statistical logic behind process-tracing often criticise the subjectivity of these assessments⁷⁶, and quantifying these criteria has been described as ‘very arbitrary at best, and misleading at worst’⁷⁷. For example, it is difficult say how unique a piece of evidence is with complete accuracy and objectivity and even trickier to explain why something is 65% unique instead of 75%. In order to ameliorate these criticisms, the thesis will merely rely on broad word-based categories, as it is more possible explain their accuracy, as opposed to a more precise numerical figure. This choice fortunately does not preclude the ability to use process-tracing to assess evidence and draw conclusions.

Three specific categories will be used when assessing accuracy, uniqueness, certainty, and prior confidence – low, medium, and high. Broadly, if something falls into the ‘high’ category, it represents a value of over 70%. If something falls into the ‘low’ category, it represents a value of less than 30%. For example, if a piece of evidence is ‘highly unique’, it has a uniqueness value of over 70%. But to reiterate, the precise number ascribed to these categories is less significant than the logical analysis the categories are used for.

In testing evidence within the process-tracing models, the values of certainty and uniqueness, based on four possible combinations: ‘doubly decisive’ high certainty, high uniqueness; ‘hoop test’ high certainty, low uniqueness; ‘smoking gun’ high uniqueness, low certainty; ‘straw in the wind’ low certainty, low uniqueness⁷⁸. Each piece of evidence will be categorised as one of these tests.

A ‘straw in the wind’ test is a piece of evidence with low uniqueness and low certainty. Finding it is a straw in the wind indicating the metaphorical breeze is moving in a particular direction. But with low certainty and low uniqueness, finding the piece of evidence does not greatly increase confidence in

⁷⁵ Eg. Bennett, ‘Appendix: Disciplining our conjectures : Systematizing process tracing with Bayesian analysis’ in Bennett, Checkel, *supra* note 61.

⁷⁶ Chalmers, *What is this thing called Science?* (Open University Press, 1999), 177-181.

⁷⁷ Beach, Pedersen, *supra* note 32, 173.

⁷⁸ Van Evra, *Guide to Methods for Students of Political Science* (Cornell University Press, 1997), 67.

the theory – there are many other possible explanations as to why this piece of evidence exists.

A ‘hoop test’ is a piece of evidence with high certainty but low uniqueness. The value of this test is its disconfirmatory power. If that piece of evidence is not found, it is strong evidence against the theory – if it was very certain this evidence would exist if the theory was correct, not finding it is strong evidence the theory is not correct. If the piece of evidence is found however, it somewhat improves confidence in the prior but not significantly – the low uniqueness means there are many other explanations for the existence for that piece of evidence. So, in order to make a positive argument using hoop tests, one needs to either combine it with another test, or use multiple hoop tests, each of which increases our confidence in the theory by moderate amount.

A ‘smoking gun’ test is a piece of evidence that is highly unique but of low certainty. The highly unique nature of the evidence means it is a strong piece of evidence in favour of the theory – there are few other explanations for its existence, other than the theory being correct. However, not finding the evidence is not strong evidence *against* the theory, as it is uncertain whether the evidence exists. To elaborate on the metaphor, finding the murder weapon with the suspect is a strong piece of evidence that they did it, but not finding the murder weapon there does not prove they are innocent.

A doubly decisive test is a piece of evidence that is highly certain and highly unique. Highly certain, in that it is very certain this evidence will be found if this theory is correct, and highly unique, in that there are almost no other explanations for the existence. Evidence passing a doubly decisive test is very strong evidence that a theory is correct. Bluntly however, this sort of evidence is unlikely to exist in the complex social contexts in which process-tracing is used to study causality.

4.2.3 Example

The following section demonstrates how these testing of priors and theoretical assumptions will work in practice. The table below, or excerpts from it, is used throughout the thesis.

The table represents the first few steps of the process-tracing methodology. The rows marked ‘theory’ represent the causal mechanism of the thesis. It takes the assumptions and theories that I am seeking to test and turns them into a clear step by step causal mechanism for which productive continuity exists, and cause is transferred to outcome. It then moves onto ‘observable manifestations’. The ‘observable manifestations’ offers predictions as to what empirical evidence is expected at each step

of the process.

Table 1.1: Causal Mechanisms and observable manifestations

RCI: Rational choice institutionalism

SI: Sociological institutionalism

	Cause	Part 1	Part 2	Part 3	Part 4	Outcome
Theory: RCI	Charter creation	Greater Significance	Policy misfit	Changed cost-benefit analysis	Policy change	Europeanisation
Observable manifestations: RCI	Charter created	Citation or influence	Comparison between policies/norms	Discussion of sanctions/costs	New laws/policies etc	New laws/policies
Theory: SI	Charter creation	Greater Significance	Policy misfit	Changed expectations	Policy change	Europeanisation
Observable manifestations: SI	Charter creation	Citation or influence	Comparison between policies/norms	Discussion of expectations	New laws/policies etc	New laws/policies

Source : author's own elaboration of Europeanisation research

Analysis then moves onto the evidence-testing step. Confidence in the prior is assessed and used to look at what sort of evidence needs to be collected. The evidence is then applied in the 4 tests discussed above, and the degree to which the empirical evidence affects our confidence in the various theoretical stages is assessed.

Let's look for example at part 4 of the above diagram.

There is relatively high degree of confidence in the existence of this step of the causal mechanism. As already noted, and as further elaborated chapter 3, Europeanisation is a well-documented phenomenon, with clearly delineated theoretical steps.

These pieces of evidence would have a reasonable to high degree of certainty. If that specific causal mechanism was present, it is highly certain there would be evidence present – policy change leaves evidence in the form of new laws or enacting of policies. However, the evidence would arguably have lower uniqueness, as there are multiple other explanations for policy change, other than the policy

misfit caused by the Charter – political actors and policy change are motivated by a wide range of factors.

Therefore, the observable implication would be a hoop test – appropriate for high certainty low uniqueness. So if this evidence was not present it would be strong evidence *against* the theory due to a hoop test’s disconfirmatory power. But due to the low uniqueness, several pieces of evidence would be required to further improve our confidence in the theory. This is therefore a particularly suitable evidential test for this causal mechanism, in which there is high confidence.

Thus using the insights of process-tracing, using only limited evidence from a narrow number of cases, the extent to which the theoretical relationships and assumptions are backed up with hard evidence can be assessed

5. Outline of the Thesis

This final section of the chapter gives a brief overview of the remaining seven chapters of the thesis. The structure uses Dunleavy’s model of thesis content: lead in; main substance; lead out.⁷⁹

Lead In

Chapter 2 situates the thesis within broader literature on health law. Health law and policy is an area rife with contested definitions, so this chapter will provide a more detailed explanation of how the choices this thesis makes fit within the existing health law literature. It will also make some contribution to the causal mechanism required by process-tracing - which theories around health rights as human rights predict a practical impact that could potentially be applied to the Charter.

Chapter 3 has two functions – to form a more conventional literature review laying out some of the literature in the field, and to build up the detailed step-by-step causal mechanism required for process-tracing. The chapter discusses five overlapping areas: EU fundamental rights law; literature on law and institutionalism; human rights and institutionalism; the Charter more generally; and literature on Europeanisation, both generally and how it is specifically understood to take place.

⁷⁹ Dunleavy, *Authoring a PhD: How to plan, draft, write and finish a doctoral thesis or dissertation* (Palgrave Macmillan, 2003), 49-50.

Main Section

The substantive chapters (4-7) will cover Europeanisation through three different paths, focusing on the three main areas of potential national interaction with EU law: ECJ judgments; national cases; and national legislation. Each chapter will thus combine evidence from several different occurrences of that path, eg. one chapter will cover Europeanisation through multiple different ECJ cases. Methodologically this requires generalised modelling and predicted empirical observations. Whilst this slightly impacts the effectiveness of process-tracing methodological analysis in that the same mechanism is used for different circumstances, it is a justified choice for several reasons.

Firstly, as will be demonstrated in chapter 3, Europeanisation as a theoretical model is sufficiently broad that a similar reaction across countries and across different actors can be expected. So whilst it would be possible to design specific models, a broadly similar interaction in each case can be expected. This is additionally true when considering the prediction stemming from fundamental rights literature.

Secondly, one of the benefits of the thesis is assessing the impact the Charter has had on health systems (discussed in the introduction and in section 1). These impacts and any subsequent ‘loss of control’ are easier to assess in longer chapters, as there is more direct evidence to hand – it is easier to assess impact when all of the required evidence is in the same place. This is similarly true when considering whether to combine evidence from different countries – in order to assess the overall impact of the Charter and whether it lives up to the claims of the proponents of the fundamental rights approach, the thesis needs to look at evidence from multiple countries.

Chapter 4 looks parts 1 and 2 of the mechanism, taking place as a result of the Charter’s effects on cases decided by the ECJ. Whilst ECJ cases themselves do not constitute Europeanisation, this thesis looks at whether they acted as mechanisms through which Europeanisation has taken place, similarly to other academic work written on prominent CJEU cases.⁸⁰ The chapter focuses on seven cases, analysing both the Charter’s effects on the judgment itself, and the subsequent change that took place,

⁸⁰ Eg. Armstrong, Bulmer, *The Governance of the Single European Market* (Manchester University Press, 1998); Eliantonio, *Europeanisation of Administrative Justice: The Influence of the ECJ’s Case Law in Italy, Germany, and England* (Europa Law Publishing, 2008); Snyder, *The Europeanisation of Law: The Legal Effects of European Integration* (Hart, 2000); Schmidt, ‘Judicial Europeanisation: The Case of Zambrano in Ireland’ 37 *West European Politics* 4, (2014), 769; Blauburger, Krämer, ‘Europeanisation with Many Unknowns: National Company Law Reforms after Centros’ 37 *West European Politics* 4 (2014), 786; Sack, ‘Europeanization Through Law, Compliance, and Party Differences – the ECJ’s ‘Rüffert’ judgment (C-346/06) and Amendments to Public Procurement Laws in German Federal states’ 34 *Journal of European Integration* 3 (2012), 241.

resulting from the implications of the ECJ decision coupled with respect for its judgments by national governments, legislatures, and judiciaries. Thus the chapter covers parts 1 and 2 of the causal mechanism, specifically: whether the Charter existing at a European level caused it to impact the decision-making process of judges, in a way that increased the significance of fundamental rights; and whether this increased significance caused policy misfit.

However, the chapter also found that in four of the cases, the Charter reinforced national positions where they were threatened by internal market law. This finding was unexpected, as it very much went against the top-down control the thesis was seeking to investigate. Therefore the chapter concludes here in order to discuss the significance of this finding, in terms of both the consequences for internal market law and the balance between the EU and Member States.

Having concluded the previous chapter at part 2 of the causal mechanism, chapter 5 analyses parts 3 and 4 of the Europeanisation model with regards to judgments of the ECJ. Thus the chapter considers reaction to policy misfit, and whether it translates into Europeanisation at a national level. This chapter contains the few examples of top-down Europeanisation found by the thesis, some of the only evidence of assumptions being confirmed. Whilst Charter-driven Europeanisation through ECJ judgments is an infrequently occurring phenomenon in the area of health law and policy, where it does occur the chapter strongly demonstrates this using empirical evidence. The chapter concludes by analysing the significance of the Europeanisation finding. Empirically, this Europeanisation can be measured using the practice of statutory bodies affected by CJEU judgments to check for Europeanisation, or judgments of national courts implementing CJEU judgments to see if law has been Europeanised.

Chapter 6 studies whether Europeanisation through the Charter is being specifically applied in litigation in UK and Germany. This chapter is distinct from the previous chapter in that it will only include litigation that did not involve a preliminary reference to the CJEU. The Charter is to an extent binding on Member States, and has the potential to be cited in litigation in UK and Germany, either as something that binds Member States or as evidence that fundamental rights principles exist. Compared to the previous chapter, the dynamics of Europeanisation are different - given the lesser control that national judges have over specific policy formation compared to the more political actors involved in responding to ECJ judgments, Europeanisation is more clearly displayed through the actions of judges compared to policy change. Another difference to the previous chapter is that generally speaking, Europeanisation was not found, even if some of the preceding parts of the

mechanism were present.

Chapter 7 explores whether Europeanisation took place as a result of the Charter's influence on national legislation. The chapter will look at the way the Charter is utilised in arguments by Members of both legislatures, and analyse what this tells us about how the legislature perceives the Charter and its role in domestic politics. The chapter does not demonstrate Europeanisation as a result of this analysis, but does demonstrate some of the theorised parts of the causal mechanism (rational choice and sociological institutionalism), and explores some of the significance of these interactions, as well as the general lack of Europeanisation.

Lead out

The concluding chapter summarises the core chapters' research findings. The thesis' hypotheses were built upon theories and assumptions from both academics and wider society, but were ultimately rejected - the effects of the Charter do not match these expectations. The chapter also lays out the effects the Charter *did* have, both expected and unexpected. The chapter then moves onto discussing the impact of both of these sets of findings, before exploring the extent to which the thesis' findings can be generalised to other Member States, Charter Articles, or areas of EU law. The thesis then concludes by asking where future research could go from here.

Chapter 2 – Health Rights, Health Law, and Health Policy

Here is a health policy riddle: despite the fact that we are not always clear as to what we are trying to achieve, even on the most basic level, we must make policy anyway.

Daniel Skinner, review of *Just Health: Meeting Health Needs*.¹

What exactly is health law and policy? Health is an area of great national significance, with dramatic repercussions on the lives of citizens - health systems and health policy have attracted extensive academic analysis. Yet as the above quote illustrates, health law and policy contains enough ambiguity to surprise a casual reader.

To begin with, what constitutes health? Human beings are complex, suffering from a wide variety of physical and mental conditions, and the way we treat these is subject to discussion. This discussion causes frequent variations in the subject – to what extent should we treat certain acute and chronic problems, and how should we go about doing so?

This latter question itself raises further queries – many policies can have an effect on human health without intuitively being part of ‘health policy’. Should provision of public housing or welfare policy be considered part of health? These issues relate to a third set of questions – which actors are involved in health policy? Traditionally health policy covered the relationship between the doctor and patient, and various regulations covering these interactions. But over time questions have been raised as to whether this is sufficient to understand health, and a wider more diverse set of actors have been considered. One chapter in a primarily empirical thesis cannot hope to provide a definitive answer to these questions, but it is an important subject that practically must be addressed to an extent. Thus this chapter explains, for example: why the thesis treats social care as part of health law and policy but not housing; why more actors are studied here than merely doctors; and why development of new treatments is an important part of health policy.

An understanding of the history and scope of health law is useful to understand the findings of the thesis. In order to understand the significance of any impact the Charter has on health law and policy,

¹ Skinner, ‘From healthcare to health: an update of Norman Daniels’s approach to justice’ 2 *International Journal of Health Policy Management* 3 (2014), 151.

a reader must have at least some understanding of the state of the field. Laying out the history and scope of health law, as well its relationship to fundamental rights, contextualises the findings of the thesis and allows the reader to better understand its overall impacts.

The chapter thus contains several areas of discussion. Section 1 reiterates the overall aims of the thesis, in order to guide the definitional choices made in the chapter. Section 2 discusses the relationship between health law and fundamental rights, covering arguments made in favour of a health as a fundamental right and the extent to which the thesis will contribute to that debate. Section 3 covers the scope of the health law and policy, motivated by the analysis of section one. Section 4, again driven by the section one analysis, discusses the sources and documents that make up the health law and policy, as well as the degree to which it is limited to law. The final section of the chapter summarises the important information, as well as summarising its relevance, both overall and to the thesis.

1. The Context of the Thesis

To reiterate chapter 1, the thesis aims to test assumptions that using fundamental rights language causes rights claims to be taken more seriously. These assumptions and beliefs about the fundamental rights language in the EU Charter are held by national² and EU-level politicians³, as well as academics⁴. Similar theories appear in wider human rights literature⁵. The thesis focuses on areas in which the Charter is predicted to increase the significance of fundamental rights. Other predictions and fears about the Charter tie into the ‘loss of control’ concept studied by top-down

² Eg. the Michael Gove quote that opens the previous chapter, <https://www.scribd.com/doc/309694809/Michael-Gove-pro-Brexit-speech>, first accessed 07/10 2016.

³ Eg Viviane Reding, in http://ec.europa.eu/justice/events/assises-justice-2013/files/factsheets/fundamental_rights_en.pdf, first accessed 04/15/2016.

⁴ Eg. Iglesias Sánchez, ‘The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ’s approach to fundamental rights’ *CMLRev* 49 (2012), 1565; Rosas, Kaila, ‘L’application de la Charte des droits fondamentaux de l’Union européenne par la Cour de justice : Un premier bilan’ 16 *Il Diritto dell’Unione Europea* (2011), 28 ; O’Neill, ‘The EU and Fundamental Rights – Part 2’ 16 *Judicial Review* 4 (2011), 374.

⁵ Eg. Rawls, *The Law of Peoples* (Harvard University Press, 1999); Raz, ‘Human Rights without Foundations’ in Besson, Tasioulas, *The Philosophy of International Law* (OUP, 2010), 321; Skorupski, ‘Human Rights’ in Besson, Tasioulas, 357; Griffin, *On Human Rights* (OUP, 2008); Beitz, *The Idea of Human Rights* (OUP, 2009); Dworkin, *Justice for Hedgehogs* (Harvard, 2011), 335; Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, 2003), 56; Williams, *In the Beginning was the Deed* (Princeton, 2006), 19.

Europeanisation⁶. Many actors saw the Charter as something to be concerned about, as it could draw more powers away from a national level and towards an EU level⁷. Top-down Europeanisation, as a framework, tests some of these predictions in a specific context. Both of these sets of predictions will be discussed in more detail in chapter 3.

Secondly, the thesis is designed to assess the impact of the Charter on health policy and more specifically on health systems – an area of great political significance and subject to extensive national discussion. Health rights as fundamental rights have been frequently critiqued for potential cost implications (as discussed in section 2), so the thesis assesses the extent to which these critiques could be true of the Charter. This analysis can also test the impact of the UK's much disputed⁸ 'opt-out' - if it has any meaningful effect, one could expect differential impacts between the British and German contexts. Finally, the 'loss of control' being tested in the Europeanisation analysis also applies to health systems.

2. Understanding the Relationship between Health and Fundamental Rights

The previous chapter made clear that there are multiple areas of overlap between health policy and fundamental rights – it is one of the driving reasons behind this thesis. But the relationship between these two areas goes beyond a mere coincidental substantive overlap - there has been regular debate on whether health itself should be considered an enforceable fundamental right. These debates are discussed below. First, this chapter considers moral arguments on the right to health. This is followed by a discussion on the practical benefits of treating health as a 'fundamental' or 'human' right. After this discussion, the thesis' contribution to these debates will be laid out.

2.1 Moral Arguments for Health as a Fundamental Right

One of the key premises of this argument is that without good health, it is tricky to meaningfully

⁶ Eg. <http://www.telegraph.co.uk/news/worldnews/europe/eu/10765509/Another-EU-threat-to-national-sovereignty.html>, first accessed 02/02/2017; <http://www.telegraph.co.uk/comment/letters/10768300/EU-Charter-has-precedence-over-UK-law.html>, first accessed 15/10/2016.

⁷ Eg. <https://www.spectator.co.uk/2003/05/when-rights-are-wrong/>, first accessed 08/10/2016.

⁸ See for example Peers, 'The 'Opt-out' that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights' 12 *Human Rights Law Review* 2 (2012), 375.

exercise other fundamental rights. To take one example⁹,

‘without the adequate functioning of the various parts of our organisms that are needed for the development and exercise of the fundamental capacities, human beings would not be able to pursue a good life’

This approach is well-established in the literature, in particular with work spanning several decades being done by Norman Daniels¹⁰. The basics of health rights and fundamental rights are laid out in this analysis – basic health needs are those necessary to ‘normal species functioning and to secure fair opportunity’¹¹. A right to health can thus be seen as a specific case of equality of opportunity¹². Other moral bases for health rights as human rights stem from areas such as¹³: self-esteem¹⁴; solidarity¹⁵; capacities or capabilities¹⁶; recognition of human relationships¹⁷; promotion of a communitarian rather than an individualist view of health¹⁸; or the idea that practical realities generate a ‘cultural moral right to health’¹⁹. Others argue an inescapable relationship between health and human rights due to their corresponding impacts on one another - health policies impact human rights and

⁹ Liao, ‘Health (care) and human rights: A fundamental conditions approach’ 37 *Theoretical Medicine and Bioethics* 4 (2016), 259, 267.

¹⁰ Daniels, ‘Fair Equality of Opportunity and Decent Minimums: A Reply to Buchanan’ 12 *Philosophy and Public Affairs* 1 (1985), 106; Daniels, *Just Health: Meeting Health Needs Fairly* (CUP, 2008).

¹¹ Hassoun, ‘The Human Right to Health’ 10 *Philosophy Compass* 4 (2015), 277.

¹² Daniels, *Just Health care* (CUP, 1985); Daniels, *Just Health: meeting Health needs fairly*, *supra* note 10; Rawls, *A Theory of Justice* (Harvard University Press, 1971).

¹³ For a more detailed overview, see Rumbold, ‘Review article: the moral right to health: a survey of available conceptions’ 20 *Critical Review of International Social and Political Philosophy* 4 (2017), 508.

¹⁴ Eg. DeGrazia, ‘Right to Health Care in Self-respect and Self-esteem’ 5 *Public Affairs Quarterly* 4 (1991), 301.

¹⁵ Semplici, ‘The Importance of “Social Responsibility” in the Promotion of Health’ 14 *Medical Health Care and Philosophy* 4 (2011), 355.

¹⁶ Eg. Sen, *The Idea of Justice* (Belknap, 2009); Sen, ‘Capability and well being’ in Nussbaum, Sen, *The Quality of Life* (OUP, 1993); Nussbaum, ‘Human functioning and social justice’ 20 *Political Theory* 2 (1992), 202; Eberl, Kinney, Williams, ‘Foundation for a Natural Right to Health Care’ 36 *Journal of medicine and Philosophy* (2011), 527; Ram-Tiklin, ‘The Right to Health Care as a Right to Basic Human Functional Capabilities’ 15 *Ethical Theory and Moral Practice* 3 (2012), 337.

¹⁷ Hayden, ‘The human right to health and the struggle for recognition’ 38 *Review of International Studies* 3 (2012), 569.

¹⁸ Da Costa Leite Borges, ‘Making sense of human rights in the context of European Union health-care policy: individualist and communitarian views’ 7 *International Journal of Law in Context* 3 (2011), 335.

¹⁹ Menzel, ‘The Cultural Moral Right to a Basic Minimum of Accessible Health Care’ 21 *Kennedy Institute of Ethics Journal* 1 (2011), 79.

violations of human rights impact health²⁰.

There are many arguments against the idea of health rights as moral rights. Hassoun concisely summates these views and the overall objections to this moral right - 'some object that a human right to health is too vague, incoherent in its allocation of duties, unnecessary, expensive, or damaging'²¹, citing works by O'Neill²², Sreenivasan²³, and Powers²⁴. Despite frequent attempts to clarify²⁵, it remains exceptionally difficult to define what precisely is granted by a 'right to health', particularly in the context of stretched and limited health budgets. Comparing European national-level constitutional rights already shows variation from a 'mere obligation', to an individual right, to an 'almost unrestricted "socialist" health protection provision'²⁶. More specifically, Buchanan worries that these limited resources and variations affect the substance of the right itself – an affordable minimum would not necessarily sufficiently guarantee the right in all countries, and a higher minimum standard would surely be unaffordable²⁷, a point that has also been made about social rights in general²⁸. Yet an *affordable* minimum has thus been described as 'disappointingly unambitious'²⁹, as substantively an affordable minimum would not afford much protection.

This position is supported by research on the differential effects of a rights-based approach, which

²⁰ Mann, Gostin, Gruskin, Brennan, Lazzarini, Fineberg, 'Health and Human Rights' 1 *Health and Human Rights* 1 (1994), 6. This work also discusses arguments similar to the aforementioned work of Daniels, *supra* notes 10 and 12. Additionally see Miller, 'Uneasy Promises: Sexuality, Health, and Human Rights' 91 *American Journal of Public Health* 6 (2001), 861.

²¹ Hassoun, *supra* note 11, 278.

²² O'Neill, 'The Dark Side of Human Rights' in Christiano, Christerman, *Contemporary Debates in Political Philosophy* (Wiley-Blackwell, 2009), 17-425.

²³ Sreenivasan, 'Human Right to Health? Some Inconclusive Skepticism' 86 *Aristotelian Society Supplementary Volume 1* (2012), 239.

²⁴ Powers, 'Health Care as a Human Right: The Problem of Indeterminate Content', 6 *Jurisprudence* 1 (2015), 138.

²⁵ Eg. Greco, 'The Politics of Indeterminacy and the Right to Health' 21 *Theory, Culture, and Society* 6 (2004), 1; Kottow, 'Defining Health' 6 *Medical Hypotheses* 10 (1980), 1097; Marks, 'Normative Expansion of the Right to Health and the Proliferation of Human Rights' 49 *The George Washington International Law Review* 1 (2016), 101; Shue, *Basic Rights*, (Princeton University Press, 1996, 2nd edition).

²⁶ Den Exter, Hermans, 'Constitutional Rights to Health Care: The Consequences of Placing limits on the Right to Health Care in several Western and Eastern European Countries' 5 *European Journal of Health Law* 3 (1998), 261, 283.

²⁷ Buchanan, *The Heart of Human Rights* (OUP, 2013); Buchanan, 'The Right to a Decent Minimum of Health Care' 13 *Philosophy and Public Affairs* 1 (1984), 55.

²⁸ Eg. Vincent, *The Politics of Human Rights* (OUP, 2010), 150; Obler, 'Generosity, duty and the welfare state' 18 *Polity* 3, 408.

²⁹ O'Neill, 'The Dark side of Human Rights' 81 *International Affairs* (2005), 427; Wolff, 'The Demands of the Human Right to Health' 86 *Proceedings of the Aristotelian Society Supplement 1* (2012), 239, 222.

found that rights were dependent on a number of civil society factors between countries.³⁰ Thus the right has been described as a ‘luxury for rich states’ rather than a universal fundamental right.³¹ Sreenivasan argues that a right to health is unfeasible due to too many aspects of people’s health being socially determined.³² If wealth and education are important determinants of health, it becomes tricky for a state to ensure similar health rights for everyone due to there being too many factors beyond the state’s control. It has also been argued that focusing purely on a rights-based approach is excessively limiting. Rather, global health policy needs to focus on values more widely.³³

There are also a series of interrelated democratic objections to a right to health, for example: significant proportions of the population may legitimately reject the obligations stemming from social rights; there may be legitimate objections to the correct way to implement the obligations, even if the rights are in principle politically accepted; and political actors may object to the involvement of non-elected judges.³⁴ Some argue that an expansive right to health constitutes a specific welfare policy that not all political parties would agree with, damaging necessary constitutional neutrality.³⁵ Similarly, with disagreement between multiple legitimate rights methods of protecting health interests, it is seen by some as illegitimate to use human rights to impose one specific view, particularly if this done by a court as opposed to an elected legislature.

Like any complex contentious academic debate, a significant number of opinions exist. However, this thesis is not designed to advocate any one moral position on health rights, it is designed to test various predictions of politicians and academics. These predictions themselves stem from different sides of the debate – some are in favour of the right to health and the Charter,³⁶ others see the Charter as an unnecessary imposition.³⁷ Regardless of who is correct, the thesis is only testing the predictions as far as their practical impacts – that the Charter will increase significance of fundamental rights and consequently cause Europeanisation, as assumed by both above-mentioned groups.

It is also worth noting at this point that the Charter does not explicitly contain a right to health, merely

³⁰ Singh, Govender, Mills, ‘Health and Human Rights 2: Do Human Rights Matter to Health?’ 37 *The Lancet* 9586 (2007), 521.

³¹ Steiner, Alston, *International Human Rights in Context: Law, Politics, and Morals* (OUP, 2000), 300-305.

³² Sreenivasan, *supra* note 23.

³³ Tasioulas, Vayena, ‘Getting human rights right in global health policy’ 386 *The Lancet* 9995 (2015), 738.

³⁴ Wesson, ‘Disagreement and the Constitutionalisation of Social Rights’ 12 *Human Rights Law Review* 2 (2012), 221.

³⁵ *Ibid*, 225-226.

³⁶ See for example section 2.3.1 in chapter 3.

³⁷ See for example some of the British political opinion discussed in chapter 1.

a ‘right to preventative health care’ and a statement that ‘A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities’. However, this does not preclude practical dynamics similar to a more general ‘right to health’³⁸. There are some potential practical impacts of the thesis that overlap with the moral arguments made above. Various actors within the governmental and legislative process could be required, when applying the Charter, to balance some of the competing interests raised by Sreenivasan or O’Neill. Actors could, when applying specific health rights as fundamental rights, be required to decide upon the sort of minimum imagined by Buchanan. The thesis itself assesses some of the practical consequences of health rights as fundamental rights in the specific context of the Charter of Fundamental Rights and EU law. The potential financial implications, the understanding of which motivates the thesis, also feature in the aforementioned objections of Buchanan. The thesis will add to the moral debate in this minor sense by assessing some of the cost implications, but is more focused on providing knowledge about empirical realities to national actors.

The thesis’ examining of Europeanisation and control also plays into the moral arguments around the right to health. The thesis is studying top-down Europeanisation as it best represents any potential loss of control of policy-making. These fears of loss of control echo some democratic objections to health rights – some argue health policy should not be taken from politicians and placed in the hands of judges³⁹, a fear that could also apply to EU-level judges and officials.

2.2 Practical Impacts of Treating Health Rights as Fundamental Rights

Beyond any moral correctness of a human right to health, a position held by many of the above authors, there are practical impacts to considering health rights as human rights. Many authors justify a right to health based on these practical impacts, which I have grouped into three categories: accountability deriving from treating human rights with increased significance; using human rights as monitoring indicators; and the justiciability of rights improving individual protections.

2.2.1 Accountability

There is a normative difference between general public policy goals and something categorised as a

³⁸ Hervey, ‘The ‘Right to Health’ in European Union Law’ in Hervey, Kenner, *Economic and Social Rights Under the EU Charter of Fundamental Rights – A Legal Perspective* (Hart, 2003).

³⁹ Wesson, *supra* note 34.

‘fundamental right’ or a ‘human right’. To quote Chinkin:

‘Characterisation of a specific goal as a human right elevates it above the rank and file of competing social goals, gives it a degree of immunity from challenge and generally endows it with an air of timelessness, absoluteness, and universal validity’⁴⁰.

Looking at the international sphere, constitutionalising something as a human right implies further obligations for states, including: the obligation to fulfil a right by providing funding; the further obligation to respect rights by not undertaking certain actions; and also an obligation to protect rights from unjustified breaches by third parties⁴¹. This can also be framed as obligations ‘to respect, to protect, and to fulfil’⁴².

The point here is that a ‘fundamental or human right’ is something that comes with a set of implicit understandings and obligations, and a greater normative weight than a conventional policy goal. The argument for treating health claims as human rights stems from this greater normative weight – the idea is that creating specific implicit and explicit obligations for states means creating additional obligations, and fulfilling these obligations provides greater protections for individuals.

It follows that obligations flowing from health rights as human rights become part of the framework of basic global obligations states hold. This ‘rights-based approach’ is ‘explicitly shaped by human rights norms’ which ‘legitimize legal structures, [frame] policy processes, and [evaluate] health outcomes’⁴³, which thus also provide an additional normative justification for pre-existing health institutions⁴⁴. Granting health claims human rights status provides a normative basis for the development of structures designed to protect them – a human right is something that requires protection over and above a normal policy goal. So protection comes both from the creation of more

⁴⁰ Chinkin, ‘Health and Human Rights’ 120 *Public Health* (2006), 52.

⁴¹ Yamin, ‘Our place in the world: Conceptualizing obligations beyond borders in human rights-based approaches to health’ 12 *Health and Human Rights* 1 (2010), 6; Mok, ‘International assistance and cooperation for access to essential medicines’ 12 *Health and Human Rights* 1 (2010), 72.

⁴² Ruggie, A/HRC/8/5, 7 April 2008, UNHRC; Hervey, ‘The Right to Health in the EU Charter and the ESC’, in De Búrca, De Witte, *Social Rights in Europe* (OUP, 2005); Eide, ‘Economic, Social, and Cultural Rights as Human Rights’ in Eide, Krause, Rosas, *Economic, Social, and Cultural Rights* (Brill, 2001).

⁴³ Gable, Mason Meier, ‘Global Health Rights: Employing Human Rights to Develop and Implement the Framework Convention on Global Health’ 15 *Health and Human Rights* 1 (2013), 19.

⁴⁴ Pogge, ‘The Health Impact Fund and Its Justification by Appeal to Human Rights’ 40 *Journal of Social Philosophy* 4 (2009), 542.

specific structures to protect human rights, as well as the normative shift in state obligations. The predictions the thesis is designed to test frequently utilise this logic. Significant practical implications of this have been argued on multiple occasions, including: human rights providing a legislative stop-gap against so-called 'market fundamentalism'⁴⁵; human rights causing regulatory standards to be harmonised upwards⁴⁶; rights being used to allow marginalised groups to confront power⁴⁷; ensuring health systems achieve the highest attainable standard of health⁴⁸.

2.2.2 Monitoring Indicators

With the above-discussed normative developments leading to structural change, more detailed international monitoring mechanisms can play a role in improving health rights. International treaties provide for monitoring of progress on human rights goals⁴⁹. There are many monitoring bodies that cover health rights in the form of human rights, including: the Committee on the Rights of the Child⁵⁰; the Committee on the Elimination of All Forms of Discrimination Against Women⁵¹; and the Committee on Economic, Social and Cultural Rights⁵². In the EU monitoring is done both by the European Commission as well as the more specifically focused European Union Agency for Fundamental Rights. These bodies collect and collate information on the practical implementation of fundamental rights policies, using this information to raise awareness and to inform policy-makers⁵³.

Classification of these rights as human rights aids monitoring of health rights. Gostin argued that

⁴⁵ Schrecker, Chapman, Labonté, De Vogli, 'Advancing health equity in the global marketplace: How human rights can help' 71 *Social Science & Medicine* 8 (2010), 1520; O'Connell, 'The human right to health in an age of market hegemony', in Harrington, Stuttaford, *Global Health and Human Rights Legal and Philosophical Perspectives* (Routledge, 2010), 190.

⁴⁶ London, Schneider, 'Globalisation and health inequalities: Can a human rights paradigm create space for civil society action?' 74 *Social Science & Medicine* 1 (2012), 6.

⁴⁷ Joshi, 'Legal Empowerment and Social Accountability: Complementary Strategies Toward Rights-based Development in Health?' 99 *World Development* 160, 162

⁴⁸ Hunt, Backman, 'Health Systems and the Right to the Highest Attainable Standard of Health' 10 *Health of Human Rights* 1 (2008), 81.

⁴⁹ Crawford, 'The UN human rights treaty system: A system in crisis?' in Alston, Crawford, *The future of UN human rights treaty monitoring* (CUP, 2000).

⁵⁰ Monitoring the United Nations Convention on the Rights of the Child 1989.

⁵¹ Monitoring the Convention on the Elimination of All forms of Discrimination against Women 1979.

⁵² Monitoring the United Nations International Covenant on Economic, Social, and Cultural Rights 1966.

⁵³ See for example, <http://fra.europa.eu/en/about-fra>, first accessed 13/02/18; <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx>, first accessed 13/02/18.

‘human rights, unlike ethics, provides a mechanism for constructing claims in sufficiently precise ways that they become enforceable’⁵⁴. A right requires a certain degree of specificity for enforcement, so will bring some clarity to a general health claim. Human rights, due to being seen as something universal, have also ‘provided widely accepted tools to hold national governments accountable’. This accountability is specifically brought about using a human rights approach – international and national bodies use human rights as a framework by which to interpret existing health data on social rights, economic development, and epidemiology, as well as a range of other factors⁵⁵.

2.2.3 Specific Rights-based Litigation

The final practical impact of fixing health rights as human rights is justiciability.

‘By allowing individuals to seek impartial adjudication from a formal institution with remediation authority, litigation provides justice beyond the individual claimant, with tribunals expansively exercising their authorities to apply and consequently prescribe national health policies in response to public health threats’

This quote⁵⁶ neatly illustrates multiple ways which treating health rights as human rights can improve protection. Firstly, through individual cases. If an individual is not receiving or does not have access to a sufficient quality of healthcare, that individual is able to enforce this right against the state – particularly useful where marginalised groups may struggle to influence political processes⁵⁷. This litigation can lead to a specific remedy, ensuring their health is adequately protected. A justiciable right will undoubtedly help some individuals achieve healthcare to which they would not otherwise have had access, improving their access to healthcare. For example an individual could bring a judicial

⁵⁴ Gostin, ‘Beyond Moral Claims: A Human Rights Approach in Mental Health’ 10 *Cambridge Quarterly of Healthcare Ethics* 3 (2001), 264, 265.

⁵⁵ Meier, Kayser, Amjad, Kestenbaum, Bartram, ‘Drop by Drop: Examining the practice of developing human rights indicators to facilitate accountability for the human right to water and sanitation’ 6 *Journal of Human Rights Practice*, 159; O’Hare, Delan Devakumar, Allen, ‘Using international human rights law to improve child health in low-income countries : a framework for healthcare professionals’ 16 *BMC International Health and Human Rights* (2016), 11; Skempes, Bickenbach, ‘Developing human rights based indicators country monitoring for rehabilitation services and programmes for people with disabilities: a study protocol’ 15 *BMC International Health and Human Rights* 1 (2015), 25; Backman, Hunt, Khosla, Jaramillo-Strouss, Fikre, Rumble, Pevalin, Acurio Páez, Armijos Pineda, Frisancho, Tarco, Motlagh, Farcasanu, Vladescu, ‘Health systems and the right to health: an assessment of 194 countries’, 372 *Lancet* (2008), 2047; McGrogan, ‘Human Rights Indicators and the Sovereignty of Technique’ 27 *European Journal of International Law* 2 (2016), 385.

⁵⁶ Byrne, ‘Enforcing the right to health: Innovative lessons from Domestic Courts’ in Clapham, Robinson, Mahon, Jerbi, *Realizing the Right to Health* (Ruffer and Rub, 2009); Gable, Mason Meier, *supra* note 43, 20.

⁵⁷ Gearty, Mantouvalou, *Debating Social Rights* (Hart, 2011), 116.

action before the ECJ, or more likely a case could be referred by a national court.

The wider societal effects of litigation are the second method through which a human right to health can influence change. Firstly, the threat of litigation is something that drives governments to action.⁵⁸ If governments fear expensive and potentially politically embarrassing litigation, they are likely to ensure they meet the standards required by the human right, as applied by the judiciary. This dynamic is further elaborated in the following chapter. Furthermore, precedent-setting judgments, especially those which draw on jurisprudence from a number of courts, have potential to bring about systemic changes. By setting standards that apply across the system, the judiciary is able to enforce health rights system-wide – empirically demonstrated to improve outcomes in some studies.⁵⁹

2.3 Impacts of the Thesis on the Debate on Health Rights

As mentioned in previous sections, the thesis will be testing the practical impact of the health rights in the Charter, providing some more evidence to the general debate on health rights. Some of the specific expectations being tested (discussed in greater detail in chapter 3) cover the various practical arguments mentioned above.

Designating something a ‘human right’ adds a greater normative weight to a specific policy goal (see above section 2.2.1). These arguments match several of the predictions and arguments the thesis is testing, for example: the Charter’s preamble stating that it will strengthen rights by making them more visible; arguments from human rights academics on the basics of human rights⁶⁰; or statements from members of the EU judicial system that the Charter was a ‘reflection of the common denominator of legal values paramount in Member States’⁶¹.

Here the thesis is testing some of the practical arguments for a right to health, in the specific context

⁵⁸ Börzel, Dudziak, Hofmann, Panke, Sprungk, ‘Why Member States do (not) comply with European law’ CES Working Paper 148 (Harvard, 2007).

⁵⁹ Eg. Hogerzeil, ‘Essential medicines and human rights: what can they learn from each other?’ 84 *Bulletin of the World Health Organisation* 5 (2006), 371; Brinks, Gauri, ‘A new Policy Landscape: legalizing social and economic rights in the developing world’ in Gauri, Brinks, *Courting Social Justice: Judicial Enforcement of social and economic rights in the developing world* (Cambridge, 2008); Shrecker, Chapman, Labonté, De Vogli, *supra* note 45.

⁶⁰ Eg. Dworkin, *Justice for Hedgehogs*, (Harvard, 2011), discussed in section 2.1 of chapter 3.

⁶¹ Opinion of AG Colomer in Case C-208/00, *Überseering*, ECLI:EU:C:2001:655.

of EU law and the Charter. Any findings will thus add to the debate on this issue, an impact that is extended by the wider analysis of the Charter's impact on health systems providing new evidence in this area. If the thesis can demonstrate notable impacts on health systems, potentially in a way that increases protection of a right to health, it would reinforce calls for such a right to be codified elsewhere.

The mechanisms of Europeanisation, as will be further outlined in chapter 3, resemble the increased justiciability and monitoring indicators discussed in sections 2.2.2 and 2.2.3 above, adding to the debate on both areas. Again, if the thesis finds Europeanisation (in this context the Charter leading to policy change), due to this resemblance it will add empirical evidence to those particular arguments in favour of health as a fundamental right.

3. Defining Health Law and Policy

The area of health law and policy is not one with clear established boundaries. But in order to understand the effects the Charter has had on a specific policy area, the area of study needs to be sufficiently clearly defined. This task also needs to be done with regard to the thesis' overall purpose. The following section turns to that task.

3.1 Scope of Health Law and Policy

Initially, one of the most practical and obvious definitions of health law and policy is the law and policy concerning 'health'. This definition has a superficial appeal, but does raise the obvious question – what is health?

Traditionally in the literature, definitions of health cover two models, a 'social model' or an 'engineering and mechanical' model.⁶² The 'engineering and mechanical' model concerns itself with 'fixing' what goes wrong with the health and wellbeing of humans, i.e. solving imminent medical issues.⁶³ The 'social model' takes a considerably broader approach concerning itself with, for example, achieving a 'state of complete physical, mental and social well-being and not merely the absence of infirmity'.⁶⁴ The 'social model', in encompassing a considerably broader definition of health, opens up

⁶² Montgomery, *Health Care Law* (Oxford, 2003, 2nd edition), 2-3.

⁶³ Ibid.

⁶⁴ Constitution of the World Health Organization 1946.

the scope of 'health law' to something potentially massive in size, including such varied topics as: laws on the quality of food; environmental protection laws; provision of public housing; and welfare benefits⁶⁵.

For a substantial period of time, the focus of legal practice and legal academics remained strongly on the doctor, even despite a wider definition of health⁶⁶. With doctors as the primary providers and 'gatekeepers' of health, the majority of cases stemmed from the doctor-patient interaction, including tort and criminal law⁶⁷, something that was echoed by academic literature on the subject⁶⁸.

Over time, this narrow definition was challenged by academics, and consequently in some quarters expanded to refer to 'health care law'⁶⁹. This definition encompasses not just the doctor-patient relationship, but also 'that of the non-medical health care professions, the administration of health services and the law's role in maintaining public health'⁷⁰. Generally a composite of principles deriving from other legal disciplines⁷¹, health care law expanded to include many more aspects of health care services – going beyond the traditional domains of medicine to areas such as non-essential cosmetic surgeries, and 'over-the-counter' medicine less heavily controlled by health care professionals and health care teams⁷². Further to this, health care law can encompass public health legislation, as a method of protecting the health of the population.

Moving beyond this, the finances and resources of health systems have also been included within health law. Buijsen, for instance, argued that health law must include: the law of healthcare provision; the law of healthcare finance; and the law of health insurance⁷³.

When looking at which definitions will be used by this thesis, and thus which areas of 'health care law', 'medical law', or 'health law' the thesis will focus on, the purpose of the thesis and importance of the

⁶⁵ Montgomery, *supra* note 62.

⁶⁶ Hervey, McHale, *European Union Health Law: Themes and Implications* (CUP, 2015), 15.

⁶⁷ *Ibid*, 13-14.

⁶⁸ Eg. Kennedy, Grubb, *Medical Law: Text with Materials* (Butterworths, 1994, 2nd Edition); Morgan, *Issues in Medical law and Ethics*, (Butterworths, 2000).

⁶⁹ Montgomery, *supra* note 62; McHale, Fox, *Healthcare Law: Texts and Materials* (Sweet and Maxwell, 2007, 2nd Edition).

⁷⁰ Montgomery, *supra* note 62, ch. 1.

⁷¹ Hervey, McHale, *supra* note 66, 13-17.

⁷² *Ibid*, 18-19.

⁷³ Buijsen, 'The concept of Health law', paper delivered at the 14th World Health Law Congress, Maastricht, (2002).

research questions must be considered. The focus of the research is top-down Europeanisation, and factors which influence and control the actions of Member States. This presupposition, built upon my initial work on Europeanisation (see chapter 3), leads to several specific conclusions about the definitions used and the areas studied in this thesis.

In order to better understand the way top-down control has affected Member States, the thesis needs to go beyond narrower definitions of 'medical law'. Narrowing the scope of the thesis to primarily focusing on the doctor-patient relationship would exclude many of the interactions governments have with the healthcare system, as well as exclude many areas in which the Charter could have an impact – thus not a suitable choice for the thesis. Similarly limiting would be a focus purely on public health. Whilst public health does touch more clearly upon the actions and responses of Member States to EU-level stimuli, it is still not the area of health law that most focuses upon the actions of Member State governments. Therefore, not only is the broader definition of 'health law' outlined above required, it is necessary to focus most clearly on the aspects of health law dealing with the financing of health law. The focus on top-down Europeanisation also justifies a focus on financing – it is this area where control matters most. Overall it is important to note that the thesis focuses on health law and policy concerning health systems. The health system more generally encompasses the above areas, without the limitations of focusing on the doctor-patient relationship.

For several reasons, the thesis will focus on an engineering model of health as opposed to the wider social model. Firstly, because a broader definition of health could cover multiple different areas of government policy across multiple different departments. This spread could cause the thesis to become unfocused, and would also draw the thesis into other policy areas beyond the healthcare system. Secondly, the national fears around control of health policy refer to health systems and health policy more directly⁷⁴, as opposed to other areas of policy that could potentially impact health. Thus if seeking to answer these questions, these predictions should be its focus.

Health law and policy thus includes social care, as part of this focus on systems. Montgomery's classic text studies the law surrounding the healthcare system as a whole, including many aspects which overlap with social care, including care in the community⁷⁵, and mental health⁷⁶. As early as 2000, it

⁷⁴ See for example the discussions of the NHS during the Brexit referendum.

⁷⁵ Montgomery, *supra* note 62, 59.

⁷⁶ *Ibid*, 311.

was suggested that health law and social care law would become one integrated area of law⁷⁷, and they are frequently considered together as part of legislation⁷⁸. Additionally, when the practicalities are being considered, the effects on health and social care can often be jointly considered⁷⁹.

Secondly, prolonged social care has multiple potential fundamental rights implications. Individuals who require social care generally have to cede a degree of personal autonomy to either the state or another individual, be it a family member or medical professional. For these reasons, disabled groups have emphasised the role of social rights in exercising civil and political rights in these circumstances⁸⁰. Social care, when implemented, can raise questions of liberty, dignity, and autonomy yet it can also be vital for the realisation of other fundamental rights by providing the base level of functionality required to enjoy them, similar to the right to health itself⁸¹. Thus social care plays into two previously mentioned aspects of health as a fundamental right – health policy intrinsically impacting human rights⁸², and health providing vital equality of opportunity⁸³.

3.2 Purpose of the Thesis and Substantive Areas

Having placed my research on one side of some of the broader divides within health law, the following section will analyse more precisely which substantive areas of health law the thesis will study. Some of the purpose of and benefits from the thesis comes from understanding the financial implications the Charter could have on the actions of Member States and its effects on their healthcare systems, as well as testing the accuracy of various human rights-related predictions.

⁷⁷ Brazier, Glover-Thomas, 'Does Medical Law have a Future?', in Hayton, *Law's Futures* (Hart, 2000).

⁷⁸ Eg. Health and Social Care Act 2012.

⁷⁹ Spencer-Lane, 'Modernising the regulation of health and social care professionals: the Law Commissions' final report and draft Bill' 16 *Journal of Adult Protection* 6 (2014), 411; Law, Saunders, 'Engaging consumer voices in health care policy: lessons for social work practice' 41 *Health and Social Work* 1 (2016), 9; Reeves, Baker, 'Investigating relationships between health need, primary care and social care using routine statistics' 10 *Health and Place* 2 (2004), 129.

⁸⁰ Boyle, 'Social policy for people with dementia in England: promoting human rights?' 18 *Health and Social Care in the Community* 5 (2010), 511; Arnardóttir, 'rights of persons with disabilities in the context of healthcare', in Toebes, Hartlev, Hendricks, Herrmann, *Health and Human Rights in Europe* (Intersentia, 2012), 249.

⁸¹ Commission for Social Care Inspection, Annual Report and Accounts 2008-09, Presented to Parliament by the Care Quality Commission and by the Comptroller and Auditor General in pursuance of the Health and Social Care Act 2008 (Commencement No. 9, Consequential Amendments and Transitory, Transitional and Saving Provisions) Order 2009, 20 July 2009.

⁸² Mann, Gostin, Gruskin, Brennan, Lazzarini, Fineberg, *supra* note 20; Miller, *supra* note 20.

⁸³ Daniels, *supra* note 10; Nunes, Nunes, Rego, 'Health care as a universal right' 25 *Journal of Public Health* 1 (2017), 1.

What determines the financial cost of healthcare in Member States? Firstly, the thesis needs to look at who pays for healthcare, including: Member State governments, who spend money on offering services; and individuals, who contribute through both taxes and insurance payments, depending on the system in question. Secondly, the thesis need to look at what areas of law cover the sort of financial implications discussed, including: legislation; contractual relationships between individuals and other bodies, such as doctors or insurers; and broader non-contractual agreements between different bodies. Finally, it is worth analysing what covers the sort of care that is available, be it decisions on the 'basket of care' being offered or the rules on who can access healthcare and in which circumstances⁸⁴.

Beyond the reasons given above and the subject areas' potential effects on the financial cost of healthcare in Member States, each subject area has potential implications for fundamental rights, further justifying its inclusion. Finally, the areas selected should be those most relevant to the question of Europeanisation – those where national control would be most significant, and whose interdisciplinary nature reflects the interdisciplinary nature of Europeanisation.

With these considerations in mind, the substantive areas of health law and policy investigated in this thesis are as follows:

1. Financing of health care systems. Laws covering health care financing contain budgetary implications for Member States encompassing all types of payment mentioned in the previous section, including both rules on healthcare access and factors which affect the amounts individuals have to pay for private health insurance. The easier or harder it is to take up private insurance, the more or less likely an individual is to rely upon state provision, thus affecting costs for states. For example, something affecting health insurance premiums or the take-up of private health care would be included within this substantive area, as the fewer people take up private healthcare, the more money the state has to pay. Because of this, past research into the impacts of EU law in this area has included voluntary insurance⁸⁵. The number of people who have access to healthcare, and under which conditions, heavily influences costs, particularly in the EU context in which EU law influences the

⁸⁴ Eg. Decisions and Directives of the Federal Joint Committee in Germany can be found here <https://www.g-ba.de/informationen/>, first accessed on 20/01/2018; and the equivalent for the NHS is here <https://www.nhs.uk/service-search>, first accessed 20/01/2018.

⁸⁵ Nistor, *Public Services and the European Union: Healthcare, health insurance, and Education Services* (Asser, 2011).

extent to which migrants can access healthcare.

Beyond the financing of healthcare being obviously connected to the thesis' purpose, health care financing can have human rights implications. Almost any health care system will involve a budget, with decisions being made to deny treatment or specific types of treatment on financial grounds. Decisions to deny treatment raise rights questions, as it is arguable a right to healthcare access is breached by a denial or limitation of treatment, discussed both in academic literature on the subject⁸⁶ as well as constitutional jurisprudence⁸⁷.

2. Public health. Laws, rules, and public health practices fall within the focus of the thesis to the extent to which they could potentially have reasonably significant impacts on finances. For example, blood donation laws are part of public health, and can be considered as part of this thesis in that altering the supplies of blood affects health and the financial calculations of Member States.

The origins of human rights are public, and it is this public nature of human rights accountability that leads human rights to interact with public health⁸⁸. The objective of health *is* public health when applied to the general public as a whole. For example, the International Covenant on Economic, Social, and Cultural Rights establishes the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. A right of everyone to a high standard of health translates to an objective of high public health. Additionally, various fundamental rights documents acknowledge 'protection of public health' as a legitimate objective, indicating an overlap between public health and human rights. Health rights existing at a population level gives the issue of public health a suitable human rights dimension, giving it further reason to be included.

3. Regulation of healthcare. The thesis will also be looking at the regulation of healthcare, including: liability for institutions; professional liability; regulation of new treatments; and regulation of premises. The multi-step regulation of treatments and liability are demonstrably part of the narrower

⁸⁶ Eg. Liao, *supra* note 9; D'Oronzio, 'A Human Right to Healthcare Access: Returning to the Origins of the Patients' Rights Movement' 10 *Cambridge Quarterly of Healthcare Ethics* 3 (2001), 285.

⁸⁷ Eg. *Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC)*; see Ngwena, 'Commentary: Access to Health Care Services as a Justiciable Socio-Economic Right under the South African Constitution' 6 *Medical Law International* (2003), 13, 16-23; Den Exter, Hermans, *supra* note 26.

⁸⁸ Gruskin, Tarantola, 'Health and Human Rights' in Detels, McEwen, Beaglehole, Tanaka, *Oxford Textbook of Public Health* (OUP, 2002, 4th Edition); Editorial, 'Human Rights and Ethics in Public Health' 96 *American Journal of Public Health* 11 (2006), 1903.

definition of ‘medical law’, with liability in particular also forming a significant part of health law for some time⁸⁹. As these regulations can build up substantial costs and affect available treatments, the area is relevant to this thesis as it limits and affects the actions of Member States. The number and type of treatments available affects the finances of health systems -it affects the treatments that are available to offer, which affects the cost of treatments as well as the health of the citizens. This area also includes factors which affect the researching and development of new treatments.

Researching new treatments is often something that can raise rights issues. Experimentation itself can raise issues of human dignity and autonomy of subjects, and uses of health data frequently raise questions of privacy. This is particularly true when considering the development of new health treatments – for example use of human cells in various stages of development can raise controversial issues of human dignity. The potential for new treatments to trigger rights questions adds a fundamental rights element to this area.

4. Social care – moving beyond the usual application of health care is also important when considering the budgetary implications for Member States. Prolonged social care is one of the more expensive and complex areas in which states have to offer care, so any effects the Charter has in this area could have notable budgetary effects. Given this significance, it is important for this thesis to include social care, and the effects of EU law on social care have been studied previously⁹⁰. Further reasons for including social care were discussed in the previous section.

4. Content and Sources of Health Law and Policy

When defining health law and policy, it is also necessary to define the extent to which it is solely law - particularly true when studying such a contested field.

This debate already existed within health law and pre-cursor sub-specialisations. In Montgomery’s classic text, he outlines that ‘the concept of ‘law’ used here is broader than the first [traditional] view would allow’⁹¹. Montgomery includes areas traditionally defined as law in the UK, such as court judgments and primary and secondary legislation. Notably however, it also includes ‘professional law’

⁸⁹ Hervey, Mchale, *supra* note 66, 22.

⁹⁰ Eg. Hervey, Stark, Dawson, Fernandez, Matosevic, McDaid, ‘Long-term care for older people and EU law: the position in England and Scotland’ 34 *Journal of Social Welfare and Family Law* 1 (2012), 105.

⁹¹ Montgomery, *supra* note 62, 5.

– rules and regulations that professionals use to regulate their own actions free from the imperative of statutory influence. Further to the point being made here, Montgomery includes what he calls ‘quasi-law’⁹². – codes of practice from relevant bodies empowered by statute, or explanatory documents laying out the principles under which specific bodies will operate. This expansion of what is deemed to be ‘law’ illustrates that a broader conception of law and legal elements has long formed the object of study for health law-related research⁹³, giving this thesis the option to include multiple different sources.

Again, given the thesis is studying the potentially wide-ranging effects of a new EU-level document, the significance of using a broad definition of relevant ‘law’ goes beyond mere congruence with existing health law – the choice of a broad definition allows us to analyse and assess a wide range of consequences, and allows the greatest possible analysis of the specific policy impacts of the Charter. Additionally, when looking at the substantive areas discussed in the previous section, the substantive areas themselves involve what Montgomery calls ‘quasi-law’. Therefore, in order to understand change in these substantive areas, the thesis needs to use this traditionally broad understanding of law used in health law. Health policy is similarly broad, having been defined as being ‘concerned with all aspects of provision of health care – both publicly and privately financed- ranging from regulations of health professionals and producers of medical products such as pharmaceuticals, individual entitlements to provision of medical treatment, and health promotion generally’⁹⁴.

Additionally, the overall aims and benefits of the thesis need to be taken into account. Firstly, given that the predictions being tested come from political actors and in many cases concern areas beyond law, the thesis takes a broad approach to the health law and policy to encompass these areas. Secondly, as discussed above, an assessment of the impact of the Charter should encompass the full range of potentially affected areas of law and policy, so a broad approach is again justified. Finally, Europeanisation is an interdisciplinary phenomenon, involving both politics and law, so again the thesis needs to take a broad approach to the subject matter.

Based on the above considerations this thesis, in its empirical work, analyses multiple different sources of health law and policy, which together provide a framework which shapes and regulates health

⁹² Montgomery, *ibid*, 12.

⁹³ Eg. Senden, *Soft Law in European Community Law* (Hart, 2004); Borrás, Jacobsen, ‘The Open Method of Co-ordination and new governance patterns in the EU’ 11 *Journal of European Public Policy* 2 (2004), 185.

⁹⁴ Hervey, *European Social Law and Policy* (Longman, 1998), 135.

systems. The sources studied are:

1. Judicial decisions on the above-outlined substantive areas. In that policy can be determined and altered by the outcome of judicial decisions, these decisions are an important area of study.
2. Judicial reasoning. As part of the above, judicial reasoning can provide evidence of Europeanisation beyond the change brought about by the substantive outcome of the judgment. If judges are considering the Charter as part of their reasoning, this constitutes evidence of Europeanisation even if the outcome remains similar to a situation without Europeanisation.
3. Statutes laid down on the above-outlined substantive areas.
4. Secondary legislation and administrative decisions on the above-outlined substantive areas.
5. Policy change on the above-outlined substantive areas, as implemented by statutory authority, secondary legislation, or administrative decision.
6. Policy changes as implemented by bodies empowered by statute to regulate content included in the substantive areas. For example, the Intellectual Property Office (UK) determining what research is now patentable.
7. Statements from relevant governmental and non-governmental bodies describing current policy, including discussions in the legislature.

Other sources are used to analyse other stages of the Europeanisation model, and will be discussed in their relevant empirical chapters. Secondary legal literature will also be used throughout, in order to clarify the law and better illustrate any changes that may have taken place.

5. Conclusions

The main function of the chapter was to clarify the scope and boundaries of the thesis, as well as providing some context for the overall findings. However, beyond this, it is worth further considering the consequences of the choices made in this chapter. These choices have implications for the broader significance of thesis' findings.

The thesis stands on the practical side of the debate on health rights. Without being unduly dismissive of the moral arguments, the thesis does not directly engage with these questions. As a piece of work the analysis can be read and understood equally well regardless of one's opinions on whether these

rights constitute a moral necessity. This neutral moral stance has several consequences, specifically on how to understand the conclusions reached elsewhere in the thesis.

Firstly, the thesis holds a neutral position on the practical consequences of the health rights in the Charter. Therefore, regardless of the extent to which Europeanisation is found by the thesis, no judgment is made on whether this is an appropriate consequence of EU fundamental rights protection. Secondly, whilst the conclusions of various chapters may discuss possible courses of action for governmental or non-governmental actors based on the findings and effects of the Charter, the thesis does not take a particular moral position on whether these actions would be advisable or worth pursuing.

There is also notable overlap between the mechanisms involved in Europeanisation (discussed in more detail in the next chapter), and mechanisms involved in the right to health. For example, one of the core mechanisms behind the idea of a 'right to health' is that of causing certain rights and claims to be treated with greater significance than mere policy goals, thus altering the expectations of actors regarding that right. This mechanism of 'altered expectations' is crucial to Europeanisation, specifically explained by theories of sociological institutionalism (discussed in section 3.2 of the following chapter), in which actors treat changes in law at a European level as something they themselves should consider, thus changing their own expectations and consequently actions.

There are several potential consequences to this overlap that are worthy of discussion. Firstly, it adds some additional evidence to the predictions this thesis is setting out to test – where academics have expectations based on both the Charter and these mechanisms, these can be bolstered by the fact that similar mechanisms affect health rights elsewhere. Secondly, the overlap is relevant in so far as it raises potential questions for future research, as many of the mechanics of Europeanisation apply to other international institutions. If the thesis finds Europeanisation relying on the same mechanisms that ground arguments in favour of health rights, future research could look at the effects of other international organisations which propagate a right to health, using the same mechanisms.

Whilst these consequences are noteworthy, they must be linked back into the specific focus of this thesis. The chapter's function is to set the scope of the thesis, and to place the thesis in the context of wider health law. The effects with regards to thesis are discussed above. The questions posed in the introduction cover any broader developments. Health policy is not treated in its broadest sense of encompassing a wide variety of subject areas, but rather as the specific goal of health systems. The

surrounding law goes beyond the doctor-patient relationship to other systemic considerations, for example health insurance and financing. This choice elucidates how the thesis fits into the broader literature on health law – as something that studies health as a broader policy area than medical law, but still a fixed policy area as opposed to an open-ended consideration affecting almost all governance.

Chapter 3 – Fundamental Rights and Europeanisation

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

Preamble, Charter of Fundamental Rights of the European Union

What does this mean? This phrase, found in the preamble of the EU's Charter of Fundamental Rights, at least purports to state the goal of the document. Preambles to international fundamental rights documents typically contain grand declarative language. But what is the meaning of such language? This chapter sets out to translate this kind of statement into those practical expectations that are germane for the research agenda of the thesis. How might this 'strengthening' of fundamental rights' protection manifest itself, if at all? How does 'strengthening' of fundamental rights protection relate to Europeanisation?

Many actors and academics in this and the previous two chapters expect a fundamental rights document to 'increase significance'. This chapter analyses these predictions and lays out the practical impacts one could expect from such 'increased significance'. The latter sections of the chapter lay out the intricacies and interactions of Europeanisation, and explain why Europeanisation follows on from the preamble's goal of 'strengthened' fundamental rights. The chapter provides in-depth analysis of the sort of increased significance predicted in the Charter's preamble. Finally the chapter sets up the empirical analysis testing those predictions by explaining the causal mechanisms required for process-tracing.

To that end, the chapter proceeds in four main sections. Section 1 lays out the sources of EU fundamental rights law as it existed before the Charter, in order to contextualise its expected effects. Section 2 lays out the expectations of increased significance, coming from several sources: human rights theory; institutionalist theory; and the predictions of political, academic, and judicial actors. Section 2 also uses the position outlined in section 1 to offer more concrete predictions about what constitutes 'increased significance' - necessary to have something against which to measure empirical events. Section 3 lays out the step-by-step Europeanisation process, both the theory and the specific causal mechanism required for process-tracing. Finally, the chapter concludes by discussing some of the wider significance of the work done in the preceding sections.

1. Sources of EU Law

In order to understand the significance of the Charter, the creation of a new and now binding form of EU Law, one must first analyse and understand the sources of EU fundamental rights law. Once this baseline is established, one can then understand any future effects the Charter has in comparison.

Fundamental rights have a lengthy history within the EU, dating back some decades. As the initial founding principles of the EU legal system were being developed, concepts such as the supremacy¹ and direct effect² of EU law caused concerns that the (then) EC was beginning to impinge upon fundamental rights without redress³. In response to these criticisms⁴, the ECJ began to incorporate fundamental rights into EU law beginning with the case of *Internationale Handelsgesellschaft*⁵, stating that ‘respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court of Justice’⁶. Alternatively, the ECJ merely began to reflect in their jurisprudence human rights already inherent in EC law, with the case describing an ‘analogous guarantee inherent in Community law’⁷. These cases established fundamental rights as part of EU law, with subsequent cases elaborating on the sources and substantive content of these ‘general principles’.

The first source of human rights identified by the ECJ as ‘general principles of EC law’ was national constitutional traditions⁸, i.e. the rights given specifically strong protections in various national constitutions. Where there is a consensus around a right within Member States, this right could be included within the list of fundamental rights recognised by EU law⁹, with Advocates General

¹ Case 2/62 *Van Gend en Loos*, ECLI:EU:C:1963:1.

² Case C-6/64, *Costa v ENEL*, ECLI:EU:C:1964:66.

³ For a early brief history, see Dausies, ‘The Protection of Fundamental Rights in the Community Legal Order’ 10 *ELRev* (1985), 396; Coppel, O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’ 12 *Legal Studies* 2 (1992), 227; Weiler, Lockhart, ‘“Taking Rights Seriously” Seriously – the European Court and its Fundamental Rights Jurisprudence’ 32 *CML Rev* 2 (1995), 579.

⁴ See for example Dehousse, ‘Report on the Supremacy of EC Law over National Law of the Member States’, Eur Parl Doc 43 (1965-66) [1965] JO (2923) 14.

⁵ Case 11/70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.

⁶ Case 29/69, *Stauder v City of Ulm*, ECLI:EU:C:1969:57; *ibid*, para. 4.

⁷ *Internationale Handelsgesellschaft*, *supra* note 5, para. 4.

⁸ Case 4/73, *Nold KG v Commission*, ECLI:EU:C:1974:51; *Internationale Handelsgesellschaft*, *supra* note 5.

⁹ The extent to which a right must be common amongst member states is disputed, with different opinions coming from various judicial sources, including: the Court of First Instance giving their opinion on the matter in Case T-112/98,

occasionally conducting surveys of national provisions and the Court occasionally citing specific pieces of national constitutions¹⁰.

The ECJ also developed (or recognised) several other sources over time, with EU-level courts occasionally drawing inspiration from various international human rights instruments including: the European Social Charter¹¹ and ILO conventions¹²; the ICCPR and Council of Europe human rights instruments¹³; and human rights norms stemming from customary international law and the UN Charter¹⁴. The ECHR has taken on a ‘special significance’¹⁵ as a source of EU law, with multiple individual rights being incorporated into EU law, including: the right to judicial process¹⁶; rights against sex discrimination¹⁷; and the right to privacy¹⁸. Indeed, the ECHR was given special significance in the Treaty Article which now lays out the basics of EU fundamental rights, with the EU to accede to the ECHR in due course¹⁹.

Most important to the present inquiry is the idea of ‘general principles’ of EU law. Both the ECHR and wider human rights contribute to these general principles, whose specific effects will be laid out in the following section. It is these general fundamental rights principles that the Charter is expected to consolidate - or build upon. In order to understand the Charter’s effects on fundamental rights one needs to understand the pre-existing effects of these sources of EU fundamental rights law, and how the Charter might add to them.

Mannesmannröhren-werke v Commission, ECLI:EU:T:2001:61; AG Warner giving his opinion in Case 155/79, *A, M, and S Europe Ltd*, ECLI:EU:C:1982:17; and the ECJ in Case C-550/07, *Akzo Nobel Chemicals v Commission*, ECLI:EU:C:2010:512.

¹⁰ Craig, De Búrca, *EU Law Text, Cases, and Materials* (OUP, 2015, 6th edition), 388.

¹¹ Case 149/77, *Defrenne v Sabena*, ECLI:EU:C:1978:130.

¹² *Ibid.*

¹³ Case C-540/03, *European Parliament v Council*, ECLI:EU:C:2006:429.

¹⁴ Case T-315/01 *Kadi v Council and Commission*, ECLI:EU:T:2005:332.

¹⁵ Eg. Case C-260/89, *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis and Aotirios Kouvelas (ERT)*, ECLI:EU:C:1991:254; Opinion 2/94 on *Accession by the Community to the ECHR*, ECLI:EU:C:1996:140.

¹⁶ Case C-424/99, *Commission v Austria*, ECLI:EU:C:2001:642.

¹⁷ Case C-13/94 *P & S v Cornwall County Council*, ECLI:EU:C:1996:170; Case C-185/97, *Coote v Granada Hospitality*, ECLI:EU:C:1998:424.

¹⁸ Cases C-465/00, 138 and 139/01, *Rechnungshof v Österreicher Rundfunk*, ECLI:EU:C:2003:294.

¹⁹ Consolidated Version of the Treaty on European Union [2012] OJ C 326/01 (TEU), Article 6(2).

1.1 What Does it Mean to be a Source of EU Fundamental rights Law?

When looking at the effects of these sources, the effects of ‘general principles’ of EU law need to be established. As pre-Charter EU fundamental rights law exists as part of these principles, it is against this baseline the Charter’s effects must be measured in order to analyse any change.

Lenaerts and Gutiérrez-Fons laid out the various functions of general principles within EU law. This classification is of some significance to the overall theory explained in section 2 below, so is worthy of full quotation²⁰.

‘General principles of EU law fulfil a triple function²¹. Firstly, they enable the European Court of Justice to fill normative gaps left either by the authors of the Treaties or by the EU legislature. The “gap-filling” function of general principles thus ensures the autonomy and coherence of the EU legal system. Secondly, general principles serve as an aid to interpretation, since both EU law and national law falling within the scope of EU law must be interpreted in light of the general principles. Finally, they may be relied upon as grounds for judicial review. EU legislation in breach of a general principle is to be held void and national law falling within the scope of EU law that contravenes a general principle must be set aside’²².

Here general principles and thus fundamental rights perform three functions; a normative contribution to EU law, ensuring certain significant normative values are sufficiently protected where they have been neglected by legislators; an aid for interpreting EU law, interpreting various acts and legislation in line with fundamental rights; and a grounds upon which to challenge EU law to ensure compliance with fundamental rights.

EU law contains some limits on the application of these general principles. They only apply to Member States when they are applying²³, implementing²⁴, or derogating from EU law²⁵. Article 51 of the

²⁰ Lenaerts, Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ 47 *CMLRev* 6 (2010), 1629, 1629.

²¹ See e.g. Bernitz, Nergelius, *General Principles of European Community Law*, European Monograph 25, (Kluwer, 2000, 2nd Edition); Tridimas, *The General Principles of EU Law*, (OUP, 2006, 2nd edition); Groussot, *General Principles of Community Law* (European Law Publishing, 2006); Bernitz, Nergelius, Cardner, *General Principles of EC Law in a Process of Development*, European Monograph 62 (Kluwer, 2008).

²² These last two functions are grounded in the constitutional status of general principles in the hierarchy of norms. See Case C-101/08, *Audiolux*, ECLI:EU:C:2009:626, para. 63; and Case C-174/08, *NCC Construction Danmark*, ECLI:EU:C:2009:669, para. 42.

²³ Case C-36/75, *Rutti*, ECLI:EU:C:1975:137.

²⁴ Case 5/88 *Wachauf*, ECLI:EU:C:1989:321.

²⁵ Case C-260/89, *ERT*, *supra* note 15.

Charter.²⁶ addresses its provisions towards EU institutions, and to Member States only when ‘implementing’ EU law – seemingly a retrenchment from EU fundamental rights’ previous broader application. However, this provision was interpreted in *Åkerberg Fransson*.²⁷ to create a similar scope for the Charter as previously existed for general principles of EU law.

2. The Increased Significance of Fundamental Rights

The main hypothesis of this thesis is that adoption of the Charter will have increased the significance of fundamental rights within EU law. This is supported by: human rights theory; institutionalist analysis commonly used in studying the EU; and the expectations of various actors surrounding the Charter-creation process.

2.1. Human Rights Literature

Various authors have categorised ‘human rights’ differently in their academic work. Some authors have argued that human rights are only those rights which trump national goals and indeed national sovereignty.²⁸ (most often used in the context of international law and interventions). Other authors have focused on the substantive content of human rights, arguing that it is the substantive content of certain claims that make them sufficiently important to qualify as ‘human rights’.²⁹ Dworkin and others have argued that human beings have a right to be treated ‘as a human being whose dignity fundamentally matters’³⁰, which means rights are defined negatively – violations which offend this fundamental principle of dignity constitute human rights violations. Human rights can also be considered ‘minimum standards’ – base protections required to live, and so rights which need to be protected from state power.³¹

No matter the chosen conception of human rights, if a right is included within a particular conception it is granted greater significance, for example: calling something a ‘human right’ implies it is so

²⁶ Charter of Fundamental Rights of the European Union [2012] OJ 326/391, Article 51.

²⁷ Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.

²⁸ Eg. Rawls, *The Law of Peoples* (Harvard University Press, 1999); Raz, ‘Human Rights without Foundations’ in Besson, Tasioulas, *The Philosophy of International Law* (OUP, 2010), 321; Skorupski, ‘Human Rights’ in Besson, Tasioulas, 357.

²⁹ Eg. Griffin, *On Human Rights* (OUP, 2008); Beitz, *The Idea of Human Rights* (OUP, 2009).

³⁰ Eg. Dworkin, *Justice for Hedgehogs* (Harvard, 2011), 335.

³¹ Eg. Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, 2003), 56; Williams, *In the Beginning was the Deed* (Princeton, 2006), 19.

significant as to trump national sovereignty; calling something a human right is to imply its substantive content is greater and more significant than other rights; calling something a human right is to imply that its violation violates the basic principles of human dignity; or calling something a human right implies it is part of the minimum standards required for life. Thus the right in question is treated by various actors with greater significance than other rights, entitlements, or policy goals - as is befitting a right which carries the moral significance used to underpin human rights.

Considering how this applies to the Charter, the codification of existing political rights as 'fundamental rights' increases their significance. By taking pre-existing rights or principles and prominently designating them 'fundamental rights' in a significantly visible document, these rights are implicitly moved into one of the categories of special significance laid out by human rights theorists and so are treated as such, even if they were not considered fundamental rights beforehand.

Similar theories have been used in an international law context. Trimble argues³² that international law is a 'form of rhetoric, whose persuasiveness depends on its legitimacy'³³. A classification of a political document as a 'human rights' treaty increases its legitimacy and consequent persuasiveness. Franck argues in favour of a 'fairness model'³⁴, where compliance with international law is determined by its normative acceptance, with normative acceptance being determined by the 'consistency of the rules with widely held values and the legitimacy of the rulemaking process'³⁵. Legitimacy under this model is determined by: transparent requirements, a 'symbolic validation' indicating a rule is an important part of a social system of order; the rule must be coherent; and the rule must be connected to secondary rules used to interpret international organisations³⁶. Under this model, human rights treaties are followed due to their high symbolic validation, with any aspect of human rights violation assuming 'greater gravity of a trespass against a major public policy of the community'³⁷. The Charter increasing the symbolic value of the rights within the Charter would increase the likelihood of compliance under this model³⁸.

This understanding of how human rights function in practice stems from the base definitional

³² Trimble, 'International Law, World Order, and Critical Legal Studies' 42 *Stanford Law Review* 3 (1990), 811.

³³ Hathaway, 'Do Human Rights Treaties make a Difference?' 111 *Yale Law Journal* 8, 1935, 1958.

³⁴ Franck, 'Legitimacy in the International System' 82 *American Journal of International Law*, 705, 712.

³⁵ Hathway, *supra* note 33, 1959; Franck, *Fairness in International Law and Institutions* (OUP, 1998)

³⁶ Franck, *supra* note 34, Hathaway, *supra* note 33.

³⁷ Franck, *supra* note 34, 124

³⁸ Franck, *ibid*, 41-46.

foundations of human rights, so one can fully expect it to apply to the EU Charter of Fundamental Rights, as a prominent fundamental rights document.

2.2 Institutionalism

There are also reasons the Charter is expected to cause rights to be treated with increased significance that stem from the institutionalist analysis of law, common throughout the history of EU scholarship.

Institutions are said to require a regulatory element, a normative element, and a cultural-cognitive element.³⁹: the regulatory element provides coercive structures such as rules and sanctions; the normative element creates binding social obligations; and the cultural-cognitive element creates shared understandings that surround the institutions.⁴⁰ Law itself is an institution, as seen in multiple pieces of work⁴¹ and in 'law and society scholarship' as a whole.⁴²

The idea of law as a significant institution driving change is common, though generally implicit, amongst legal scholarship on the development of the EU as a whole. Indeed law as a motor of integration is a crucial part of EU studies. In a famous article, Weiler highlights multiple 'constitutional tremors' upon which the foundations of the then-EC were built – direct effect, supremacy, implied powers, and human rights.⁴³ This 'constitutionalisation', in combination with systems of judicial review and accountability, is described as rendering the EC's legal structure 'indistinguishable from analogous legal relationships in constitutional federal states'.⁴⁴ The more steps that bolstered the power of the EU legal structure against Member States, giving it more power and influence, the more EU law starts to resemble the institutionalist definitions of institutions. The constitutionalisation⁴⁵ of

³⁹ Scott, *Institutions and Organizations* (Sage Publications, 2001, 2nd Edition), 51.

⁴⁰ Ibid; Greenwood, Royston, Hinings, 'Understanding Radical Organizational Change: Bringing Together the Old and New Institutionalism' 21 *Academy of Management Review* 5, (1996).

⁴¹ Oeter, 'Toward a Richer Institutionalism for International Law and Policy: A comment on Kenneth Abbott's Recent Work' *University of Illinois Law Review* (2008), 61; Lacey, 'Jurisprudence, History, and the institutional quality of law' *Virginia Law Review* 101, (2015); Armstrong, 'Legal Integration: Theorizing the Legal Dimension of European Integration' 36 *JCMS* 2 (1998), 155.

⁴² See for example Suchman, Edelman, 'Legal Rational Myths: The New Institutionalism and the Law and Society Tradition' 21 *Law and Social Inquiry* (1996), 903, 907; Scott, *supra* note 39, 1.

⁴³ Weiler, 'The Transformation of Europe' 100 *Yale Law Journal* 8 (1991), 2403, 2413-2149.

⁴⁴ Ibid, 2143.

⁴⁵ See also Stone Sweet, Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community' 92 *The American Political Science Review* 1 (1998), 63.

law (as described by Stone Sweet and Brunell) meant that EU law began to started to develop the sort of normative power and durability over long periods of time that meant it would have substantial effects in an institutionalist framework. Weiler has noted elsewhere that such developments can and have been described as an ‘institutionalisation’⁴⁶.

Law’s durability over time and its impact as described by Weiler, combined with the regulatory, cognitive, and normative elements (seen in people’s belief in a binding legal system) means that law fulfils the required elements for an institution. Moving onto more direct analysis, the Charter is law. The Charter now forms a ‘written and legally binding catalogue of fundamental rights’⁴⁷, carrying the ‘same legal value’ of the Treaties⁴⁸. This latter provision of the TEU confirms that the Charter is law given the Treaties are generally acknowledged as law⁴⁹.

Regardless of the precise doctrinal status of the Charter, this chapter argues that it sufficiently fits the concept of ‘law as an institution’ to be included in institutionalist analyses. To briefly reiterate, institutions require a regulatory element, a normative element, and a cultural-cognitive element⁵⁰.

The regulatory element is represented here by the fact the Charter can be used to regulate the behaviour of actors, both doctrinally⁵¹ and in reality⁵². The Charter increasing the significance of fundamental rights fulfils this normative element - actors are expected to follow the Charter as it represents a normative consensus around the increased significance of fundamental rights. This is supported by many practitioners’ views: various Advocates General and ECJ judges describing the Charter as an inescapable factor of fundamental rights⁵³, subject to a ‘pan-European political consensus’⁵⁴; and various academics arguing that the Charter increased the significance of

⁴⁶ Weiler, ‘A Quiet Revolution: The European Court of Justice and its Interlocutors’, 26 *Comparative Political Studies* 4 (1994) 510, 511.

⁴⁷ Lenaerts, Gutiérrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’, in Peers, Hervey, Kenner, Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014), 1560.

⁴⁸ TEU, *supra* note 19, Article 6.

⁴⁹ Lenaerts, Gutiérrez-Fons, *supra* note 47.

⁵⁰ Scott, *supra* note 39, 51.

⁵¹ Charter of Fundamental Rights of the European Union, *supra* note 26, Article 51(1).

⁵² Eg. De Schutter, ‘The Implementation of the Charter by the Institutions of the European Union’, in Peers, Hervey, Kenner, Ward, *supra* note 47.

⁵³ Opinion of AG Cruz Villalón in Case C-70/10, *Scarlet Extended SA*, ECLI:EU:C:2011:255, para. 30; Opinion of AG Bot in Case C-108/10, *Scattolon*, ECLI:EU:C:2011:211, para. 108.

⁵⁴ Lenaerts, Gutiérrez-Fons, *supra* note 47.

fundamental rights⁵⁵. In terms of institutionalism, the increased significance of the Charter produces the social obligation of compliance, as to use AG Colomer's example, non-compliance would place actors in breach of the 'basic legal values shared by Member States'⁵⁶. This is similar to the arguments made in section 1.1 of this chapter, where breach of human rights law is a 'trespass against a major public policy of the community'.

The third element of the institutionalist analysis, a cultural-cognitive element, is present as represented by specific agreed-upon interpretations of the Charter. Despite disagreements as to the substantive content of certain rights, there is a core of agreement that the Charter at least constitutes a statement of fundamental rights of the European Union. Even the core of an agreed-upon interpretation constitutes a 'shared understanding' for the purposes of institutionalism.

In summary, the conversion of existing rights, principles, and claims into a more visible, binding fundamental rights Charter increases their influence within institutionalist frameworks. In particular, the Charter increases the normative institutionalist element, thus increasing the social obligations of compliance. The practical effects of this will be discussed in section 2.4 below.

2.3 Various Actor Expectations

These theoretical expectations are supported by the analysis of various commentators and actors involved in the EU legislative process. Also predicted was that the Charter itself would cause the individual rights in the Charter to be taken more seriously. The former would likely lead to systemic change, and the latter would affect the protection of individuals within national legal systems.

2.3.1 Political opinion

The Charter was solemnly declared in 2000. In order to understand its intended effects, it is sensible to look at the discussions around its inception.

De Búrca, analysing the history of the drafting process in the *European Law Review*, discussed the

⁵⁵ Iglesias Sánchez, 'The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights' *CMLRev* 49 (2012), 1565; Rosas, Kaila, 'L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice : Un premier bilan' 16 *Il Diritto dell'Unione Europea* (2011), 28.

⁵⁶ Opinion of AG Colomer Case C-208/00, *Überseering*, ECLI:EU:C:2001:655, para. 59.

intentions and motivations of the German presidency (the then holders of the rotating presidency). Unenthusiastic about multiple proposals on how to improve human rights protection in the EU⁵⁷, the German presidency sought to launch an initiative that would be sufficiently high profile to demonstrate the EU's commitment to human rights, but 'which would not, in its view, introduce and concrete policy changes nor alter anything significant within the existing legal, political, and constitutional framework'⁵⁸. These intentions are additionally evidenced by the fact the drafters were directed in advance to those rights that should be contained within the Charter – instruments which had already been somewhat been 'to some extent indirectly adopted as community fundamental rights'⁵⁹. The Charter had also been seen as a way to 'win over the public and bring Europe closer to its citizens', but again without drastically changing EU law.⁶⁰

These intentions are reflected in the Presidency conclusions from the Cologne council⁶¹, which offered the following statements on the purpose of the Charter. It began with acknowledging the aforementioned work of the ECJ:

'the obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the Court of Justice'

This statement highlights the above-discussed fundamental rights jurisprudence is linked into the Charter. If the EU's fundamental rights obligations are 'defined' by this jurisprudence, the Charter is merely expected to confirm and codify this existing jurisprudence, limiting its effects.

They then went onto state the objective of the Charter:

'The European Council takes the view that, at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident.'

The more direct objective of the Charter was:

⁵⁷ Eg Comité des Sages and Final Project Report, 'Leading by Example: A Human Rights Agenda for the European Union for the Year 2000' (1998); Alston, Bustelo, Heenan, *The E.U. and Human Rights* (OUP, 1999).

⁵⁸ De Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' *EL Rev* 126 (2001), 129

⁵⁹ *Ibid*, 133.

⁶⁰ De Búrca, 'The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?'

⁶¹ *Washington and Lee Law Review* 2 (2004), 555, 562.

⁶¹ (1999) *Cologne European Council 3-4 June 1999. Presidency conclusions and annexe*, para. 44.

‘to make their [fundamental rights] overriding importance and relevance more visible to the Union's citizens’

Some Member States⁶² sought to formally limit certain rights within the Charter, in order to prevent any effects beyond this visibility – social and economic rights in the Charter were limited to ‘principles’⁶³ or ‘political objectives’⁶⁴ rather than ‘rights’. The Charter’s preamble thus refers to ‘rights, freedoms, and principles’, and Article 52(5) also draws this distinction in an attempt to limit their justiciability⁶⁵. The purpose of this designation was to ensure no mandate for an EU-imposition was created, and there was no obligation to treat these rights differently from already existing national law.⁶⁶ Charter references to ‘national law and practice’, or that the Union merely ‘recognizes and respects’ a particular claim, serve the same purpose.⁶⁷

These overall intentions of codification are reflected in the preamble of the Charter, which states that:

‘The Charter *reaffirms*⁶⁸, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights’

This section of the preamble lists various sources of human rights within EU law, whilst stating that the Charter reaffirms them. This passage again demonstrates that the Charter merely confirms existing human rights within EU law as opposed to bringing about widespread change. However, even if the above section precluded broad changes (as envisaged by the German presidency), the idea of strengthening fundamental rights protection is also present in the preamble:

‘To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter’

This statement in the preamble indicates that the purpose of reaffirmation and increased visibility in

⁶² Lenaerts, Gutiérrez-Fons, *supra* note 47, 1576.

⁶³ Goldsmith, ‘A Charter of Rights, Freedoms, and Principles’ *CMLRev* 38 (2001), 1201.

⁶⁴ Jääskinen, ‘Fundamental Social Rights in the Charter- are they rights? Are they Fundamental?’ in Peers, *supra* note 47.

⁶⁵ Lenaerts, Gutiérrez-Fons, *supra* note 47, 1577

⁶⁶ Goldsmith *supra* note 63, 1213.

⁶⁷ *Ibid.*

⁶⁸ Emphasis mine.

the actual text of the Charter is actually the *strengthening* of the protection of fundamental rights – linking increased protection and consolidating existing rights into a Charter.

Looking at a communication from the Commission, adopted shortly before the final draft of the Charter⁶⁹, a nuanced argument is presented that is similar to the actual text. The communication describes the Charter as ‘of revelation rather than creation, of compilation rather than innovation’⁷⁰. However, it was also argued that the Charter should ‘add real value to the abundance of existing legal or political texts dealing with human rights in Europe’⁷¹. This phrase ‘add real value’ indicates the Commission expected the Charter to have increased significance - implicitly, the Commission is arguing that revealing and compiling EU fundamental rights law is in and of itself something that increases significance of fundamental rights.

This position reflects the literature in sections 2.1 and 2.2, where fixing the Charter in a visible fundamental rights document, and particularly giving it the same legal value as the Treaties⁷², can have policy effects contrary to drafters’ intentions. In spite of attempts at consolidation for example, increasing the normative weight of the rights in the Charter by implementing them in a more visible rights document increases their significance within an institutionalist framework. This analysis also applies to those parts of the Charter designated ‘principles’ – they are designated ‘fundamental’ in a way that increases significance, and they have the regulatory, normative, and cultural cognitive element required for institutionalism.

Similarly to the Commission, when assessing the Charter’s implementation and relevance some years later, Viviane Reding (the then Commissioner for Justice, Fundamental Rights, and Citizenship) also considered the Charter significant. She was quoted by the Commission in 2012, when discussing the Charter in a factsheet on fundamental rights, saying ‘it was a political commitment to take fundamental rights more seriously in the EU institutions.’⁷³. In this view of the Charter, the document itself represents not just a legal codification of existing principles, but a political choice by various actors (multiple EU institutions) to take the fundamental rights laid out in the Charter more seriously.

⁶⁹ Commission Communication on the Charter of Fundamental Rights of the European Union, 13 September 2000, Com (2000) 559 final.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² TEU, *supra* note 19, Article 6.

⁷³ http://ec.europa.eu/justice/events/assises-justice-2013/files/factsheets/fundamental_rights_en.pdf, first accessed 04/15/2016.

Whilst this remark addressed the EU institutions specifically, the logic similarly applies to Member States.

It is worth considering at this point that when drafting the Charter, the expectations were that it would in time become legally binding⁷⁴, as did eventually happen with the Treaty of Lisbon. Within the Charter Convention various actors expressed their thoughts that: the Charter would bring about a ‘more ‘people-centred’ approach to rights; that ‘a mere declaration is not enough’; that ‘this body *must*’⁷⁵, therefore, come up with a text which the Commission believes should meet the necessary format and content requirements for integration into the Treaties’⁷⁶. In this context, it can reasonably be inferred that there was some expectation that the Charter would increase the significance of those fundamental rights embodied within the Charter, or at a minimum go beyond a mere declaration of existing rights. Such a desire for incorporation into the Treaties, or the transformation of the Charter into a legally-binding form, would have little purpose were the Charter not expected to have effects. Were the above actors merely seeking to be seen to be doing something, a mere declaration would have sufficed, along with exhortations for others to take fundamental rights more seriously.

2.3.2 Academic Opinion

Various pieces of academic work discussed the potential significance and consequences of the Charter.

In the previously discussed article, De Búrca states that the Charter was ‘not intended to create anything new of substance , other than increasing the visibility of what was already considered to exist’. This later assessment echoes other academic assessments, both contemporary and otherwise. Weiler prominently argued that without a specific fundamental rights policy, the Charter’s effect would be merely declaratory, even if it would ‘render visible and prominent that which until now was known only to dusty lawyers’⁷⁷. O’Neill described the Charter as an attempt to limit further judicial development through codification⁷⁸, an idea which was obviously designed to consolidate fundamental rights at a fixed point free of further judicial interference. Menéndez described the Charter as ‘crowning the narrative’ of European citizenship and fundamental rights in the EU, that of

⁷⁴ CHARTE 4105/00 , Record of the first meeting of the Body to draw up a draft Charter of Fundamental Rights of the European Union (held in Brussels, 17 December 1999), p. 4.

⁷⁵ Emphasis mine.

⁷⁶ De Búrca, *supra* note 58.

⁷⁷ Weiler, ‘Editorial: Does the European Union Truly Need a Charter of Rights?’ 6 *European Law Journal* 2 (2000), 95, 95.

⁷⁸ O’Neill, ‘The EU and Fundamental Rights – Part 2’ 16 *Judicial Review* 4 (2015), 374.

the ECJ developing an ‘incomplete but substantive bill of rights’. Logically, if the Charter ends the narrative of an already-built bill of substantive right, it is a consolidatory instrument, as suggested above. Denman, in the *European Human Rights Law Review*⁷⁹, describes the Charter as ‘intended to reaffirm the fundamental rights recognised in EU law, by setting them out in a single document and so making them more visible’.

Whilst merely declaratory and consolidatory, the Charter was still intended to make the rights more visible to the citizens⁸⁰. So it is important this visibility is considered as one of the key objectives, mentioned by various institutions in the Cologne Presidency conclusions. De Búrca argues it is aimed at the ‘citizens’ rather than lawyers or policy-makers⁸¹. Were the document aimed at lawyers or policy-makers as opposed to citizens, it would be something designed to have more substantive significance as opposed to merely a political declaration.

The above literature must be considered in the light of the literature in sections 2.1 and 2.2 however, which as explained above shows that even a mere reaffirmation has additional effects, which have been predicted by other EU academics studying fundamental rights.

Iglesias Sánchez in the *Common Market Law Review*, discussing the policy effects of the Charter⁸², described the Charter as something that bolstered existing fundamental rights, saying that ‘its value was generalized as a reaffirming instrument of already proclaimed fundamental rights and principles’, and as a ‘legitimate reaffirming or consolidating instrument’. Even before the Charter became legally binding, the application of the Charter was described as ‘daily business’⁸³. The Treaty of Lisbon, and the Charter becoming legally binding, merely continued the Charter being ‘confirmatory elements of fundamental rights that have already been identified in previous judgments’⁸⁴, thus continuing the Court’s expansionist path. The importance of the Charter as a whole was similarly noted, and it was stated that the Charter increased the ‘centrality and weight of fundamental rights, reinforcing both their visibility in the legal discourse of the Court and their role as parameters of constitutionality’⁸⁵. These arguments go beyond the mere political statements of visibility designed to increase the EU’s

⁷⁹ Denman, ‘The Charter of Fundamental Rights’ 4 *European Human Rights Law Review* (2010), 349.

⁸⁰ *Ibid*, 350.

⁸¹ De Búrca, note 58.

⁸² Iglesias Sánchez, *supra* note 55.

⁸³ *Ibid*, 1572 ; Rosas, Kaila, *supra* note 55.

⁸⁴ Iglesias Sánchez, *supra* note 55, 1572.

⁸⁵ *Ibid*, 1576.

human rights profile (as envisaged by the German presidency and academics such as O'Neill and Denman), and indicate that the Charter would be used, with substantive effects, more frequently in legal arguments.

The article also noted a secondary effect of the Charter, discussing it in terms of the autonomy of EU fundamental rights. The Charter is described as an 'inescapable reference and point of departure'⁸⁶, and 'when the rights and freedoms at issue are recognized under the Charter, its provisions should be the framework for the analysis'⁸⁷. Several cases⁸⁸ were discussed highlighting the role of the Charter as the 'primary source of fundamental rights in the EU legal order'⁸⁹. This autonomy is another type of increased significance – the more autonomous the system of EU fundamental rights law, the more significance it has compared to other principles within the EU legal order, echoing the political commitments to take rights more seriously. Iglesias Sánchez takes the view that the Charter 'thus has a progressive role in the framework of the overall European system for the protection of fundamental rights, offering a wider and more modern formulation of already existing rights, with considerable potential to modify their interpretation'.

O'Neill⁹⁰ balancing some of his earlier-described scepticism, echoed the conclusions of Iglesias Sánchez in describing the Charter as a 'codification' of existing fundamental rights jurisprudence. He argued that the Charter could be seen as an 'acknowledgement of the correctness of its jurisprudence to date', echoing the Iglesias Sánchez's description of the 'reaffirming' nature of the Charter. This would thus be seen as an 'encouragement' or 'justification' for the CJEU to develop further powers and influence.

Menéndez, writing in the *Journal of Common Market Studies*⁹¹, argued that the Charter was likely to reinforce a trend towards social rights over economic rights. Whilst this balancing of 'economic' and

⁸⁶ Iglesias Sánchez, *supra* note 55, 1599; Opinion of AG Bot in Case C-108/10, *Scattolon*, *supra* note 53, para. 108.

⁸⁷ Opinion of AG Cruz Villalón in Case C-70/10, *Scarlet Extended SA*, *supra* note 53, para. 30.

⁸⁸ Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, ECLI:EU:C:2010:811; Case C-92/09, *Volker*, ECLI:EU:C:2010:662; Case C-236/09, *Test-Achats*, ECLI:EU:C:2011:100; Case C-69/10, *Samba Diouf*, ECLI:EU:C:2011:524; Case C-297/10, *Hennigs & Mai*, ECLI:EU:C:2011:560.

⁸⁹ Iglesias Sánchez, *supra* note 55, 1599.

⁹⁰ O'Neill, *supra* note 78, 374.

⁹¹ Menéndez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' 40 *JCMS* 3 (2002), 471.

‘social’ has existed since at least the *Cassis de Dijon* judgment⁹², Menéndez argues that one of the effects of the Charter is ‘increasing the weight to be attributed to social values when they come into conflict with economic freedoms’⁹³. Describing this as ‘increasing the weight’ in terms of fundamental rights again echoes the expected political commitments of taking fundamental rights more seriously. Even if this is just an adjustment of the balance between competing rights, any change would logically involve a relative increase in the significance of some rights.

The Charter leading to expansion is also expected from a those *opposed* to the expansion of EU fundamental rights, with the Charter likely to lead to an expansive application of EU law: ‘the claims to universalism that are inherent in the very existence of fundamental rights protection enhance the pressure placed on the constitutional principle; the scope of application of EU law is likely to be interpreted even more generously by the EU judiciary so as to enhance individual protection’⁹⁴. Essentially, in Muir’s view, the Charter is likely to expand application of EU law merely because the ‘the ‘fundamental’ nature of fundamental rights increases the significance of the principles and rights involved. The increased scope thus also gives additional weight to rights, ‘to enhance individual protection’⁹⁵.

2.3.3 Judicial Opinion

Statements from several members of the EU judiciary, either in judgments or in academic writing, inform the work in section 2.2, and occasionally themselves stand as important statements on the Charter, given their authors’ personal significance within the EU judicial system.⁹⁶

In *Parliament and Council*⁹⁷, the court stated that

‘the principal aim of the Charter, as is apparent from its preamble, it to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-

⁹² Case C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42 .

⁹³ Menéndez, *supra* note 91, 480.

⁹⁴ Muir, ‘Fundamental Rights: An Unsettling EU Competence’, 15 *Human Rights Review* 1 (2014), 25.

⁹⁵ *Ibid*, 32.

⁹⁶ For an overview see Bazzochi, ‘The European Charter of Fundamental Rights and the Courts’ in Di Federico, *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument* (Springer, 2010).

⁹⁷ Case C-540/03 *Parliament and Council (Family Reunification)*, ECLI:EU:C:2006:429.

law of the Court... and of the European Court of Human Rights’⁹⁸.

This quote illustrates the opinion that the Charter represents a consolidation of the existing jurisprudence and general principles of EU law they themselves have developed over decades (and discussed above), a position backed up in a number of other cases and opinions⁹⁹. However, despite attempts to limit the Charter to a reaffirmation, its effects will be greater – again explained by the literature in sections 2.1 and 2.2. These wider effects have again been noted by other members of the EU judiciary.

AG Léger noted early in the history of the Charter that ‘the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without any consequences’ and ‘The Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States’¹⁰⁰. AG Cruz Villalón is the source of the previous statement that ‘when the rights and freedoms at issue are recognized under the Charter, its provisions should be the framework for the analysis’¹⁰¹. AG Bot described the Charter as an ‘inescapable reference and point of departure’¹⁰². AG Colomer described the Charter as an ‘invaluable reflection of the common denominator of the legal values paramount in Member States’¹⁰³. It has also been described as ‘the catalogue of fundamental rights guaranteed by the Community legal order’¹⁰⁴, indicating that the Charter itself has become the main source of EU fundamental rights, as opposed to merely repeating already existing general principles.

These statements indicate the increased significance of the Charter – as a basic statement of the common values of Member States, it becomes the departure point for any analysis where fundamental rights are likely to play a role. The President of the European Court of Justice Koen Lenaerts, writing in an academic capacity, described the Charter as a ‘pan-European political

⁹⁸ Ibid, para. 38.

⁹⁹ Denman, *supra* note 79, includes the following cases in his assessment: Case C-423/05 *Unibet*, ECLI:EU:C:2007:163, para. 37; Case C-303/05, *Advocaten voor de Wereld*, ECLI:EU:C:2007:261, para. 46; Case C-438/05 *Viking Line*, ECLI:EU:C:2007:772, paras. 43 and 44; Case C-341/05 *Laval*, ECLI:EU:C:2007:809, paras. 90 and 91; Case C-402/05P *Kadi* ECLI:EU:C:2008:461, para. 335. I would add Opinion of AG Maduro in Case C-341/05 *Laval* ECLI:EU:C:2007:291.

¹⁰⁰ Opinion of AG Léger in Case C-353/99 P, *Hautala*, ECLI:EU:C:2001:392.

¹⁰¹ AG Cruz Villalón in *Scarlet Extended SA*, *supra* note 53, para. 30.

¹⁰² AG Bot in *Scattolon*, *supra* note 53, para. 108.

¹⁰³ Opinion of AG Colomer in Case C-208/00, *Überseering*, *supra* note 56, para. 59.

¹⁰⁴ Opinion of AG Mischo in Case C-20/00, *Booker Aquaculture*, ECLI:EU:C:2001:469, para. 126; Opinion of AG Maduro in Case C-181/03 P *Nardone v Commission*, ECLI:EU:C:2004:397.

consensus'¹⁰⁵ towards making EU fundamental rights more visible, echoing many of the political statements as to increased visibility and consequent significance. The same piece of work also described fundamental rights (now represented by the Charter) as a 'meta-principle of interpretation' (similar to the general principles discussed in section 1.1 of this chapter), underpinning EU law more generally, and in doing so cited a working paper by AG Kokott¹⁰⁶.

2.4 What Does This Mean in Practice?

Many have offered theoretical predictions on the effects of the Charter, and predictions as to its future impact. This section will offer clear explanation on what these predictions mean in a real practical context, in order to lay out the context for the rest of the thesis.

The first important realisation is that 'increased significance' is not in of itself a clear term. It exists relative to other circumstances. Bluntly, increased significance compared to what? I offer three comparisons, against which the current significance of the Charter will be measured at various points throughout the thesis. Firstly, the significance of fundamental rights compared to before the adoption of the Charter, as illustrated by past cases on similar fundamental rights, both at a European and national level. Secondly, the significance of fundamental rights compared to circumstantially similar situations had the Charter not been passed, as illustrated by reasonable hypotheticals. Finally, the significance of fundamental rights compared to circumstantially similar situations where the Charter does not apply.

It is also important to note the difference between 'increased significance' and mere visibility. Many merely expected the Charter to consolidate existing fundamental rights, and to increase their visibility within the political sphere. The idea of 'increased significance' exists in contrast to this idea of 'increased visibility' – it goes beyond mere lip-service, and beyond merely increasing discussion of fundamental rights in the political and legal sphere. It has more significant effects, discussed below.

Increased significance is divided into three areas: actors being more likely to use arguments based on fundamental rights; arguments based on fundamental rights being more likely to be generally accepted; and in trade-offs between competing claims, actors being more likely to favour fundamental rights.

¹⁰⁵ Lenaerts, Gutiérrez-Fons, *supra* note 47.

¹⁰⁶ Kokott, Sobotta, 'The Charter of Fundamental Rights after Lisbon, *EUI Working Papers*, AEL No. 6, (2010).

Lenaerts and Gutiérrez-Fons explained that general principles of EU law (and thus pre-Charter fundamental rights) are used in judicial review cases based on fundamental rights, challenging the legality of various acts and pieces of legislation. In this function of general principles two of the practical effects of ‘increased significance’ of fundamental rights appear. Firstly, that actors are more likely to base their arguments on fundamental rights. If fundamental rights are seen as more significant, they are more likely to be seen as a relevant argument when considering grounds upon which one will bring a judicial review. Fundamental rights are then more likely to be raised in judicial review cases. This is more generally true of other cases not originating from judicial review, in which arguments based on fundamental rights are also more likely to be raised. Secondly, with the increased significance of fundamental rights, the above-discussed arguments based on fundamental rights are more likely to be accepted – both in terms of judicial review cases brought and also in terms of statutory interpretation.

For the third practical impact of ‘increased significance’ one can expect that, in trade-offs between competing claims in which fundamental rights are one consideration, judgments and decisions are more likely to favour fundamental rights due to the increased normative significance of fundamental rights. See for example, Menéndez’ claim of ‘increasing the weight to be attributed to social values when they come into conflict with economic freedoms’¹⁰⁷, and the frequent trade-offs in internal market law between individual and collective rights.

This change in trade-offs impacts two of the areas of general principles laid out by Lenaerts and Gutiérrez-Fons¹⁰⁸. In questions of interpretation, actors are more likely to favour any version supported by a fundamental rights approach, strengthening the role of fundamental rights as the ‘meta-principle of interpretation’ described by AG Kokott and Lenaerts.

Additionally, where in the past fundamental rights and general principles have made a ‘normative contribution’ to EU law, this normative contribution is likely to be stronger based on the increased significance of fundamental rights. This supposition is supported by the institutionalist analysis elaborated in section 2.2 – the Charter strengthens the normative element of the institution, in a way that strengthens the normative input of fundamental rights to EU law. It is also supported by the analysis from human rights theory – more clearly designating a right as ‘fundamental’ in a prominent

¹⁰⁷ Menéndez, *supra* note 91, 480.

¹⁰⁸ Lenaerts, Gutiérrez-Fons, *supra* note 47.

document moves into a category of special significance, something which adds a stronger normative contribution.

These effects are expected across the thesis, over the various areas in which the Charter might apply. Firstly, the Charter's effects are expected in ECJ judgments, similarly to the general principles of EU law. Secondly, the Charter applies when Member States are implementing EU law¹⁰⁹ and derogating from it¹¹⁰, thus including some Member State action in its scope. Thirdly, there is some potential for the Charter's influence to stretch further. The theoretical logics of general human rights theory *and* institutionalism (as discussed in section 2.1 and 2.2) are not completely limited by the scope of Article 51. For example, the Charter designating claims to be 'fundamental rights' still grants the greater significance accorded to those rights regardless of its strict doctrinal applications. This application opens up the possibility for the Charter to be used as contributory jurisprudence at a national level, or highlighted in national parliamentary proceedings, whilst being subject to the caveat that it was outside of the Charter's doctrinal scope. Finally, it is also worth highlighting the different types of application expected, namely both: interpretations of statutory language, weighing up which of multiple competing interpretations are correct; and the possibility of human rights-based judicial review against EU or Member State actions.

3. Europeanisation

The main hypothesis of this thesis is that the Charter will lead to Europeanisation, for several reasons. Firstly, that law and the Charter are institutions operating within the institutionalist system of Europeanisation (as explained in section 1.2 above) and secondly that the pervasive and normative nature of the Charter is likely to cause the sort of misfit that leads to Europeanisation.

Key to the Europeanisation is the idea of 'misfit'. Europeanisation focuses on reactions of Member States to differing events taking place at an EU level¹¹¹. The first step is a difference in content

¹⁰⁹ Charter of Fundamental Rights, *supra* note 51, Article 51(1).

¹¹⁰ Åkerberg Fransson, *supra* note 27.

¹¹¹ Ladrech, 'Europeanization of Domestic Politics and Institutions: The Case of France' 32 *JCMS* 1 (1994), 69.

between the EU and Member State level, described as ‘goodness of fit’¹¹², ‘misfit’¹¹³, or ‘mismatch’¹¹⁴. The lower the compatibility between the EU and Member State level, the bigger the misfit and higher the pressure to adapt¹¹⁵. Different types of misfit are described in the literature, specifically institutional misfit and policy misfit. Institutional misfit represents a clash of ‘administrative structures and procedures that are embedded in the member state’s respective state, legal and political traditions’¹¹⁶. Policy misfit involves clashes between different policies at an EU and Member State level. It has been said that policy misfits essentially equal ‘compliance problems’¹¹⁷, as Member States face pressure to comply with EU level policies. Therefore policy misfit can include both cases where Member States have a different policy to the EU-level, but also cases where Member States have the same policy but apply it differently or inconsistently (questions of policy consistency). The specificity of what causes clashes varies, described as being between: ‘processes, policies, and institutions’¹¹⁸; between ‘European rules, regulations, and collective understandings’ and ‘given domestic structures’¹¹⁹; and between ‘EU requirements’ and ‘domestic circumstances’¹²⁰.

The question is, to what extent will the Charter’s increased significance affect ‘misfit’ – if the Charter increases the likelihood of misfit, it thus increases the likelihood of Europeanisation.

Section 1 of this chapter started by discussed of ‘increased significance’ of the Charter, and beyond this the pervasive nature of the Charter was highlighted in multiple different ways. Misfit involves something new - generally speaking, Member States are in compliance with existing EU policies due

¹¹² Eg. Risse, Cowles, Caporaso, ‘Europeanization and Domestic Change: Introduction’, Cowles, Caporaso, Risse, *Transforming Europe: Europeanization and Domestic Change* (Cornell, 2001); Schmidt, Radaelli, ‘Policy Change and Discourse in Europe: Conceptual and Methodological Issues’ *27 West European Politics 2* (2006), 183.

¹¹³ Duina, *Harmonizing Europe. Nation States within the Common Market*, (State University of New York Press, 1999); Ladrech, *Europeanization and National Politics*, (Palgrave MacMillan, 2010), 31.

¹¹⁴ Héretier, Kerwer, Knill, Teutsch, Douillet, *Differential Europe – New Opportunities and Restrictions for Policy Making in the Member States* (Rowan and Littlefield, 2004).

¹¹⁵ Börzel, Risse, ‘Conceptualizing the Domestic Impact of Europe’ in Featherstone, Radaelli, *Politics of Europeanization* (OUP, 2003), 69-73.

¹¹⁶ Knill, Lenschow, ‘Adjusting to EU Environmental Policy: Change and Persistence of Domestic Administrations’ in Cowles, Caporaso, Risse, *supra* note 112.

¹¹⁷ Börzel, Risse, *supra* note 115.

¹¹⁸ *Ibid*, 61.

¹¹⁹ Risse, Cowles, Caporaso, *supra* note 112, 7.

¹²⁰ Bulmer, ‘Theorizing Europeanization’ in Graziano, Vink, *Europeanization: New Research Agendas* (Palgrave MacMillan, 2007), 51.

to various incentives such as the risk of legal action, or normative pressures to comply with EU law. So in order for misfit to take place, some element of novelty is required to differentiate EU-level policies from national-level policies. The significance of the Charter provides that novelty. By altering the 'weight' attributed to fundamental rights, as discussed in section 1, the Charter creates the novelty required for misfit. Even if the Charter principles and rights existed in some form in EU law previously, the increased significance accorded to them by the Charter changes the relationship between these rights and principles and other areas of EU law, creating something new.

It is worth re-iterating here the extent to which the Charter has been described as something that influences EU law, having been described as an 'inescapable reference' point, and a 'pan-European political consensus' to make fundamental rights more visible within EU law.

To summarise, the Charter is highly influential within EU law. It has a substantial scope. Therefore, its application is likely to lead to something new. This novelty is the factor that is likely to lead to misfit, which is the first step of the Europeanisation process.

3.1 Modelling Europeanisation – How it Takes Place and What to Expect

The process-tracing method requires a clear causal mechanism against which the empirical evidence can be tested. This section will define Europeanisation, and discuss how my hypothesis predicts Europeanisation took place.

The first task is to establish the precise form of Europeanisation I am studying. 'Europeanisation' has been quite variably defined. Taking a broad definition, Europeanisation is 'a process of change affecting domestic institutions, politics, and public policy' as a result of membership of the EU¹²¹. Traditional theoretical debates around the EU focused on EU integration¹²². However, studies shifted to analysing the EU as a political system as opposed to an international organisation *sui generis*¹²³. This was accompanied by an increase in evidential studies on the effects of the EU on various aspects

¹²¹ Radaelli, 'Europeanization: The Challenge of Establishing Causality', Exadaktylos, Radaelli, *Research Design in European Studies* (Palgrave MacMillan, 2012), 1.

¹²² Ladrech, *supra* note 113, 8.

¹²³ As stated in Ladrech, *supra* note 113, and exemplified by Hix, 'The Study of the European Community: The challenge to comparative politics' 17 *West European Politics* 1 (1994), 1 and Bulmer, 'Domestic Politics and European Community Policy-making' 21 *JCMS* 4 (1983), 349.

of Member States.¹²⁴ In the 1990s, a series of articles combined these two shifts in discussion of the EU, forming some of the earliest research on ‘Europeanisation’— studying how the unique nature of the EU was shaping changes in Member States.¹²⁵ Early pioneers defined Europeanisation as ‘an incremental process reorienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organizational logic of national politics and policy-making’¹²⁶. The basic idea of Europeanisation emerges from this - that the EU shapes events in Member States.

However, over time the usage of Europeanisation became broader and more contested, encompassing multiple definitions. Olsen¹²⁷ provided the clearest breakdown of the competing definitions of Europeanisation, including:

1. Changes in external boundaries – the process through which the EU expands the geographical reach of its influence.
2. Developing institutions at a European level – the creation of European-level institutions and governance structures, as well as the formation of constitutive principles and enforcement mechanisms.
3. Central penetration of national systems of governance – the adaptation of national and sub-national levels of governance to European-level norms and ideas.
4. Exporting forms of political organisation – this refers to exporting traditionally ‘European’ forms of government to places outside the geographical territory of Europe.
5. Political unification – Europe becoming more centralised and politically unified, influenced by both external developments and domestic adaptation.

These definitions are radically different in their subject matter. As long as the term Europeanisation is sufficiently precisely defined in individual pieces of research however, it remains a valid framework for analysis.¹²⁸ It then falls to justify the choice specifically made in this thesis, that of top-down Europeanisation. Definitions 1 and 4 given above are manifestly inapplicable to the thesis at hand.

¹²⁴ Ladrech, *supra* note 113, 9-11.

¹²⁵ Eg. Olsen, ‘European Challenges to the Nation State’, Working paper number 14 Oslo (1995); Olsen, ‘Europeanization and Nation State Dynamics’, working paper no. 9, Oslo (1995); Andersen, Eliassen, *Making Policy in Europe: The Europeification of National Policy-making* (Sage, 1993); Kohler Koch, Eising, *The Transformation of Governance in the European Union* (Routledge, 1999).

¹²⁶ Ladrech, *supra* note 113.

¹²⁷ Olsen, ‘The Many Faces of Europeanization’ 40 *JCMS* 5 (2002), 921.

¹²⁸ *Ibid*, 933.

Both definitions deal with the EU's effects beyond its current borders, which is inappropriate for this thesis given the focus on the UK and Germany.

It is necessary to analyse and review the three main types of Europeanisation beyond this. There exists a dichotomy between bottom-up Europeanisation, representing Member States exercising their preferences at an EU level, and top-down Europeanisation representing the effects that the EU has on various institutions and actors within Member States. The former is represented by definitions 2 and 5, whilst the latter is represented by definition 3. Other authors support this twofold division. In their wide-ranging study of the EU and Member States, Bulmer refers to building capacity at an EU level, the second featuring norms, policies etc. being transferred down from 'Europe'¹²⁹. Börzel has carried out further work, using the phrase 'uploading' and 'downloading', referring to bottom-up and top-down Europeanisation respectively¹³⁰, to metaphorically illustrate the interactions between various levels of governance in the EU. The more a Member State is able to 'upload' its policy to the Member State, the lesser the costs it faces from Europeanisation¹³¹. Similarly she has characterised actors within the process as 'foot-draggers', 'pace-setters', and 'fence-sitters', with pace-setters engaging in bottom-up Europeanisation, and the remaining two categories being subject to top-down Europeanisation¹³². It is worth noting that these categorisations fit with legal literature. Positive integration through law produces EU rules and enforces them on Member States, matching the 'downloading' discussed above. Negative integration involves negotiating to remove national barriers, similarly to 'uploading'.

Importantly, a focus on top-down Europeanisation is justified based upon the aims and purposes of the research. As outlined in chapter 1, one of the purposes of the research is to understand the limitations placed upon the actions of Member State governments. Top-down Europeanisation is a research framework that measures the domestic impact of the EU¹³³. Defined with slightly more complexity and drawing on Ladrech's foundational work¹³⁴, Radaelli discussed 'beliefs, formal and informal rules, procedures, policy paradigms, styles, "ways of doing things", ... incorporated in the logic

¹²⁹ Bulmer, *supra* note 120, 47.

¹³⁰ Börzel, 'Europeanization: How the European Union Interacts with its Member States' in Bulmer, Lequesne, *Member States of the European Union* (OUP, 2007), 63.

¹³¹ *Ibid.*

¹³² Börzel, 'Pace-Setting, Foot-Dragging, and Fence-sitting. Member State responses to Europeanization', *Europeanisation Online Papers*, Queen's University Belfast, No 4/2001.

¹³³ Radaelli, Pasquier, 'Theory and Methods', in Graziano, Vink, *supra* note 120, 37.

¹³⁴ Ladrech, *supra* note 113.

of domestic (national and subnational) discourse'¹³⁵. Whilst naturally the thesis uses more specific definitions and more precise mechanisms, the broader thrust remains. Top-down Europeanisation analyses the effects that the EU has on Member States, which better fits with the core goal of the thesis. Furthermore, top-down Europeanisation represents the 'loss of control' expected as a result of the Charter, so testing its existence is key to understanding these expectations. Bottom-up Europeanisation, whilst a useful framework in studying how Member States use the EU to express their own policy preferences, does not help us understand the control placed *on* Member States, and thus is not a useful framework for this thesis.

3.2 How Top-down Europeanisation Takes Place

The first step of top-down Europeanisation is misfit. It essentially represents a clash between the EU level and Member States regarding things such as administrative cultures or policies. The hypothesis of the thesis (as explained in section 2) is that the Charter increases the significance of fundamental rights, as defined in section 2.4, thus causing misfit. Similarly to some of the choices made in chapter 1, the thesis will utilise a broader definition of misfit to encompass the full range of possible evidence. Therefore misfit, for the purpose of this thesis, encompasses several of the different types of policy misfit discussed at the beginning of section 3. Therefore the thesis will be searching for evidence of Member States having formally different policies from an EU level, but also for evidence of where the policies are formally the same but are subsequently different in terms of compliance. The latter is arguably more likely – with the Charter shifting *understanding* and significance of fundamental rights in a way that could redefine policies without changing formal text.

The way Europeanisation plays out then depends upon the national reaction to misfit, as explained by theories of rational choice institutionalism and sociological institutionalism.

According to theories of rational choice institutionalism, misfit creates 'an emerging political opportunity structure which offers some actors additional resources to exert influence, while severely constraining the ability of others to pursue their goals'¹³⁶. Actors base their response to the misfit on new opportunities or constraints, and the result of this process is conceptualised as a redistribution of resources between different actors. A few further factors mediate the degree of change that can occur. 'Multiple veto factors' in a country's institutional structure can limit actors' ability to exploit the

¹³⁵ Radaelli, 'Europeanization of Public Policy', in Featherstone, Radaelli, *supra* note 115, 30.

¹³⁶ Börzel, Risse, 'Conceptualizing the Domestic Impact of Europe' in Featherstone, Radaelli, *supra* note 115, 63.

new adaptational pressure¹³⁷. The greater the number of veto players, either with a formal institutional role or with a factual political veto, the harder it is to develop the domestic political consensus required for policy change in response to Europeanisation pressures – more actors are able to step in and block change¹³⁸. Existing formal institutions can also accelerate change. To the extent additional resources are required to utilise the changing opportunity structure, these can sometimes be provided by formal institutions. Where actors have stronger relationships with European institutions for example, directly, regionally¹³⁹, or through central government, they have greater action capacity and so Europeanisation is more likely¹⁴⁰.

Sociological institutionalism relies on actors' responses to what is expected of them in certain circumstances. In this model, misfit is understood as creating new expectations and norms surrounding how institutions and actors *should* behave – what is expected of them. If expectations change because of misfit, then actors adapt through the process of 'arguing, persuasion, and social learning'. Discourse leads them to change their actions for reasons such as: to better meet expectations and to remain 'in good standing'¹⁴¹; to protect their overall reputation¹⁴²; or because following a rule is the most 'appropriate' response within institutions of democratic governance¹⁴³. The more European norms fit with domestic-level norms, the less likely the domestic change. Theories of sociological institutionalism offer several alternative potential mediating factors. One theoretical explanation is that of 'norm entrepreneurs' - specific actors with greater norm-shaping influence mobilise to advocate change. Either: 'epistemic communities', networks of actors with authoritative claims to knowledge who have greater influence in areas of uncertainty; or 'advocacy or principal issue' networks, groups bound together by shared beliefs and values, who appeal to collectively shared norms and identities¹⁴⁴. Both of these groups of actors are better placed to engage in the persuasion and social learning predicted by sociological institutionalism, so their increased presence facilitates

¹³⁷ Börzel, Risse, *ibid*, 68.

¹³⁸ *Ibid*.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid*; Caporaso, Jupille, 'The Europeanization of Gender Equality Policy and Domestic Structural Change', in Risse, Cowles, Caporaso, *supra* note 112.

¹⁴¹ Börzel, Risse, *ibid*, 66.

¹⁴² Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, 1984), 106.

¹⁴³ March, Olsen, 'The Logic of Appropriateness', ARENA Working Papers WP 04/09.

¹⁴⁴ Börzel, Risse, 'Conceptualizing the Domestic Impact of Europe' in Featherstone, Radaelli, *supra* note 115, 68.

Europeanisation¹⁴⁵. Additionally, Europeanisation is more likely if a country has a political culture conducive to consensus building – this can render the use of veto points inappropriate and allow sharing of any adaptational costs, both of which make it easier for actors to change their actions to better meet expectations by removing barriers and reducing adaptational costs.¹⁴⁶

How would these models theorise the impact of the Charter? Using rational choice institutionalism, the risk of legal sanctions alters the cost-benefit calculations of ministries in national governments and other actors¹⁴⁷. The Charter could cause Europeanisation through similar mechanisms. Firstly, the Charter could cause a judgment that would not have been delivered in the Charter's absence. Consequently, non-compliance with the judgment would raise the risk of damages awarded by a national court¹⁴⁸, or infringement proceedings initiated by the Commission. Both of these legal steps would impose a financial and political cost on actors, and it is this cost that would alter the relevant calculations. Secondly, the Charter could provide a new mechanism through which policies could be challenged. The Charter empowers actors who wish to challenge certain laws and policies by providing a new mechanism to do so, and these additional challenges impose further financial and political costs on other actors for non-compliance with the Charter.

According to theories of sociological institutionalism, compliance with law is a norm expected for many actors¹⁴⁹, therefore a change in the law brings about a change in expectations. Actors want to remain 'in good standing', so a change in law creates a likelihood of behavioural change. The Charter could cause change by altering what is expected from actors by providing a new understanding of fundamental rights standard that actors are expected to follow. This altering of expectations could have particularly powerful effects as it concerns fundamental rights. Fundamental rights are the most

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Börzel, Dudziak, Hofmann, Panke, Sprungk, 'Why Member States do (not) comply with European law' CES Working Paper 148 (Harvard, 2007).

¹⁴⁸ Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italian Republic*, ECLI:EU:C:1991:428.

¹⁴⁹ Berglund, Gange, van Waarden, 'Mass production of law. Routinization in the transposition of European directives: a sociological-institutionalist account' 13 *Journal of European Public Policy* 5 (2006), 692, 701; Falkner, Treib, Hartlapp, Leiber, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge, 2005); Sverdrup 'Compliance: a matter of ability?', Paper presented at 'Transposition and Compliance in the European Union' (2004); Börzel, Hofmann, Sprungk, 'Why do states not obey the law? Non-compliance in the European Union'. Paper presented at the workshop 'Transposition and Compliance in the European Union', (2004).

basic norms with which actors are expected to comply.¹⁵⁰, so actors are more likely to comply with Charter norms than other legal norms. For example, parliamentarians could highlight the Charter as something with which the executive *should* comply if they wished to be fully compliant with EU law and fundamental rights protection.

Persuasion, in contrast to the ‘social learning’ described above, consists of actors attempting to convince other actors of the validity of claims inherent in any causal or normative statement.¹⁵¹ The Charter could be thus used by a wide variety of actors as evidence of the legitimacy of a particular claim. In particular, the Charter as a document could be used as evidence of the legitimacy of a claim that a certain right is a fundamental or human right.

A process of arguing would be similar but subtly different, with actors challenging claims in order to seek a communicative consensus of how to act in a given situation.¹⁵² Consensus would be sought on a theoretical level, or a practical and moral level – theoretical discourses covering their assumptions about the world, or practical and moral discussions about whether norms of behaviour can be justified.¹⁵³ Here, the ‘fundamental’ nature of the rights in the Charter could influence the arguments being made, for example being used as a reason why a previously existing norm of behaviour either could or could not be justified. Alternatively a deliberative discussion of a policy taking into account the Charter as a new factor for consideration.

The literature highlights that the two separate theories of Europeanisation, rational choice and sociological, do not exist in a vacuum. The clearer the actors’ preferences and options, the more likely they are to rely upon rational mechanisms of resources redistribution – rational choice institutionalism.¹⁵⁴ Conversely, the less clear their preferences, the more likely they are to be shaped by socialisation.¹⁵⁵ A further suggestion is that the pathways are sequentially linked, eg. social pressure and changes in norms might be required in order to accept any redistribution of resources

¹⁵⁰ Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’ 54 *International Organization* 2 (2000), 217, 224.

¹⁵¹ Börzel, Risse, ‘From Europeanisation to Diffusion: Introduction’, 35 *West European Politics* 1 (2012), 1, 8.

¹⁵² Risse, ‘Global Governance and Communicative Action’, 39 *Government and Opposition* 2 (2004), 288, 294.

¹⁵³ Ibid.

¹⁵⁴ March, Olsen, ‘The Institutional dynamics of international political orders’ 52 *International Organizations* 4 (1998), 943, 952-3.

¹⁵⁵ Ibid.

or those seeking to change norms are empowered by supportive institutions.¹⁵⁶ A third theoretical suggestion is that rational choice logic ‘exogenises’ preferences where sociological institutionalism ‘endogenises’ preferences. Therefore the more rational choice logic places adaptational pressure on deeply constitutive identities, the more a socialisation process is required to bring about change.¹⁵⁷

One of the benefits of the process-tracing methodology is that the researcher can assess simultaneously existing theoretical ideas against the empirical evidence. Additionally, even if the two theoretical branches co-exist within these specific empirical circumstances, process-tracing can be used to assess the extent to which they can be empirically observed.

There are multiple outcomes within the Europeanisation literature. Four of the most common are: absorption – Member States adopt European-level policies without a great deal of domestic change; accommodation – some domestic change in order to accommodate changes at a European level; transformation – ‘Member States completely replace existing policies, processes, and institutions by substantially different ones’; and inertia - general lack of action on the part of the Member State.¹⁵⁸ These can be divided fairly simply into those that represent change and outcomes that do not represent change. Another outcome has been added.¹⁵⁹ This outcome is known as ‘retrenchment’, and represents active resistance to the Europeanisation process, the result of which is the policy is less Europeanised. This leaves a total of five commonly used outcomes against which policy change can be measured in order to measure change as a result of Europeanisation.

3.3 Causal Mechanism

In order to test this hypothesis using the process-tracing methodology, the theories discussed in the previous section need to be divided into a causal mechanism. Given rational choice and sociological institutionalism predict different responses from actors, it is worth modelling them separately,

¹⁵⁶ Börzel, Risse, ‘Conceptualizing the Domestic Impact of Europe’ in Featherstone, Radaelli, *supra* note 115, 74.

¹⁵⁷ *Ibid*, 75.

¹⁵⁸ Börzel, Risse, *supra* note 115.

¹⁵⁹ Eg. Radaelli, ‘Europeanization of Public Policy’, in Featherstone, Radaelli, *supra* note 115, 38; Börzel, ‘How the European Union Interacts with its Member States’, in Bulmer, Lequesne, *supra* note 130; Héritier, ‘Differential Europe: National Administrative responses’ in Cowles, Caporaso, Risse, *supra* note 112; Radaelli, ‘Whither Europeanization: Concept Stretching and Substantive Change’ 4 *European Integration online Papers* 8, (2000); Kostera, ‘Europeanizing Healthcare: Cross-border Patient Mobility and Its Consequences for the German and Danish Healthcare Systems’, *Bruges Political Research Paper No. 7*, (2008).

beginning with the expectations from rational choice institutionalism. Following this assessment, the thesis can observe the extent to which these models empirically exist simultaneously. The process-tracing methodology (discussed in chapter 1) requires each part to be followed by the expected evidence. Part 1 represents the Charter's increased significance (discussed in section 1.2). Part 2 represents the subsequent misfit, and parts 3 and 4 represent how Europeanisation follows under two different theories. The outcome section covers the effects of the independent variable on the dependent variable.

Table 3.1 Causal Mechanism

RCI: Rational choice institutionalism

SI: Sociological institutionalism

	Cause	Part 1	Part 2	Part 3	Part 4	Outcome
Theory: RCI	Charter creation	Increased Significance	Policy misfit	Changed cost-benefit analysis	Policy change	Europeanisation
Observable manifestations: RCI	Charter created	Citation or influence	Comparison between policies/norms	Discussion of sanctions/costs	New laws/policies etc	New laws/policies
Theory: SI	Charter creation	Increased Significance	Policy misfit	Changed expectations	Policy change	Europeanisation
Observable manifestations: SI	Charter creation	Citation or influence	Comparison between policies/norms	Discussion of expectations	New laws/policies etc	New laws/policies

Source : author's own elaboration of Europeanisation research

4. Conclusions

This chapter, and specifically the causal mechanism elucidated earlier, plays a vital role in the thesis by providing the precise mechanism against which the empirical evidence is being tested. However, the theoretical analysis in the chapter could have wider implications and applications elsewhere, discussed in this conclusion.

The opening half of the chapter does extended work on integrating: existing theoretical analysis of human rights; institutionalism; and the role of fundamental rights within EU law. Several developments clarify the potential impact of the Charter, translating generic predictions of 'increased visibility' into more concrete mechanisms within EU law. Firstly, by establishing that despite some limitations, the chapter establishes that the same institutionalist analysis applies to the Charter as to other aspects of EU law. Secondly, the chapter lays out the interaction between 'increased significance' of fundamental rights and the operation of general principles of EU law – defining practically how the Charter will impact and interact with other principles and rights in EU law. The most important development in the chapter is that, despite the expectations and intentions of various actors that the Charter is limited to an exercise in visibility, the nature of human rights and the Charter means it is bound to increase significance in a practical way – actors being more likely to use fundamental rights arguments, such arguments being more likely to be accepted, and fundamental rights being favoured in trade-offs.

These concrete, understandable, predictions of the Charter's effects can be used by both academics and practitioners in attempting to understand the Charter. There is potential for these predictions to be used as the basis for empirical research into other areas, either at an EU or national level. The results found in this thesis can be used to shape any future research. If the predictions being tested turn out to be true, evidence of them playing out elsewhere can be sought. If not, the process-tracing methodology will allow us to analyse why, something which will additionally aid future research.

The second half of the chapter integrates the above analysis into models of Europeanisation, by explaining how the Charter and 'increased significance' fits into the 'misfit' step of the Europeanisation model. The main benefit of this is again that it allows a clearer understanding of the potential effects of fundamental rights. Tying the effects of the Charter into a clear, pre-existing model of the EU's effects contextualises the effects of fundamental rights *law* in a way that is more easily understandable to those more familiar with EU politics. It also allows clearer analysis on the effects the Charter in terms of how it affects relations between the EU and Member States. Again, the significance of this analysis comes from its potential usage in this and future research. A positive finding would show fundamental rights causing the loss of control, and a negative finding would rule it out – both a noteworthy improvement on our understanding of the relationship between the EU and its Member States.

Chapter 4 – Shifting Dynamics in the ECJ

For their part, social scientists have produced more research on the ECJ, and its impact on markets and politics, than on any other court in the world, with the single exception of the United States Supreme Court.¹

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EU Law was famously credited with the ‘transformation of Europe’². When studying the Europeanising effect of law, as this thesis does when studying the Charter, one of the first places to start is the institution tasked with interpreting EU law – the European Court of Justice. The work of the European Court of Justice has been subject to extensive analysis³. Much of this analysis has been on the integrationist effects of the Court, a topic of great controversy in the history of EU law⁴, and many analyses have taken place as to the Court’s Europeanising effects⁵. Drawing upon this literature means the starting point for the substantive content of this thesis is an EU institution with a long and substantial history of Europeanisation and integration.

¹ Stone Sweet, ‘The European Court of Justice and the Judicialization of EU Governance’ Faculty Scholarship Series Paper 70 (2010)

² Weiler, ‘The Transformation of Europe’ 100 *Yale Law Journal* 8 (1991), 2403.

³ Eg. Weiler, De Búrca, *The European Court of Justice* (OUP, 2001); Kuper, *The Politics of the European Court of Justice* (Kogan, 1998); Tridimas, *The European Court of Justice and the EU Constitutional Order: essays in judicial protection* (Hart, 2005); Wasserfallen, ‘The Judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union’ 17 *Journal of European Public Policy* 8 (2010), 1128; Stone Sweet, *supra* note 1.

⁴ Eg. Alter, ‘Who are the “Masters of the Treaty”? European Governments and the European Court of Justice’ 52 *International Organization* 1 (1998), 121; Stone Sweet, Brunell, ‘Constructing a supranational constitution: Dispute Resolution and governance in the European Community’ 92 *American Political Science Review* 1 (1998), 63; Burley, Mattli, ‘Europe before the Court – A political theory of legal integration’ 47 *International Organization* 1 (1993), 41; Alter, ‘The European Court and Legal Integration: An Exceptional Story or Harbinger of the Future’ in Whittington, Kelemen, Caldeira, *The Oxford Handbook of Law and Politics* (OUP, 2008); Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (St Martin’s Press, 1998); Beach, *Between Law and Politics. The relationship between the European Court of Justice and EU Member States* (DJØF publishing, 2001).

⁵ Eg. Panke, ‘The European Court of Justice as an agent of Europeanization? Restoring compliance with EU law’ 14 *Journal of European Public Policy* 6 (2007) 847; Caranta, ‘Europeanisation of Administrative Justice? The Influence of the ECJ’s Case Law in Italy, Germany and England’ 17 *European Law Journal* 1 (2011), 138; Baeten, Vanhercke, Coucheir, ‘The Europeanisation of national health care systems: creative adaptation in the shadow of patient mobility case law’ OSE Paper series 2010 (2010); Stone Sweet, *supra* note 1.

This chapter and the next represent this thesis' contribution to that body of literature, testing its own predictions from chapter 3 – that the Charter's institutionalist effects will result in a comparative increase in the significance of fundamental rights, and subsequently Europeanisation will take place. Despite some beliefs within the UK that the country enjoys an 'opt-out' from the Charter⁶, this chapter will demonstrate empirical evidence for the first two steps of the Europeanisation mechanism. As predicted, the Charter's institutional influence, at least through the mechanisms of the ECJ, causes misfit between national policies and EU law.

However, the chapter concludes after analysing the first two parts of the mechanism, for one important reason. Over the course of assembling the evidence for this chapter, I found developments resembling bottom-up Europeanisation – almost the opposite of the predicted empirical phenomenon. With a number of cases illustrating this phenomenon, it was worth taking time to consider the implications of these findings. The Charter provides Member States with increased freedom to act - a significant development, one which contradicts many of the predictions and expectations the thesis is designed to test.

The chapter proceeds in several steps. Section 1 will lay out the relevant methodological elements required for this chapter – explaining how the overall causal mechanism is applied in this context, and analysing the expected evidence and tests. The full body of evidence and its accuracy is discussed in appendix 4.1. Section 2 covers the course of litigation of the various cases being discussed in the chapter, and provides context to the choice of cases. The next section is the substantive analysis of the chapter, which weighs up the first two parts of the causal mechanism. These are, to repeat, increased significance and policy misfit. Finally, the conclusion considers the implications of the chapter's findings for the UK and Germany, as well as wider research – particularly those findings which are unexpected.

1. Mechanism and Methodological Elements

In order to empirically test the causal mechanism in the specific context of ECJ judgments, it needs to be adapted to the specific relevant actors. It is laid out in table 4.1 and much more fully discussed in chapter 3, but it is worth briefly reiterating a few of the key elements. The predictions for this chapter are collated in table 4.1. Parts 3 and 4 of the mechanism, the reaction to policy misfit and policy change,

⁶ Arnall, 'Protocol 30', in Peers, Hervey, Kenner, Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014), 1597.

are laid out and analysed in the following chapter. This split is due to unexpected findings when assessing part 2 of the mechanism, and the consequent need to assess these findings.

Chapter 3 established that it is the institutionalist nature of the Charter that causes its effects within the Europeanisation framework. Part 1 of the mechanism is that the institutionalist influence of the Charter will affect the actions of the ECJ in specific cases – it is expected that conceptualising a right as a fundamental right leads to additional significance compared to if there is no ‘fundamental right’ at issue.

This increased significance is due to two elements of institutionalism. Firstly, the regulatory element - as the ECJ sees the Charter as binding in multiple circumstances in terms of both Member States and European institutions, it will see the Charter as a binding factor in cases with fundamental rights implications. Secondly, the normative element of institutionalism. To reiterate some of the detail from chapter 3, the Charter has been seen as a ‘pan-European political consensus’ and it has made fundamental rights more central, more visible, and play a weightier role in defining constitutionality within the EU.⁷ The significance of this consensus adds normative weight to the Charter as an institution, creating a social obligation for compliance, including for judges. It is therefore more likely to be considered by judges, regardless of whether it is explicitly cited or not, as there is a feeling of obligation.

Part 2 of the mechanism is that these ECJ cases generate the ‘misfit’ required for Europeanisation. The Charter, either through its regulatory element or its normative element, leads to a differing interpretation of existing law or norms than if the Charter was not engaged. The difference between this interpretation and existing interpretations or norms that exist at a Member State level is the misfit that will generate the adaptational pressure which lies at the basis of Europeanisation.⁸

1.1 Evidence Expected and Priors

Having laid out the theoretical expectations, the next required step of the process-tracing methodology is to analyse what is expected at each part of the mechanism - the prior confidence in the likelihood of each part. The relevant test (hoop test, smoking gun test, etc.) is then decided, and

⁷ Opinion of AG Colomer in Case C-208/00, *Überseering*, ECLI:EU:C:2001:655, para. 59.

⁸ Eg. Börzel, Risse, ‘Conceptualising the Domestic Impact of Europe’ in Featherstone, Radaelli, *Politics of Europeanization* (OUP, 2003), 63.

how this affects the evidence-gathering process of the chapter. The full body of evidence is laid out in appendix 4.1, in order to transparently display the data used and its accuracy. This transparency is key to avoiding any perceptions of selective analysis or personal bias.

1.1.1 Evidence Expected at Part 1

Part 1 is that conceptualising a legal right or a policy choice as a fundamental right, especially in a binding fundamental rights document, results in the right or choice being treated with increased significance in the ECJ-judgment than the same right prior to the fundamental rights classification. In terms of the empirically observable manifestations of this prediction, it is pieces of evidence that demonstrate the Charter was involved in the ECJ decision being studied, specifically in a way that showed increased significance of the right in question. One form this evidence takes is of a direct citation of the Charter in explaining the ECJ's reasoning in a specific judgment. Alternatively, analysis that demonstrates the Charter's influence through comparisons with other primary legal sources (cases, Treaties etc.), or through analysis in legal literature.

There is moderate prior confidence in this part. Some scholarship predicts that a fundamental rights document will increase significance of fundamental rights, but is far from an overwhelmingly held position amongst EU law or human rights law academics⁹. Indeed, one of the benefits of this piece of research is empirically testing this aspect of the theory. This level of confidence means that merely the evidential presence of the step cannot merely be assumed, rather multiple pieces of confirmatory evidence must be found.

In terms of the process-tracing methodology, part one requires a 'smoking gun' test (see chapter 1 for more detail). The evidence has a high level of uniqueness. There are few alternative explanations for an increased significance of a fundamental right or fundamental rights approach, other than being triggered by an external event such as the Charter. However, there is considerably lower certainty. Even if there is increased significance for fundamental rights, it is not wholly certain that clear evidence

⁹ See chapter 3 for in depth analysis of this issue. In favour of increased significance including: Iglesias Sánchez, 'The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights' *CMLRev* 49 (2012), 1565; O'Neill, 'The EU and Fundamental Rights – Part 2' *16 Judicial Review* 4 (2015), 374; Menéndez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' *40 JCMS* 3 (2002), 471; and human rights theory including Dworkin, *Justice for Hedgehogs*, (Harvard, 2011), 335. Against the idea of increased significance, includes: Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' *6 European Law Journal* 2 (2000), 95; De Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' *EL Rev* 126 (2001), 129.

of this will manifest – judges frequently do not fully elucidate their full range of motivations.¹⁰. Therefore the evidence has a high degree of uniqueness and a low degree of certainty. Either a direct citation or clear explanation of the Charter causing increased significance is strong evidence of the existence of part 1 of the mechanism and the correctness of the hypothesis. However, if there is no clear evidence, it does not necessarily damage the theory too heavily due to the low level of certainty.

1.1.2 Evidence Expected at Part 2

Part 2 follows logically part 2 - policy misfit. The analysis and observation of policy misfit is relatively simple compared to the observation of part 1. Any empirically observable manifestations will be evidence that policies and norms at a national level differ from the outcome of the ECJ judgment. This evidence takes the form of a direct analytical comparison between national and EU-level laws and policies – either through looking at legislation or direct statements of policy.

There is again moderate confidence in this part of the theory. The theories that support the existence of part 1 also support the existence of part 2 – if there is increased significance, this will be shown in judgments of the relevant courts, as a shift in values from a previous case is likely to be explained in a judge’s ruling. However, as discussed above these theories are not universally accepted¹¹, so again the necessary evidence is confirmatory as opposed to disconfirmatory.

The evidence in this section will be a hoop test - high certainty, low uniqueness. The evidence expected, policy misfit, is an observable phenomenon - laws and policies are something can be directly compared to the outcome of the judgment. If policy misfit is present, there will very likely be evidence of it. However, as a piece of evidence it has relatively low uniqueness – there are many reasons policy misfit could occur as a result of a given ECJ judgment separate from the Charter, and indeed it may have existed even before the judgment.

Given the hoop test only provides a mild version of the confirmatory evidence being sought at this stage, there will need to be multiple pieces of evidence (passing through several metaphorical hoops) in order to provide sufficient confirmation of this part of the theory.

¹⁰ Griffith, *The Politics of the Judiciary* (Fontana Press, 1997, 5th Edition), 283-294.

¹¹ *Supra* note 9.

Table 4.1 : Causal mechanism and observable manifestations

RCI: Rational choice institutionalism

SI: Sociological institutionalism

	Cause	Part 1	Part 2
Theory: RCI	Charter creation	Increased Significance	Policy misfit
Observable manifestations: RCI	Charter created	Citation or influence	Comparison between policies/norms
Theory: SI	Charter creation	Increased Significance	Policy misfit
Observable manifestations: SI	Charter creation	Citation or influence	Comparison between policies/norms

Source: author's own elaboration of Europeanisation research

2. ECJ Cases Studied

The first step of analysis is assessing which ECJ cases will be studied as evidence in this substantive chapter. I began with a full list of ECJ cases which cited the Charter within the relevant time period (2000 onwards). This list can be found in the evidence base appendix at the end of the thesis. The majority of cases were then excluded for a variety of reasons. Firstly, a large proportion of the cases were unconnected to the substantive areas of health law and policy being studied in this thesis, and frequently concerned asylum and migration law. Secondly, many cases were not concerned with the interaction between the EU and Member States, but were cases specifically concerned with administration at an EU level, so were not relevant to the thesis. In further cases the Charter did not lead to a substantive outcome against a Member State in a particular question, meaning that no Europeanisation could be expected to take place as a result.

Given there is also potential for the Charter to influence judgments without being specifically cited, as

previously outlined, it was also worth looking at ECJ cases identified by EU health law literature¹² as notable cases with a fundamental rights element occurring during the timeframe of the thesis. Given some of these cases have dealt with the rights and principles covered by the studied Charter articles, it is essential to analyse any effects the Charter has had on these cases.

After this process, just seven cases remain. The various courses of litigation in each are laid out in the next section. Three of these cases are *Brüstle*¹³, *Test-Achats*¹⁴, and *Léger*¹⁵. Whilst these judgments were all delivered in the past 5 years, they each represent the culmination of a lengthy process. In the evidence presented, Directives (or Commission Directives) were created dealing with specific topics, and the Charter empowered interest groups within various Member States to challenge specific provisions of the Directive or their implementation in court. The national courts referred the cases to the ECJ, and these referrals generated the cases being studied in this chapter.

There are several more ECJ cases that are discussed in the chapter, which are grouped together for ease of analysis. In that they are the cases where unexpected but similar effects were found in each of the following cases, clearer conclusions can be drawn from combined analysis. The cases are as follows: *Susisalo*¹⁶, *Venturini*¹⁷, *Blanco Pérez and Chao Gómez*¹⁸, and *Deutsches Weintor*¹⁹. Three of the cases cover regulations on pharmacy establishment, and *Deutsches Weintor* is about national compliance with EU consumer protection legislation. However, all four involve using Article 35 of the Charter in justifying national-level action and legislation in the face of challenges based on EU internal market law. National rules were referred to the ECJ by a national court to establish potential incompatibility with internal market law, and those preliminary references form the cases in this chapter.

Before moving on, one substantive point needs to be made. Already the number of judgments in this chapter is small, only encompassing seven separate courses of litigation and surrounding documents.

¹² Eg Hervey, McHale, *European Union Health Law: Themes and Implications* (Cambridge, 2015); Mossialos, Permanand, Baeten, Hervey, *Health Systems Governance in Europe: The role of European Union law and Policy* (CUP, 2010).

¹³ Case C-34/10, *Brüstle*, ECLI:EU:C:2011:669.

¹⁴ Case C-236/09, *Test-Achats*, ECLI:EU:C:2011:100.

¹⁵ Case C-528/13, *Léger*, ECLI:EU:C:2015:288.

¹⁶ Case C-84/11, *Susisalo*, ECLI:EU:C:2012:374.

¹⁷ Joined Cases C-159/12, C-161/12, *Venturini*, ECLI:EU:C:2013:791.

¹⁸ Case C-570/07, *Blanco Pérez and Chao Gómez*, ECLI:EU:C:2010:300.

¹⁹ Case C-544/10, *Deutsches Weintor*, ECLI:EU:C:2012:526.

Substantively this means the chapter must state that at best, no matter the weight of evidence found from this point onwards, Europeanisation through ECJ judgments in the field studied in this thesis is a rarely occurring phenomenon. The significance of this narrow scope is discussed in the chapter's conclusions.

2.1 *Brüstle*

The *Brüstle* judgment affects the boundaries of patent law within the Member States, specifically on stem-cells. Limits on the patentability of stem cell research affects its commercial viability, and consequently investors' willingness to invest. Given stem cell research is at the cutting edge of research into the treatment of multiple serious diseases, this limitation affects the ability of medical researchers to treat diseases. Therefore, these legal limitations constitute part of health law and policy entitled 'regulation of health care'.

The course of the *Brüstle* litigation begins with the Biotechnology Directive, adopted on 6 July 1998.²⁰, which constituted a substantial development in EU health law.²¹. The Directive is designed to harmonise biotechnological patents in Europe, applying general principles of patent law to biotechnological inventions.²². 'Biotechnological inventions' in the Directive refer to inventions involving biological material.²³ which includes: material that contains genetic information; and material capable of reproducing itself in a biological system.²⁴. 'Biotechnological inventions' also includes the processes by which these materials are obtained.²⁵. Given the ethical sensitivity of the topic and disagreements between Member States, certain areas of health law and health-related research were considered to be unacceptable when drafting the Directive, and so were excluded from patentability.²⁶.

Certain inventions are unpatentable due to contravening 'ordre public or morality'.²⁷. This is a long-

²⁰ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, Official Journal L 213.

²¹ See 'The Regulation of Clinical Research', in Hervey, McHale, *Health Law and the European Union* (CUP, 2004).

²² Recitals 3, 8, and 9, Biotechnology Directive, *supra* note 20.

²³ Article 3(1), Biotechnology Directive, *supra* note 20.

²⁴ Article 2(1)(a), Biotechnology Directive, *supra* note 20.

²⁵ Art. 2, Biotechnology Directive, *supra* note 20.

²⁶ Recital 16, Biotechnology Directive, *supra* note 20.

²⁷ Article 6(1), Biotechnology Directive, *supra* note 20.

standing provision of patent law²⁸, and similarly-phrased prohibitions proliferate in national and international patent law²⁹, including the European Patent Convention³⁰, representing rejection of things considered morally ‘unacceptable’ by society. The prohibition in the Biotechnology Directive represents an embodiment of the aforementioned ethical concerns as well as wider morality questions³¹. The Directive gives examples of exclusions from patentability on grounds of public morality, and specifically mentions ‘uses of human embryos for industrial or commercial purposes’³².

The Directive, following initial resistance and infringement proceedings³³, was eventually implemented in Germany³⁴. The provisions of the Directive excluding ‘uses of human embryos for industrial and commercial purposes’ were directly transposed into German law, which inserted the German-language version of that provision into Article 2(2)(3) of the German patent law³⁵. The transposition of this provision led to the judgment that is being discussed in this chapter. This initial transposition could be considered a case of Europeanisation, albeit one which will not be considered here as it was not as a result of the Charter. Rather it was the Directive that created a misfit between the EU-level policy and the German-level policy, and enforcement proceedings and the threat of sanctions created adaptational pressure to change. The adaptation being studied in this chapter constitutes a separate change following the initial implementation of the Directive.

The German scientist Brüstle obtained a patent covering neural precursor cells, and the process of extracting them from the blastocyst stage. The patent was challenged in the German Federal Patent Court, and was held invalid so far as it covered neural precursor cells obtained from human embryonic stem cells³⁶. The Federal Patent Court ruled that obtaining these precursor cells from human

²⁸ Witek, ‘Ethics and Patentability in Biotechnology’, 11 *Science and Engineering Ethics* 1 (2005), 105, 106.

²⁹ Gold, Gallochat, ‘The European Biotech Directive: Past as Prologue’ 7 *European Law Journal* 3 (2001), 331, 345.

³⁰ Convention on the Grant of European Patents (European Patents Convention) 1973, Article 53(a).

³¹ Gold, Gallochat, *supra* note 29, 339-340.

³² Article 6(2)(c), Biotechnology Directive, *supra* note 20.

³³ Case C-5/04, *Commission v Bundesrepublik Deutschland*, ECLI:EU:C:2004:688.

³⁴ Gesetz zur Umsetzung der Richtlinie über den rechtlichen Schutz biotechnologischer Erfindungen, Bundesgesetzblatt Jahrgang 2005 Teil I, Nr. 6, ausgegeben zu Bonn am 28. Januar 2005.

³⁵ Patentgesetz in der Fassung der Bekanntmachung vom 16. Dezember 1980 (BGBl. 1981 I S. 1), das zuletzt durch Artikel 4 des Gesetzes vom 8. Oktober 2017 (BGBl. I S. 3546) geändert worden ist, Para. 2, S. 2 - ‘die Verwendung von menschlichen Embryonen zu industriellen und kommerziellen Zwecken’.

³⁶ Bundespatentgericht, 3 Ni 42/04, Proclaimed on 5th December 2006, Part 2, para. 2; Garvey, <http://www.bristows.com/articles/patentability-of-human-embryonic-stem-cells-by-shauna-garvey>, first accessed 15/04/2015.

embryonic stem cells constituted ‘use of a human embryo for industrial or commercial purposes’, contrary to the German law transposing the Directive³⁷. Following an appeal to the Federal Supreme Court, a referral was made under Article 267 TFEU in order to clarify several questions concerning the interpretation of the Directive.

The ECJ was called upon to determine: firstly, the meaning of ‘human embryo’ for the purposes of the directive, whether it included neural precursor cells as obtained by Brüstle; secondly, the meaning of the phrase ‘industrial or commercial purposes’; and thirdly, the status of patents that do not mention human embryos, but where destruction of human embryonic stem cells is involved in the process³⁸. If the ECJ held that the Brüstle patent cells were human embryos for the purposes of the Directive and were being used for industrial or commercial purposes, the invention would be unpatentable. The ECJ controversially³⁹ held⁴⁰:

‘any human ovum must, as soon as fertilised, be regarded as a ‘human embryo’ within the meaning and for the purposes of the application of Article 6(2)(c) of the Directive, since that fertilisation is such as to commence the process of development of a human being.

That classification must also apply to a non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted and a non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis. Although those organisms have not, strictly speaking, been the object of fertilisation, due to the effect of the technique used to obtain them they are, as is apparent from the written observations presented to the Court, capable of commencing the process of development of a human being just as an embryo created by fertilisation of an ovum can do so.’

Having stated the definition of ‘human embryos’ given above for the purposes of the Directive, the ECJ held that inventions involving the destruction of such cells were unpatentable under the provision excluding ‘uses of human embryos for industrial and commercial purposes’⁴¹, and that the research

³⁷ *BGh, Xa ZR 58/07*, Proclaimed on 17th December 2009, paras. 56-58.

³⁸ *Brüstle*, *supra* note 13, para. 23.

³⁹ Much has been written on the merits of the judgment, eg. Staunton, ‘BRÜSTLE V GREENPEACE, EMBRYONIC STEM CELL RESEARCH’ 21 *Medical Law Review* 2 (2013), 310; Plomer, ‘After Brüstle: EU Accession to the ECHR and the Future of European Patent Law’ 2 *Queen Mary Journal of Intellectual Property* 2 (2012), 110; Nielen, de Vries, Geijsen, ‘European stem cell research in legal shackles’ 32 *Embo Journal* 24 (2013), 3107; Harmon, Laurie, Courtney, ‘Dignity, Plurality and Patentability: The Unfinished Story of Brüstle v Greenpeace’ 38 *European Law Review* 1 (2013), 92.

⁴⁰ *Brüstle*, *supra* note 13, para. 23, para. 35-36.

⁴¹ *Brüstle*, *supra* note 13, para. 53.

in *Brüstle* constituted such an industrial or commercial purpose.⁴² The case was referred back to the German court, specifically to determine whether blastocysts fitted the above definition of human embryo.⁴³ The judgment of the ECJ establishes the specific given definition of human embryo, and its application to the sort of scientific research at stake in the case. Finally, destruction of the embryos at any stage renders the invention unpatentable.⁴⁴

2.2 *Test-Achats*

The *Test-Achats* decision judgment affected insurance and insurance premiums, specifically the use of statistical and actuarial data to justify discrimination on grounds of sex. One area in which this discriminatory treatment takes place is in the area of health insurance. Changes in insurance premiums affect the costs of healthcare access for many individuals, particularly in the German system, in which many people regularly rely upon private health insurance. Increases or decreases in the cost of health insurance make access to healthcare harder or easier for those who use private health insurance.⁴⁵ Statutes and policies on the extent to which insurers can vary premiums due to thus falls within the ‘financing of health systems’ area of health law and policy.

This is a case concerning sex equality and, as will be shown, is a case in which Article 21 of the Charter played a prominent role, leading to Europeanisation. A Charter-driven norm led to a Directive being interpreted in a specific way, the result being that said norm was transferred down to a Member State level.

The Directive at stake in this case is Directive 2004/113/EC, generally known as the Gender Directive.⁴⁶ The purpose of the Directive is stated in Article 1, namely to ‘lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into

⁴² *Brüstle*, *supra* note 13, para. 46.

⁴³ *Brüstle*, *supra* note 13, para. 37.

⁴⁴ *Brüstle*, *supra* note 13, para. 53.

⁴⁵ Roughly 11% of the population of both countries relies on some form of private health insurance, see: http://www.commonwealthfund.org/~media/files/publications/fund-report/2013/nov/1717_thomson_intl_profiles_hlt_care_sys_2013_v2.pdf, first accessed 06/06/2015; <https://www.kingsfund.org.uk/sites/files/kf/media/commission-appendix-uk-private-health-market.pdf>, first accessed 06/06/2015.

⁴⁶ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37.

effect in the Member States the principle of equal treatment between men and women'⁴⁷. The Directive focused on access to goods and services, as problems were 'particularly apparent' in this area⁴⁸. It applies to both direct and indirect discrimination⁴⁹, and focuses on a number of areas such as discrimination due to maternity leave⁵⁰, discrimination in services separate from the employment relationship⁵¹, and the monitoring of gender discrimination by the Member States⁵².

The provision at stake in the *Test-Achats* case was Article 5(2), which is a provision that links non-discrimination with an area of health law – the regulation of private health insurance. Article 5 of the Gender Directive deals with the relationship between sex and the cost of 'insurance and related financial services'⁵³. Article 5(1) stipulates that the use of sex as a factor in these calculations shall not result in 'differences in individuals' premiums and benefits'. The second paragraph of the article provides an exception to the first paragraph. This exception stipulates that 'where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data', Member States may permit proportionate differences in individuals' premiums and benefits. This exception was further conditional on Member States informing the Commission and compiling, updating, and publishing 'accurate data relevant to the use of sex as a determining actuarial factor'.

The Gender Directive was implemented in Belgium by the Law of 21 December 2007⁵⁴, as stated in Article 2 of this law. Article 3 of this law replaces Article 10 of the Law of 10 May 2007⁵⁵, and implements in a very similarly worded way the exception established by Article 5(2) of the Gender Directive.

The Belgian law implementing the Gender Directive was challenged before the Belgian Constitutional Court by a Belgian consumer rights organisation, Association Belge des Consommateurs Test-Achats ASBL. The applicants argued that the exception created by Article 5 was 'contrary to the principle of

⁴⁷ Ibid, Article 1.

⁴⁸ Ibid, recital 10.

⁴⁹ Ibid, recital 12.

⁵⁰ Ibid, recital 20.

⁵¹ Ibid, recital 15.

⁵² Ibid, recital 25.

⁵³ Ibid, Article 5(1).

⁵⁴ *Test-Achats*, *supra* note 14, para. 9.

⁵⁵ Ibid, para. 9.

equality between men and women'⁵⁶. The Constitutional Court, given the question involved assessing the validity of EU law, referred the case to the ECJ.

The ECJ was called upon to determine: firstly, whether Article 5(2) of the Gender Directive was compatible with Article 6(2) TEU and the fundamental rights obligations contained within; and if the answer to the first question was yes, whether it would still be incompatible were it limited to life assurance contracts.⁵⁷

If the first question was answered in the affirmative, insurers (for example health insurers) would be greatly limited in their ability to take sex into account when determining insurance premiums. This would be a significant change in the area of health, given the importance of insurance premiums in determining healthcare costs for some individuals in some healthcare systems.

Overall, the ECJ held that as Article 5(2) of the Directive allows discrimination with no temporal limit⁵⁸, the provision 'works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.'⁵⁹ The ECJ consequently held that Article 5(2) must therefore be considered to be 'invalid upon the expiry of an appropriate transitional period'. There was no consideration of the second question, as even if Article 5(2) were limited to life assurance contracts, it would still allow discrimination without any temporal limit.

Following the decision, the Commission issued guidelines on applying the judgment⁶⁰. These guidelines set a deadline of 21 December 2012 for the application of the Article 5(1) unisex rule without any exception⁶¹, detailing the aforementioned 'appropriate transitional period'. It also laid down specifications for what constituted a 'new contract'⁶², and what gender-related practices remain possible⁶³.

⁵⁶ Ibid, para. 13.

⁵⁷ Ibid, para. 14.

⁵⁸ Ibid, para. 25.

⁵⁹ Ibid, para 32.

⁶⁰ Guidelines on the application of Council Directive 2004/113/EC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats) Text with EEA relevance, OJ C 11.

⁶¹ Ibid, paras. 5-6.

⁶² Ibid, paras. 7-13.

⁶³ Ibid, paras 14-15.

2.3 Léger

The third case under consideration in this chapter is the case of *Léger*. This case concerned French blood donation laws, and the complete prohibition of donations from men having had sexual relations with another man (MSM). The judgment is part of the ‘public health’ area of the dependent variable. Regulations on blood donation are designed to ensure the quality of the blood used for transfusions and transplants. Any changes made to quality checks will have an effect on the health of the public, good or bad, meaning it is a reasonably significant area in terms of public health. The case itself involved interaction between multiple Charter rights, specifically the right to non-discrimination in Article 21 of the Charter and the right to health care embodied in Article 35.

More pertinently, the Court was asked to interpret point 2.1 of Annex III to Commission Directive 2004/33/EC of 22 March 2004, a Commission Directive designed to implement the Blood Directive⁶⁴.

Léger had attempted to donate blood at the local branch of the French Blood Agency, but was rejected by a decision of 29 April 2009⁶⁵, on the grounds of having had sexual relations with another man. This decision was based on the French Decree of 12 January 2009, a decree which references Directive 2004/33 in its preamble, and allows donations to be rejected if the donor presents a ‘contraindication’⁶⁶. Such contraindications were listed in a separate annex and included a permanent contraindication for men who had sex with men⁶⁷.

Léger brought an action before the Administrative Court in Strasbourg arguing the French Decree was incompatible with Directive 2004/33⁶⁸, an issue which the French Court felt was sufficiently complex for the French Court to refer the case to the Court. The Court had to determine, in light of Annex III of Directive 2004/33, whether a case of MSM was a ‘severe’ risk justifying permanent deferral from blood donation, or merely capable of a lesser risk justifying only a temporary donation for a certain period⁶⁹.

Having established that only a ‘high risk’ of acquiring a severe infectious diseases that can be

⁶⁴ Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components (Text with EEA relevance) OJ L 091

⁶⁵ *Léger*, *supra* note 15, paras. 24-25.

⁶⁶ *Ibid.* paras. 21-23.

⁶⁷ *Ibid.* para. 23.

⁶⁸ *Ibid.*, para 27.

⁶⁹ *Ibid.*, para. 29.

transmitted by blood justifies a permanent ban, the Court established that the crux of the case was whether the category of MSM in the French law were of a sufficiently high risk as to justify a permanent deferral, within the margin of appreciation the Member States were afforded.⁷⁰

Regarding the substantive decision on this question, the ECJ began by noting that when implementing EU rules, as the French Decree was doing in this case, the Member States were bound by fundamental rights, and obligated to 'not rely on an interpretation of wording of secondary legislation which would be in conflict with those fundamental rights'.⁷¹ After referring issues of epidemiology and statistics back to the referring court in France.⁷², the Court moved onto considering whether the French Decree breached the Charter of Fundamental Rights. The decree was swiftly deemed to contradict Article 21(1) of the Charter, as male homosexual donors were treated less favourably compared to male heterosexual donors.⁷³

The question then was whether the discrimination was justified discrimination. Restrictions on Charter rights are permitted in the general interest, and the Court noted that protection of health is a legitimate objective recognised in multiple Treaty Articles and specifically Article 35 of the Charter.⁷⁴

The court then moved to proportionality. This was almost wholly referred back to the referring court as they were in a better place to judge the available scientific methods in protecting health, and whether the epidemiological data in France meant that MSM were a 'high risk' population. The Court merely held that:

'it must be concluded that if effective techniques for detecting severe diseases that can be transmitted by blood or, in the absence of such techniques, less onerous methods than the permanent deferral of blood donation for the entire group of men who have had sexual relations with other men ensure a high level of health protection to recipients, such a permanent contraindication would not respect the principle of proportionality, within the meaning of Article 52(1) of the Charter.'

If a less onerous restriction were available and protected health to the same extent, the restriction would be an unjustified discrimination.

⁷⁰ Ibid para. 40.

⁷¹ Ibid, para 41.

⁷² Ibid, paras. 42-44.

⁷³ Ibid, para 49.

⁷⁴ Charter of Fundamental Rights of the European Union [2012] OJ 326/391, Article 35.

2.4 Article 35 in Internal Market Law

The case of *Susisalo*⁷⁵ concerned the licensing laws for Finnish pharmacies. Briefly, Finnish law prohibited sale of medicines unless done through licensed pharmacies, with licenses being given on a municipality level dependent on a number of factors, including: number of inhabitants in an area; existing pharmaceutical services; and other healthcare services available. Universities gain special privileges to operate pharmacies, and relevant universities in large cities such as Helsinki were given specific preferential licenses.

Two sets of applications were the source of the referral. The health company UHP sought to transfer one of its branch pharmacies to the Tammisto district of Vantaa – an application that was accepted and that Mr Susisalo sought to overturn. Secondly, an application was made by Mr Susisalo to open his own branch in the same district.

The Court was asked to answer multiple questions regarding the compatibility of these rules, and specifically these applications, with Article 49 TFEU and freedom of establishment. Specifically, the case hung on the distinction between the regulatory regimes laid down for private pharmacies and university pharmacies.

*Blanco Pérez and Chao Gómez*⁷⁶ is another case on pharmacy regulations. In this case, Mr Blanco Pérez and Ms Chao Gómez, who were qualified pharmacists, sought to open a pharmacy in a specific region of Spain without having to comply with the local planning rules, under which licences were granted on considerations such as ‘population density, the distribution of inhabitants, the distance between pharmacies, and very small population units’⁷⁷. Their applications were rejected, and they sought to challenge this decision as an unjustified breach of freedom of establishment.

Similarly, in *Venturini*⁷⁸, several pharmacists sought to challenge licencing restrictions using the freedom of establishment, with a judgment and outcome that substantively resembles *Blanco Pérez and Chao Gómez*.

⁷⁵ *Susisalo*, *supra* note 16.

⁷⁶ *Blanco Pérez and Chao Gómez*, *supra* note 18.

⁷⁷ *Ibid*, para. 24.

⁷⁸ *Venturini*, *supra* note 17.

In *Deutsches Weintor*⁷⁹, a wine-growers co-operative described specific types of wine, as part of their marketing, as ‘easily digestible’ due its low acidity. This was prohibited by the relevant authority as a ‘health claim’, prohibited by in conjunction with alcoholic beverages by Article 4(3) of Regulation No 1924/2006. The national court subsequently referred the case to the ECJ for an authoritative interpretation of what constituted a ‘health claim’.

Broadly speaking, the relevant sections of the ECJ judgments followed a similar pattern, and is adequately exemplified by the two cases below. The issue was not whether or not the national rule in question constituted a restriction on the relevant freedom. The substantive content of the decisions was whether the restriction was a justified one. Importantly for the chapter and the research as a whole, in all of the cases the ECJ found the restriction to be legitimate and proportionate.

For example, in *Blanco Pérez and Chao Gómez*, the court established that Directive 2005/36 does not preclude specific regulations on the establishment of pharmacies, and also that the restriction in question constituted a restriction on freedom of establishment. The case then hinged on the proportionality of the restriction. The ECJ establishes as a baseline the fundamental right and importance of high protection of human health, then eventually concluded the restriction was proportional.

The judgment in *Deutsches Weintor* is slightly different, in both its subject matter and the trade-offs in question. Here the ECJ decision rested on whether a prohibition on health claims was compliant with the Charter, specifically freedom to conduct a business in Article 15. Thus the ECJ weighed up this Charter right against the Article 35 right to public health. With the ECJ having repeatedly acknowledged the need to limit marketing of alcoholic beverages, and a ban on certain health claims only constituting a minor restriction on this freedom, the Court held that it was justified restriction.

3. Europeanisation

What do the above cases tell us about Europeanisation and misfit, and about whether a Charter right is treated with increased significance compared to the situation pre-Charter? This section compares the theoretical expectations and expected empirical observations with the actual evidence – using the qualities of certainty and uniqueness to properly weigh the evidence within the process-tracing methodology.

⁷⁹ *Deutsches Weintor*, *supra* note 19.

3.1 Part 1 – Increased Significance

For part 1 of the mechanism evidence is required which, if found, has a reasonably high significance in of itself, as it is relatively unique piece of evidence in favour of the mechanism.

3.1.1 *Brüstle*

Starting with the *Brüstle* case, there are several pieces of evidence. Whilst the Charter is not directly cited in the case, the lack of certainty in the evidence does not rule out the correctness of this part of the mechanism – the part could be present without leaving clear evidence. Despite this potential for absence, there are several compelling pieces of evidence.

The first piece of evidence comes from comparing *Brüstle* to other ECJ cases on dignity that pre-date the Charter. In the challenge to the Biotechnology Directive brought by the Netherlands⁸⁰, the ECJ acknowledged that it is its duty to safeguard the fundamental right to human dignity⁸¹. However, it did not establish an EU-level definition of what this means in the context of EU law, which would have made clear the substantive standard to be applied in the future. Similarly in even earlier cases on dignity⁸², the ECJ declined to lay out a centralised meaning, restricting the application to the case at hand. This newfound centralisation, by contrast with the pre-existing general principle of human dignity within EU law, is a strong piece of evidence of the Charter increasing the significance of the right in question.

Various academics have also noted the Charter's centralising effect. Gärditz contrasts the Court's approach to dignity in this case with cases that took place before the Charter became legally binding. He argues that in previous dignity cases such as *Omega Spielhallen*⁸³, the ECJ was 'reluctant to develop an autonomous concept of dignity', which resulted in a 'decentralized' concept of dignity specific to each individual Member State⁸⁴. He argues that the ECJ then had the 'resolution' to develop an autonomous conception of human dignity as they implicitly accepted the duty to protect human

⁸⁰ Case C-377/98, *Kingdom of the Netherlands v European Parliament and Council of the European Union*, ECLI:EU:C:2001:523.

⁸¹ *Ibid*, para. 70.

⁸² Case C-13/94 *P & S v Cornwall County Council*, ECLI:EU:C:1996:170.

⁸³ Case C-36/02, *Omega Spielhallen*, ECLI:EU:C:2004:614.

⁸⁴ Gärditz, 'Human dignity and research programmes using embryonic stem cells: An analysis of *Brüstle*/Greenpeace-judgment of the European Court of Justice' (Bonn, 2011).

dignity created by Article 1 of the Charter.⁸⁵ There is little reason for Gärditz, as an external academic, to be particularly susceptible to bias towards the hypotheses in the thesis, and it is reasonable to conclude that it probably accurately reflects the first part of the mechanism.

The pre-Charter approach has been described as ‘ad-hoc’ in authoritative analysis of the Charter⁸⁶, with the post-Charter approach being described as ‘a new and particularly strong commitment to protect and respect it [human dignity] in all of its [the Charter’s] activities’⁸⁷. These academic opinions provide additional evidence of increased significance.

Further academic commentary applies less specifically to the mechanism at hand, but nevertheless notes the influence of the Charter on the *Brüstle* case – each of these comparisons adds to the evidence base for this part, and again provides impartial analysis on the specific issue.

Aidan O’Neill noted that the Charter was ‘conspicuous in its absence’⁸⁸, indicating that it was odd that the effects of the Charter went unmentioned. Fontanelli has described this as an intentional omission – the judgment being motivated by the Charter, but the judges having chosen to avoid explicit mentions of the Charter to avoid polarising public opinion against the document in a controversial decision⁸⁹. It has also been argued that the ECJ abstains from references to fundamental rights where it is ‘inconvenient’⁹⁰. Iglesias Sánchez similarly argues that whilst the Charter has ‘improved the centrality and weight of fundamental rights, reinforcing [...] their visibility in the legal discourse of the Court’⁹¹, the ECJ will intentionally omit the Charter ‘particularly when the controversial or adventurous solutions arrived at by the Court could somehow have a negative impact in the attitude of national authorities or private actors towards the Charter’⁹². McCrudden describes dignity in the context of the Charter as being ‘the subject of considerable debate and litigation’, citing *Brüstle* as an

⁸⁵ Gärditz, *ibid*, 4-5.

⁸⁶ Dupré, ‘Article 1’, in Peers, Hervey, Kenner, Ward, *supra* note 6, 13.

⁸⁷ Dupré, *ibid*, 15.

⁸⁸ O’Neill, <http://eutopialaw.com/2011/10/21/eu-law-human-dignity-and-the-human-embryo-the-decision-of-the-cjeu-grand-chamber-in-Brüstle-v-greenpeace-ev-c%E2%80%9913410/>, first accessed 01/05/2015.

⁸⁹ Fontanelli, ‘The European Union’s Charter of Fundamental Rights two years later’ 3 *Perspectives on Federalism* 3 (2011), 22, 36.

⁹⁰ Geiger, *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015), 126.

⁹¹ Iglesias Sánchez, *supra* note 9, 1576.

⁹² *Ibid*, 1577.

example⁹³. Den Exter and Földes described the ECJ as pointing out that the ‘Charter emphasises that patent law must be applied so as to respect fundamental principles safeguarding the dignity and integrity of the person’, a sign of the Charter’s influence on the decision⁹⁴. Puppinck similarly acknowledges the Charter’s influence on both the ECJ decision and the opinion of the Advocate-General⁹⁵.

Finally, on top of this academic evidence, a report from the European Commission. In the section of the report detailing the impact of chapter 1 of the Charter, the chapter dealing with ‘dignity’, *Brüstle* is cited as one of the main cases in which human dignity (Article 1) had an impact. Given the case’s prominence in a report on the impact of the Charter, it is reasonable to say that the Commission view is that the Charter impacted the *Brüstle* judgment. Reports from the European Commission remain relatively impartial. However, it is worth treating this piece of evidence marginally more sceptically than academic commentary. Whilst there will be trends towards objectivity in European Commission reports, there would also be a tendency to overplay the role of the Charter – as it was at least partially introduced to bolster the fundamental rights reputation of the EU, there would be an incentive for the European Commission to overemphasise its effects. Despite this however, the Commissions’ commentary remains a somewhat valuable piece of evidence on top of the above academic commentary.

3.1.2 *Test-Achats*

In this case, unlike *Brüstle*, the Charter is directly cited, both in the ‘legal context’ section, and multiple times within the ECJ’s consideration on the questions referred. The repeated references are in of themselves evidence that the Charter is relevant to the ECJ’s decision-making process in the judgment.

More direct evidence is the analysis demonstrating the Charter increased the significance of fundamental rights. The Court declares the provision incompatible with Articles 21 and 23 of the Charter, using the Charter as a standard against which fundamental rights should be measured. Furthermore, the citations of the Charter indicate that the ECJ was motivated by the Charter

⁹³ McCrudden, ‘Labour Law as Human Rights Law: A Critique of the Use of ‘Dignity’ by Freedland and Kountouris’, in Bogg, Costello, Davies, Prassl, *The Autonomy of Labour law* (Hart, 2015), 278.

⁹⁴ Den Exter, Földes, *Casebook on European Union Health Law* (Maklu, 2014), 21.

⁹⁵ Puppinck, ‘Synthetic analysis of the ECJ case C-34/10 *Oliver Brüstle v Greenpeace e.V.* and its ethical consequences’ (European Centre for Law and Justice, 2013).

specifically when coming to this interpretation. If they considered previously existing principles of gender equality sufficient to make this decision, they would have merely cited either Treaty provisions on gender equality⁹⁶, or its existence as a general principle within EU law⁹⁷. The ECJ going beyond a basic citation indicates the significance of the Charter to the judgment, and so is notable evidence in favour of part 1 of the mechanism.

Koldinská⁹⁸ supported this view, in another piece of academic evidence, noting that whilst the Advocate-General ‘recalled the already-existing case law’⁹⁹ when making her decision, the Court ‘limited itself to declaring that Articles 21 and 23 of the Charter state, respectively, that any discrimination based on sex is prohibited and that equality between men and women must be ensured in all areas’¹⁰⁰. The Advocate-General provided a clear route for the ECJ to rely on existing case law, but instead they chose to rely on the Charter.

Di Torella noted that embedding sex equality as a fundamental right in the Charter was ‘crucial’ and something that ‘completed’ the ‘deepening process of equality’¹⁰¹. Additionally, she argued that it was ‘against the background’ of the Charter that the ECJ made its decision. She argues that the law changed to state that ‘the law reflects that change by starting to state explicitly (...) that certain forms of discriminatory treatment...will be tolerated no longer’. Importantly, with the ECJ expanding the norm of sex equality against the background of and with many explicit references to the Charter, it can be said that the Charter led to a new norm in the area of sex equality, as expressed through the *Test-Achats* judgment. The creation of a new norm, based on the Charter, indicates that it has increased significance of fundamental rights in question.

These two academic opinions support the first piece of evidence in this section, and my own subsequent analysis highlighting the court’s choice to rely on the Charter. Overall, this impartial assessment supports the primary evidence and my own analysis.

⁹⁶ Consolidated version of the Treaty of the Functioning of the European Union [2012] OJ C/326/01, Article 157(1).

⁹⁷ Eg. Case 149/77, *Defrenne v Sabena*, ECLI:EU:C:1978:130,

⁹⁸ Koldinská, ‘Case Law of the European Court of Justice on Sex Discrimination 2006-2011’ 48 *CMLRev* 5 (2011), 1599.

⁹⁹ Koldinská, *ibid*, 1635.

¹⁰⁰ Koldinská, *ibid*, 1636.

¹⁰¹ Di Torella, ‘No sex please: we’re insurers’ 38 *ELRev* (2013), 638.

3.1.3 Léger

In this case again, direct citations of the Charter constitute important evidence, and this direct evidence is reinforced by academic commentary. The ECJ notes that Member States are bound by the Charter in some circumstances, including when implementing EU law¹⁰² - a situation applying in this case. As discussed above, the main impetus of the ECJ's decision was to assess whether the French Decree was compliant with the Charter. Even if other fundamental rights standards exist within EU law, in this case the Charter was used. At the Charter's least influential in this case, it provided a the current standard of fundamental rights in EU law with which Member States had to comply.

Baeyens and Goffin note that the 'Court observes that the Decree of 12 January 2009 may discriminate against homosexuals on grounds of sexual orientation within the meaning of Article 21(1) of the Charter' and the 'Court observes that the Decree of 12 January 2009 may discriminate against homosexuals on grounds of sexual orientation within the meaning of Article 21(1) of the Charter' and 'It must be determined whether the permanent contraindication to blood donation provided for in the Decree of 12 January 2009 for a man who has had sexual relations with another man none the less satisfies the conditions laid down by Article 52(1) of the Charter in order to be justified'¹⁰³.

Alina Tryfonidou wrote an unfavourable case critique¹⁰⁴. In it she states that the court held that MSM blood bans are discriminatory and in breach of Article 21 unless justified. She also states that the court provides detailed guidance on determining whether such bans are justified, including a strict proportionality test - 'demonstrating that a finding that a ban is considered by the national authorities (merely) reasonable does not suffice for justifying it'¹⁰⁵.

Various other authors have similarly assessed the Charter's influence and the ECJ's use of it as a

¹⁰² *Léger*, *supra* note 15, para. 46; Charter of Fundamental Rights of the European Union [2012] OJ 326/391, Article 51(1) CFREU.

¹⁰³ Baeyens, Goffin, 'European Court of Justice. ECJ 2015/05, Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes, Établissement français du sang, 29 April 2015 (c-528/13)' 22 *European Journal of Health Law* 4 (2015), 396, 400.

¹⁰⁴ Tryfonidou, 'Block exclusion on blood donation by gay and bisexual men: a disappointing CJEU ruling' <http://eulawanalysis.blogspot.co.uk/2015/04/block-exclusion-on-blood-donation-by.html>.

¹⁰⁵ *Ibid.*

standard in this case¹⁰⁶. Again – academic commentary supports the direct evidence.

Furthermore, the impact of the Charter in this case has been acknowledged by the European Commission, in the same report cited in section 3.1.1. Again, whilst there are incentives for the European Commission to overstate the influence of the Charter, their informed opinion can be taken as evidence supporting evidence already seen elsewhere.

3.1.4 Article 35 in Internal Market Law

The following paragraph¹⁰⁷ from *Susisalo* best illustrates the Charter's influence in these cases. In all the cases the Charter was directly cited, constituting multiple pieces of evidence for this part of the causal mechanism.

'It is also apparent from Article 52(1) TFEU that the protection of public health can justify restrictions on the fundamental freedoms guaranteed by the Treaty, such as the freedom of establishment. More specifically, restrictions on the freedom of establishment may be justified by the objective of ensuring that the provision of medicinal products to the public is reliable and of good quality. The importance of that objective is confirmed by Article 168(1) TFEU and Article 35 of the Charter of Fundamental Rights of the European Union, under which, inter alia, a high level of protection for human health is to be ensured in the definition and implementation of all policies and activities of the European Union (*Blanco Pérez and Chao Gómez*, paragraphs 63 to 65).'

In *Susisalo*, the effect of the Charter is to bolster the existing defence of 'protection for human health'. Conceptualising this defence as a fundamental rights defence, or at least one with some fundamental rights relevance, means it is implicitly granted greater significance by the ECJ - something occurring due to the greater normative weight of fundamental rights and the Charter. This can be seen in the above extract, in which the ECJ directly cites the Charter in emphasising the importance of health.

Blanco Pérez and Chao Gómez is the source of the principle used in *Susisalo*, and similarly in this case, the Charter's influence extends to reinforcing the significance of the aim of protecting public health in the form of a restriction on free movement. The same logic is seen in the reasoning in *Venturini*.

¹⁰⁶ Dunne, 'A right to donate blood? Permanent deferrals for "Men who have Sex with Men"(MSM):Léger' 52 *CMLRev* 6 (2015), 1661; Belavusau, Isailovic, "Gay blood: Bad blood? A brief analysis of the Léger case [2015] C-528/13" <europeanlawblog.eu/?p=2823>, first accessed 10/09/2015.

¹⁰⁷ *Susisalo*, *supra* note 16, para. 37.

The Charter's influence was subtly different in the case of *Deutsches Weintor*. In this case, the Court was required to weigh up competing Charter rights, and the Court eventually held that the significance of public health as a justification warranted the minor restriction on the economic rights in question. Consider the following paragraphs¹⁰⁸:

'As regards, secondly, the freedom to choose an occupation and the freedom to conduct a business, it must be borne in mind that, according to the case law of the Court, the freedom to pursue a trade or profession, like the right to property, is not an absolute right but must be considered in relation to its social function (see, to that effect, Case C210/03 Swedish Match [2004] ECR I11893, paragraph 72). Consequently, restrictions may be imposed on the exercise of those freedoms, provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights (Case C22/94 Irish Farmers Association and Others [1997] ECR I1809, paragraph 27, and Joined Cases C20/00 and C64/00 Booker Aquaculture and Hydro Seafood [2003] ECR I7411, paragraph 68)

So far as those objectives are concerned, it follows from paragraphs 48 to 53 of the present judgment that the legislation at issue is designed to protect health, which is an objective recognised by Article 35 of the Charter.'

This paragraph demonstrates the weighing off of one fundamental right against another – with the acknowledgement of the 'social function' as a limitation on one fundamental right, the conceptualising of social rights eg. health as a fundamental right then suffices as a reason to restrict the right to conduct a business, a proportionality calculation which would have been harder to justify were the Charter merely consisting of economic rights. This trade-off is one seen in the previous chapter.

The common theme in these cases is that the Charter was used to conceptualise public health as a fundamental right, thus increasing its significance in the way predicted in the causal mechanism. During this decision-making, the normative weight of the Charter and fundamental rights means the justification itself is treated with greater importance, and so can be used to justify more significant restrictions on market freedoms than is possible with mere policy considerations. The increased significance here is a subtle alteration of the ECJ's attitude. The more important a defence is considered, the less is required to justify its protection, meaning it can be used to justify far more restrictions on free movement – numerically and substantively. This trend is seen across the cases on Article 35 and the internal market. The three cases on pharmacy regulation all emphasise the significance of the Charter, before engaging in assessments of proportionality. In *Deutsches Weintor*, whilst Article 35 is weighed off against other Charter rights as opposed to more directly boosting restrictions on internal market freedoms, the Charter conceptualising health as a fundamental right still increased the significance of health increased the weight of this concept within the proportionality

¹⁰⁸ *Deutsches Weintor*, *supra* note 19, paras. 54-55.

calculation.

The ECJ's previous assessments of restrictions concerning public health as a policy consideration were different from these cases.¹⁰⁹ According to Hervey, by the mid-2000s the ECJ's point of view was that 'the place of public health regulation had become EU level'¹¹⁰. The ECJ decided internal market cases based more on harmonised EU legislation, as opposed to using a proportionality test to balance public health against market freedoms.¹¹¹ This process thus represented a strict application of the proportionality test. Were this status quo to continue, one could expect the ECJ to continue to assess cases in this way, by focusing on EU regulatory legislation.

But this did not happen. For instance, in *Deutsches Weintor* the ECJ has changed attitudes. The ECJ's reasoning has moved beyond simply considering EU regulatory legislation. The ECJ now considers a right to public health as a separate, more significant element in and of itself – a reflection of conceptualising it as a fundamental right. Inglese¹¹² also noted this, describing the ECJ's reasoning as 'the balance to be stricken is not between HCR [the regulation in question] and consumer protection but between the former and health protection'. *Deutsches Weintor* seems to confirm that 'health as a fundamental right is not simply a principle any more but stands autonomously'.

Another example of the ECJ's new approach is found in *Blanco Pérez and Chao Gómez*. The ECJ, rather than using Directive 2005/36 to assess pharmacies (the natural extension of the ECJ's self-perception as described by Hervey), the ECJ instead chose to revert to balancing freedom of establishment against public health as a fundamental right¹¹³.

This shift away from the ECJ analysing cases based on a stricter proportionality test and EU legislation towards fundamental rights demonstrates the greater consideration of public health as a justification,

¹⁰⁹ Also explored in Young, 'Fundamental rights and EU health law and policy' in Hervey, Young, Bishop, *Research Handbook on EU Health Law and Policy* (Edward Elgar, 2017), 102-106.

¹¹⁰ Hervey, 'The role of the European court of justice in the Europeanization of communicable disease control: driver or irrelevance?' 37 *Journal of Health Politics, Policy, and Law* (2013), 977, 995; Hervey, 'The European Union, Its Court of Justice, and "super-stewardship in Public Health' 62 *Northern Ireland Legal Quarterly* 5 (2011), 633.

¹¹¹ Ibid; Hervey, 'The European Union, Its Court of Justice, and "super-stewardship in Public Health' 62 *Northern Ireland Legal Quarterly* 5 (2011), 633.

¹¹² Inglese, 'Do Consumers Have the Right to Drink Healthy Wine? An Appraisal of the *Deutsches Weintor* Case' 20 *European Journal of Health Law* 4 (2013), 409.

¹¹³ *Blanco Pérez and Chao Gómez*, supra note 18, paras. 43-51, para. 65.

and thus the increased significance predicted by the mechanism. The regulation-based approach originated as a result of strict scrutiny¹¹⁴, and so a lessening of the regulation-based approach implies lessened scrutiny, as reflecting the conclusions drawn in this section. Importantly when comparing these findings to the predictions in chapter 3, the evidence shows that as predicted, in trade-offs between health and the market, fundamental rights are being treated with greater significance.

3.1.5 Overall Assessment

Overall, it can safely be declared that the available evidence supports part 1 of the causal mechanism in these specific courses of litigation. At the beginning of the analysis in this section, smoking gun evidence was required, with individual pieces of evidence leading to strong conclusions. Several individual pieces of direct evidence are present across two cases, which in and of themselves prove the occurrence of part 1 of the mechanism – a smoking gun is strong evidence of empirical accuracy. These pieces of evidence tend towards high uniqueness, high accuracy, or both (in appendix 4.1, see for example *P1 (i)*, *P1 (ii)*, *P1 (ix)*, *P1 (x)*, *P1 (xviii-xxii)*). To reiterate, this evidence is: comparing *Brüstle* with previous cases on human dignity, showing the court's newly centralised conception of dignity; the Gärditz analysis that this was due to the Charter giving the Court the 'increased resolution' to act; the repeated citations of the Charter in the *Test-Achats* case; multiple citations of Article 35 in internal market cases; and the internal market conclusions being supported by doctrinal analysis of my own that shows that the Charter increased significance of fundamental rights by choosing to rely on the Charter rather than previous case law.

Beyond this evidence, in and of itself sufficient, there are many other pieces of academic evidence supporting the Charter's influence (for example *P1 (iii-vii)*), as well as Commission reports (*P1 (viii)* and *P1 (xvii)*). The full of extent and accuracy of this evidence is laid out in appendix 4.1 for transparency, as well as in the discussion above, but overall it forms a coherent body of evidence providing additional support to the smoking gun evidence. Therefore the empirical existence of part 1 of the mechanism is quite reasonably confirmed in these three specific cases.

3.2 Part 2 – Policy Misfit

At part 2 of the causal mechanism, policy misfit is expected - some sort of clash between Member State level policy and the policy following the ECJ judgment. Specifically, as discussed in section 1.1.2

¹¹⁴ Hervey, *supra* note 110.

above, any evidence that is found has relatively low uniqueness. Therefore multiple pieces of evidence are required in order to accurately prove the existence of part 2 of the mechanism.

3.2.1 *Brüstle*

The first piece of evidence is a comparison between the German law as implemented by the German Supreme court, which originally referred the case to the ECJ, and the German law preceding the judgment.

As previously mentioned in section 2.1, the German law preceding the ECJ judgment indicates that German law prior to the *Brüstle* case included the obtaining and usage of neural precursor cells within the definition of ‘uses of human embryos for industrial or commercial purposes’. It is also important to note that this remained true regardless of whether destruction of embryos took place.¹¹⁵ Looking at policy misfit, this legal status needs to be compared with the ECJ case. No specific policy was suggested – the ECJ defined ‘human embryo’ for the purposes of the Directive, and then referred the case back to the German court to determine whether blastocysts fitted the definition. Looking at the German Supreme Court decision.¹¹⁶, *Brüstle’s* patent was partially upheld. Where the patent did not involve the destruction of human embryos, this fell outside of the ECJ’s interpretation of unpatentability in the Directive.¹¹⁷ Human embryonic cells taken *without* destroying the embryo itself were held to be patentable, as they did not fall within the specific interpretation of the Directive as per the ECJ.

Where previously the German legal position had been that the inventions using neural precursor cells extracted at the blastocyst stage constituted a prohibited ‘use’ of human embryos for industrial and commercial purposes, following the application of the *Brüstle* case, inventions were (in this context) only excluded from patentability if they involved the destruction of human embryos. Even if they used the same type of precursor cells and extraction techniques, they were now patentable so long as the process of creating them did not involve the destruction of the human embryo – something which the German Supreme Court was satisfied was now technologically possible.¹¹⁸ This shift involved changing the definition of human embryo that previously existed in the German interpretation of the Directive,

¹¹⁵ BGH, Xa ZR 58/07, *supra* note 37, p. 1.

¹¹⁶ BGH, X ZR 58/07, proclaimed on 27th November 2012.

¹¹⁷ *Ibid*, p. 1.

¹¹⁸ Oser, <http://www.lexology.com/library/detail.aspx?g=00bf462b-c485-4c40-8716-c01cc1281ee9>, first accessed 08/07/2015.

i.e. in the relevant provisions of the Patent Law, and so is clear evidence of policy misfit. Even where the statutory text remains, the shift in definition creates policy inconsistency, itself a type of policy misfit.

A second piece of evidence comes from the UK. British patent law is laid down in the Patent Act 1977. This Act was amended in 2000 in order to implement the Directive, and the statutory instrument¹¹⁹ doing so added a schedule to the Patents Act¹²⁰ explaining what may or may not be patented in the area of ‘biotechnological inventions’. Schedule A2 includes the provision from the Biotechnology Directive. Article 3 of Schedule A2 states that ‘the following are not patentable inventions’, and Article 3(d) includes ‘uses of human embryos for industrial or commercial purposes’. This latter phrase reflects word for word the prohibition in the Directive¹²¹, similar to the German implementing legislation.

There has yet to be any judgment directly applying this provision of UK law, so there is not yet a clear judicial statement of its interpretation in this case. However, UK patent law can be clarified by looking at the textual statements of policy from the relevant patent-granting body. These statements will establish the policy preceding the *Brüstle* ruling, and how Article 3 of Schedule A2 was defined at that point.

The relevant body is the Intellectual Property Office (IPO). Pre-*Brüstle*, the practice notice issued by the IPO stated their position by assessing three categories: human embryos; human totipotent cells; and human embryonic pluripotent stem cells¹²². Totipotent cells can form any cells, both embryonic and extra-embryonic, and are developed in the first few cell divisions following fertilisation¹²³, whereas human embryonic pluripotent stem cells will develop into a specific aspect of the human body¹²⁴.

Processes for obtaining stem cells from human embryos were not patentable due to being in breach of paragraph 3(d) of Schedule A2 of the Patents Act 1977 – the provision directly transcribing the contested provision in *Brüstle*. Human totipotent cells were unpatentable due to their potential to

¹¹⁹ Article 8(2), The Patents Regulations 2000.

¹²⁰ Schedule A2, Patents Act 1977.

¹²¹ Article 6(c), *supra* note 20.

¹²² <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/pro-types/pro-patent/p-law/p-pn/p-pn-stemcells-20120517.htm>, first accessed 12/04/2015.

¹²³ Bosch, *Stem Cells: From Hydra to Man* (Springer, 2008), 61.

¹²⁴ Han, Zhao, Fu, ‘Induced Pluripotent Stem Cells: The Dragon Awakens’ 60 *Bioscience* 4 (2010), 278.

develop into the human body, as prohibited by a provision unrelated to the *Brüstle* judgment. Embryonic pluripotent stem cells, cells which do not have the potential to develop into a whole human body, were patentable, as on balance they were not deemed contrary to public policy or morality in the United Kingdom, despite widespread opposition.

This note provides several pieces of evidence of policy misfit. Firstly, no specific definition of human embryo exists in the previous practice note, whereas a specific one is given as a result of the judgment – a clear misfit between definition and lack of definition. Secondly, in the previous statutory guidance, the prohibition dealt only with ‘processes of obtaining stem cells from human embryos’. The ECJ judgment states that destruction of the embryos at any stage renders the invention unpatentable.¹²⁵ This clashes with the British policy, which previously only concerned itself with processes directly stemming from the human embryo itself. Where in Germany merely the interpretation clashes with the *Brüstle* judgment, here there is more of a clear difference in policy – a lack of definition in the UK compared to a definition at an EU level.

The evidence in this section comes from directly comparing the outcome of the ECJ judgment with the state of national policy – analysis done solely using primary evidence. It therefore provides strong evidence of policy misfit and part 2 of the mechanism.

3.2.2 Test-Achats

In Germany, the ‘Allgemeine Gleichbehandlungsgesetz’¹²⁶ or General Equal Treatment Act, which was passed in 2006, was designed to transpose four different EU equal treatment directives, including the Gender Directive.¹²⁷ The specific equal treatment requirement of Article 5(1) was implemented by §7 of the General Treatment Act, banning unequal treatment based on the protected characteristics named in §1, which includes sex.¹²⁸ The exception created by Article 5(2) of the Gender Directive was transposed into §20(2) of the General Equal Treatment Act.¹²⁹

¹²⁵ *Brüstle*, *supra* note 13, para. 53.

¹²⁶ Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung, Bundesgesetzblatt Jahrgang 2006 Teil 1 Nr 39, ausgegeben zu Bonn am 17. August 2006.

¹²⁷ Allgemeines Gleichbehandlungsgesetz vom 14. August 2006 (BGBl. I S. 1897), das zuletzt durch Artikel 8 des Gesetzes vom 3. April 2013 (BGBl. I S. 610) geändert worden ist.

¹²⁸ *Ibid*, paras. 7 and 1.

¹²⁹ *Ibid*, para 20(2)(1).

This German provision places the exception created in Article 5(2), allowing unequal treatment in some circumstances, into the areas of German equal treatment law affecting health insurance premiums. This implementation of the Gender Directive as a whole could constitute a separate case of Europeanisation, but again one that falls outside of the scope of this thesis as it is not driven by the Charter.

There is clear evidence of policy misfit created here – the General Equal Treatment Act includes the exception laid down in Article 5(2), which was held to be unlawful by the ECJ. The misfit is clear – German law contains an exception that is considered invalid by the ECJ. What was a compliant policy became inconsistent due to a new interpretation.

Further evidence emerges from studying the implementation in the UK. In the UK, the Gender Directive was implemented by the Sex Discrimination Act 1975 (Amendment of Legislation) Regulations 2008.¹³⁰ The Sex Discrimination Act 1975 was the legislation dealing with sex discrimination in the UK at the time of the Gender Directive coming into force.

The Regulations make multiple amendments to the Sex Discrimination Act, but it is Article 13 of Schedule 1 of the Regulations that implements Article 5 of the Gender Directive. This schedule adds multiple sub-sections to the Article of the Sex Discrimination Act dealing with insurance. The newly-inserted Subsection 3(a)(i) allows discriminatory treatment if ‘the use of sex as a factor in the assessment of risk is based on relevant and accurate actuarial and statistical data’¹³¹. This exception reflects the exception in Article 5(2) of the Gender Directive, discussed earlier in this section – this again demonstrates policy misfit after the *Test-Achats* judgment, as the British law also contained an exception which was annulled by the ECJ under the new interpretation.

Again, direct comparison between primary sources provides strong empirical evidence for part 2 of the mechanism.

3.2.3 Léger

Once again, the chapter looks at the state of national law in the UK and Germany the before the *Léger*

¹³⁰ The Sex Discrimination (Amendment of Legislation) Regulations 2008.

¹³¹ *Ibid*, Schedule 1, Article 13.

judgment in order to assess policy misfit.

Before the *Léger* judgment, blood donation in Germany was governed by a general law on transfusions, which has regulated blood donation in Germany since 1998.¹³² This law contains provisions allowing the Health Ministry to consult the Federal Chamber of Doctors to produce specific requirements and conditions for donations, donors, and other similar categories. Consequently, the federal chamber of doctors produced a set of regulations.¹³³

Section 2.2 of these regulations require every potential donor to be assessed to see if they meet any of the criteria for permanent exclusion.¹³⁴ One of these criteria is ‘people whose sexual behaviour constitutes a clear high risk for the general population of serious infections transferred by blood’.¹³⁵ Men who have sex with men (MSM) are listed as one of these groups.¹³⁶ Thus the pre-*Léger* state of blood donation laws in Germany permanently excluded MSM individuals from blood donation, constituting clear evidence of policy misfit – the ECJ judgment having explicitly excluded permanent donation on non-scientific grounds.

It is worth noting at this point, that in the UK, no policy misfit was created due to the *Léger* judgment. In 2011, following an ‘evidence-based review’, the permanent ban on MSM blood donation was lessened, allowing men whose last sexual contact with a man was more than 12 months ago to donate.¹³⁷ With a permanent exclusion, the subject of the *Léger* case, having already been removed, there was not a policy misfit created between the EU and UK level.

3.2.4 Article 35 in Internal Market Law

With regard to these cases, there is no need to engage in similar analysis to establish policy misfit. In all four of the cases discussed in this section, there was a lack of policy misfit as the ECJ found in favour

¹³² Transfusionsgesetz in der Fassung der Bekanntmachung vom 28. August 2007 (BGBl. I S. 2169), das durch Artikel 12 des Gesetzes vom 17. Juli 2009 (BGBl. I S. 1990) geändert worden ist.

¹³³ Richtlinien zur Gewinnung von Blut und Blutbestandteilen und zur Anwendung von Blutprodukten (Hämotherapie), Zweite Richtlinienanpassung 2010.

¹³⁴ ‘Dauerausschluss’, own translation.

¹³⁵ Own translation.

¹³⁶ Section 2.2.1, *supra* note 132.

¹³⁷ <https://www.gov.uk/government/news/lifetime-blood-donation-ban-lifted-for-men-who-have-had-sex-with-men>, first accessed on 27/02/2016.

of the Member States. With a finding in favour of the Member States, the outcome of the ECJ judgment is thus aligned with national policy. The national policy is compliant with EU law, thus meaning there is no policy misfit.

3.2.5 Overall Assessment

At the beginning of this section, I explained that several pieces of evidence were required to demonstrate the existence of this step. There are multiple pieces of highly accurate evidence, passing through the several metaphorical hoops, including: in Germany, inventions were precluded from patentability where they were not before; in the UK, the relevant IPO practice notes contain a definition where they did not before as well as expanding the areas of the process that the policy covers; multiple exceptions exist in the national equality law of both countries that would be precluded by the *Test-Achats* judgment; and in Germany blood donation laws include a permanent exclusion that is precluded by *Léger*. These pieces of evidence are represented by P2 (i-vi) in the evidence appendix. There is evidence of policy misfit as a result of two separate ECJ cases in both countries, and policy misfit in one of the two countries following the *Léger* case.

The lack of policy misfit with the UK following *Léger* does constitute evidence against this part of the mechanism – failing to pass through one of the metaphorical hoops is relatively strong disconfirmatory evidence. It is therefore worthy of consideration. The UK law on the specific topic of blood donation had already been brought into line with the outcome of the ECJ judgment, as opposed to the Charter itself not causing policy misfit at all. The Charter still changed the outcome of the ECJ judgment in a way that created policy misfit in several circumstances, albeit not in the UK.

Overall however, it can be stated with reasonable accuracy that (in the circumstances studied by the thesis), part 2 of the causal mechanism is present. Each piece of positive evidence, i.e. each piece of evidence that passes through the metaphorical hoop, increases the overall confidence that this part of the mechanism is present. Despite the one piece of negative evidence, the increase in significance provided by multiple pieces of positive evidence mean that overall the empirical evidence increases confidence in this part of the mechanism – a finding in its favour.

The lack of policy misfit in the cases summarised in section 3.2.4 does not constitute evidence in favour of the causal mechanism, but it is a noteworthy finding in the context of the relationship between Member States and EU law. Additionally, the lack of policy misfit in the UK as a result of the *Léger* judgment echoes this dynamic – where a Member State pursues a policy that is already in line with

the increased significance of fundamental rights, that policy is likely to be upheld at an EU level. For this reason, as mentioned in the introduction, the chapter will conclude by discussing these findings.

4. Conclusions

This chapter has demonstrated empirical evidence for parts 1 and 2 of the causal mechanism in three ECJ cases. Whilst this finding is noteworthy, in that it represents some evidence for the human-rights-based and institutionalist predictions outlined in the previous chapters, the purpose of the thesis is to investigate the full Europeanisation process. The following chapter will analyse parts 3 and 4 of the mechanism in the context of ECJ judgments, and establish whether Europeanisation has followed the policy misfit found in this chapter. Any further significance of any Europeanisation found will be discussed in the next chapter and the overall conclusions. Meanwhile, it is worth assessing the unexpected findings the internal market law cases discussed in section 3.1.4.

The more important a justification for a breach of internal market law is considered, the less is required to permit its protection, meaning it can be used to justify far more serious breaches of Treaty freedoms than less important public interests. The Charter grants these justifications additional importance in comparison with mere policy preferences, allowing Member States greater scope to defend their interests before the Court of Justice in the name of fundamental rights protection. Contrary to expectations, the Charter has reinforced the powers and abilities of *Member States* against individual citizens' or companies' rights (for example the right to establishment), as opposed to the Charter being used by individual citizens against Member States as predicted in the literature in chapters 1 and 3.

This sort of change is almost diametrically opposed to top-down Europeanisation. Referring back to chapter 3, top-down Europeanisation refers to Member States 'downloading' policies and norms from an EU level, and bottom-up Europeanisation refers to Member States 'uploading' their preferences to an EU level.¹³⁸ Whilst both uploading and downloading operate as part of the same broad process, the Charter causing Member States restrictions on market freedoms based on public health to be treated more significantly than before represents *uploading*. Member State preferences in the cases discussed section 3.1.4 are to limit market freedoms using national legislation designed to protect health. The Charter, in strengthening judicial treatment of these restrictions, in effect strengthens

¹³⁸ Börzel, 'Europeanization: How the European Union Interacts with its Member States' in Bulmer, Lequesne, *Member States of the European Union* (OUP, 2007), 63.

Member States' ability to exercise their policy preferences. This represents bottom-up Europeanisation, close to the opposite of the sort of top-down Europeanisation envisaged by the thesis.

But moving beyond the mere partial rejection of the hypothesis of the thesis, these findings have potentially broader impact. These findings show the ECJ favouring a national restriction in a trade-off with internal market law, where the restriction is based on European-level fundamental rights. Thus the Member States have greater flexibility in implementing national restrictions based on public health without fear of these restrictions being overturned using internal market law. In Europeanisation terms this Charter vastly increases the ability of Member States to operate on the assumption of no policy misfit. This increases Member State control, perceived and actual, over national legislation.

It is the nature of fundamental rights within the EU, when compared to internal market law, that prompts this changing dynamic. As noted by Hervey and discussed in the chapter, previously the ECJ had been reluctant to grant Member States much discretion - the internal market is regulated at an EU level, and Member States could only act in a very constrained manner. However, the logic of fundamental rights within EU law runs contrary to this line of thinking. Fundamental rights are subject to multiple legitimate competing interpretations, with high levels of deference towards Member States. It is this contrast that is key to understanding the bottom-up Europeanisation seen in the chapter. Where previously the ECJ followed a centralised approach, Member States' control was limited. But by designating public health a fundamental right, the ECJ's approach shifts to a decentralised, fundamental rights approach, and thus the Member States were given much greater control over the process.

Beyond altering the institutional balance towards Member States, an increase in the significance of public health alters the balance of internal market law back towards the social value of health. Previously, economic rights have taken prominence over social rights¹³⁹. But social rights are now treated as a fundamental right, thus increasing the significance of health claims in question in trade-offs with other claims. Although the Charter also contains economic rights, potentially providing other

¹³⁹ Scharpf, 'The European social model: coping with the challenges of diversity' 40 *JCMS* 4 (2002), 645; Scharpf, 'The Asymmetry of European Integration or Why the EU Cannot be a "Social Market Economy"', KFG The Transformative Power of Europe, Working Paper (2009); Scharpf, 'A New Social Contract? Negative and Positive Integration in the Political Economy of European Welfare States', EUI Working Paper RSC 96/44 (1996).

competing rights which could limited the effects of strengthened social rights, increased significance could still result in some additional protection for health.

5. Appendix 4.1 - Evidence Appendix

Causal Relationship

Causal mechanism by which the Charter causes Europeanisation through ECJ judgments

Moderate Prior confidence

Contested initial step but well theorised responses thereafter

Proposition 1

Creation of Charter of Fundamental Rights causes ECJ to treat rights with greater significance

Expected Evidence

Direct citations of the Charter in a way that makes increased influence clear. Alternatively, legal or institutionalist analysis that demonstrates the Charter's influence on the judgment (common doctrinal evidence)

Evidence from the Brüstle judgment

Evidence of P1 (i)

Comparison of *Brüstle* with cases on human dignity that pre-date the Charter. In neither two previous cases did the Court create such a centralised conception of the Charter. Provides further comparative evidence of (i).

Mu, Ma – There are other potential reasons the Court could have chosen not to create a centralised conception in these cases as opposed to merely the absence of the Charter. Own analysis, so susceptible to at least some bias.

Evidence of P1 (ii)

Gärditz analysis argues after the Charter became legally binding, the Court had the 'resolution' to develop an autonomous and centralised conception of dignity. Academic evidence of (i).

Hu, Ha – little reason for academic commentary to argue to increased significance of the Charter if not a genuinely held position, and expert analysis increases accuracy.

Evidence of P1 (iii)

Pre-Charter approach described as 'ad-hoc'. Further academic comparative evidence of (i).

Mu, Ha – Could be other reasons for ad-hoc approach. Expert analysis increases accuracy.

Evidence of P1 (iv)

Post-Charter as 'a new and particularly strong commitment to protect and respect it [human dignity] it in all of its [the Charter's] activities'. Further evidence of (i) in that it makes the same point.

Hu, Ha - little reason for academic commentary to argue to increased significance of the Charter if not a genuinely held position, and expert analysis increases accuracy.

Evidence of P1 (v)

McCrudden describes dignity in the context of the Charter as being 'the subject of considerable debate and litigation', citing *Brüstle* as an example.

Lu, Ha – Merely mentions Charter and dignity in same context, many potential reasons for this, expert analysis increases accuracy.

Evidence of P1 (vi)

Den Exter and Földes described the ECJ as pointing out that the 'Charter emphasises that patent law must be applied so as to respect fundamental principles safeguarding the dignity and integrity of the person', a sign of the Charter's influence on the decision

Mu, Ha – There are other possible reasons for Den Exter and Földes to make these statements, in that it only argues towards the Charter's influence as opposed to the proposition of increased

significance. Expert analysis increases accuracy.

Evidence of P1 (vii)

Puppink similarly acknowledges the Charter's influence on both the ECJ decision and the opinion of the Advocate-General.

Lu, Ha – Acknowledgement of 'influence' is evidence, but there are many reasons Puppink could acknowledge 'influence' that do not directly match the proposition. Expert analysis increases accuracy.

Evidence of P1 (viii)

Multiple academics acknowledge that is normal for the Charter's influence to not be explicitly cited. Supporting evidence for (vi and vii)

Lu, Ha – Low uniqueness – it is not specifically a statement directed towards the propositions so there are many other explanations for it being offered. Expert analysis increases accuracy.

Evidence of P1 (viii)

European Commission report cites *Brustle* as one of the cases where the Charter had an impact.

Lu, Ma – Mere discussion of the Charter case does not necessarily speak directly to proposition. There is medium accuracy - whilst there will be trends towards objectivity in European Commission reports, there would also be a tendency to overplay the role of the Charter – as it was at least partially introduced to bolster the fundamental rights reputation of the EU, there would be an incentive to overemphasise its effects.

Evidence of P1 in the Test-Achats case

Evidence of P1 (ix)

In the *Test-Achats* case, the Charter is directly repeatedly cited.

Mu, Ha – The repeated direct citations of the Charter are relatively unique evidence – there are few other reasons the Charter would be cited other than it influenced the case. However the mere

citations themselves do not prove the proposition as there are still other reasons it could have been cited that was not directly the proposition. The direct court report is a highly accurate piece of evidence

Evidence of P1 (x)

Looking doctrinally at *how* the Charter was used, it was used in a way that went beyond existing fundamental rights, indicating the Charter's increased significance.

Hu, Ma – High uniqueness – unless the Charter did increase the significance of fundamental rights, it would not be possible to demonstrate this using doctrinal analysis. The analysis is my own, so could be prone to bias.

Evidence of P1 (xi)

Koldinská notes that the Advocate general provided a clear route for the Court to rely on existing case law, but in spite of this the Court chose to rely heavily on the Charter. Some supporting evidence for (x).

Mu, Ha – There are other explanations for the Court's reliance on the Charter that do not support the proposition. Expert analysis provides accuracy.

Evidence of P1 (xii)

Di Torella argues that the decision took place 'in the background' of the Charter, and argued that the law changed to reflect that 'certain forms of discriminatory treatment... will be tolerated no longer'.

Hu, Ha – There are very few reasons Inglese would argue that the Charter had led to change in treatment other than that this had happened. Expert analysis provides high accuracy.

Evidence of P1 in the Léger case

Evidence of P1 (xiii)

In the *Léger* case there are direct citations of the Charter.

Mu, Ha – The repeated direct citations of the Charter are relatively unique evidence – there are few other reasons the Charter would be cited other than it influenced the case. However the mere

citations themselves do not prove the proposition as there are still other reasons it could have been cited that was not directly the proposition. The direct court report is a highly accurate piece of evidence.

Evidence of P1 (xiv)

Looking doctrinally at the *Léger* case, the Charter was used as a standard against which the compliance of the French decree was tested.

Mu, Ma – This is medium uniqueness – even if the Charter is used as a standard, it does not directly contribute towards the proposition, and the Charter could have been used as a replacement for existing standards. Medium accuracy – my own doctrinal analysis

Evidence of P1 (xv)

Baeyens and Goffin observe that the Charter was used as a standard in this case, and that the Court highlighted the decree would be in breach of the Charter unless there was sufficient justification

Mu, Ha – This is medium uniqueness – even if the Charter is used as a standard, it does not directly contribute towards the proposition, and the Charter could have been used as a replacement for existing standards. Expert analysis leads to high accuracy.

Evidence of P1 (xvi)

Tryfonidou, in a critical case critique, also stated that the Court assessed the decree against the Charter, and required a justification.

Mu, Ha – This is medium uniqueness – even if the Charter is used as a standard, it does not directly contribute towards the proposition, and the Charter could have been used as a replacement for existing standards. Expert analysis leads to high accuracy.

Evidence of P1 (xvii)

European Commission report cites *Léger* as one of the cases where the Charter had an impact.

Lu, Ma – Mere discussion of the Charter case does not necessarily speak directly to proposition. There is medium accuracy - whilst there will be trends towards objectivity in European Commission reports, there would also be a tendency to overplay the role of the Charter – as it was at least

partially introduced to bolster the fundamental rights reputation of the EU, there would be an incentive to overemphasise its effects.

Evidence of P1 in cases contrasting Article 35 with internal market law

Evidence of P1 (xviii)

In *Susisalo*, direct citations of the Charter

Mu, Ha – The repeated direct citations of the Charter are relatively unique evidence – there are few other reasons the Charter would be cited other than it influenced the case. However the mere citations themselves do not prove the proposition as there are still other reasons it could have been cited that was not directly the proposition. The direct court report is a highly accurate piece of evidence.

Evidence of P1 (xix)

In *Venturini*, direct citations of the Charter

Mu, Ha – The repeated direct citations of the Charter are relatively unique evidence – there are few other reasons the Charter would be cited other than it influenced the case. However the mere citations themselves do not prove the proposition as there are still other reasons it could have been cited that was not directly the proposition. The direct court report is a highly accurate piece of evidence.

Evidence of P1 (xx)

In *Blanco Pérez and Chao Gómez*, direct citations of the Charter

Mu, Ha – The repeated direct citations of the Charter are relatively unique evidence – there are few other reasons the Charter would be cited other than it influenced the case. However the mere citations themselves do not prove the proposition as there are still other reasons it could have been cited that was not directly the proposition. The direct court report is a highly accurate piece of evidence.

Evidence of P1 (xxi)

In *Deutsches Weintor*, direct citations of the Charter

Mu, Ha – The repeated direct citations of the Charter are relatively unique evidence – there are few other reasons the Charter would be cited other than it influenced the case. However the mere citations themselves do not prove the proposition as there are still other reasons it could have been cited that was not directly the proposition. The direct court report is a highly accurate piece of evidence.

Evidence of P1 (xxii)

Doctrinal comparison between treatment of public health in these cases, and in previous cases as outlined by Hervey. This comparison demonstrates increased significance.

Hu, Ma – High uniqueness – unless the Charter did increase the significance of fundamental rights, it would not be possible to demonstrate this using doctrinal analysis. The analysis is my own, so could be prone to bias.

Evidence of P1 (xxiii)

Inglese argument that health as a fundamental right now stands autonomously as opposed to being a more general principle of law. Change in status demonstrates increased significance.

Hu, Ha – There are very few reasons Di Torella would argue that the Charter had led to change in treatment other than that this had happened. Expert analysis provides high accuracy.

Proposition 2

Greater significance leads to policy misfit

Expected Evidence

The evidence of policy misfit will be a difference between the EU-level policy as a result of the judgment and national level policy – either legislative change or changes in the actions of relevant bodies.

Evidence from the Brüstle judgment

Evidence of P2 (i)

Inventions were, unlike before, excluded from patentability if they involve destruction of human embryos, including if they used the same type of precursor cells and extraction techniques. This shift involved changing the definition of human embryo within the German interpretation of the Directive.

Hu, Ha – There are few other conceivable reasons why the outcome of the judgment would appear to be different from the previous policy other than policy misfit being present. The evidence is a direct report of the Court judgment, so is highly accurate.

Evidence of P2 (ii)

Comparing the relevant IPO practice notes before and after the *Brüstle* case, a specific definition of human embryo existed where one did not before.

Mu, Ha – The lack of a definition does not fully prove the definition was different. The lack of evidence could be explained by the definition being implicit. This obvious plausible counter-explanation lowers the uniqueness. The practice note directly represents IPO and British policy in action, and therefore is highly accurate.

Evidence of P2 (iii)

Again comparing the relevant IPO practice notes before and after the *Brüstle* case, the previous note only concerned itself with processes directly stemming from the human embryo itself, whereas the ECJ judgment states that destruction of the embryos at any stage renders the invention unpatentable.

Hu, Ha - There are few other conceivable reasons why the policy would appear to be different from the previous policy other than policy misfit being present. The practice note directly represents IPO and British policy, and therefore is highly accurate.

Evidence from the Test-Achats judgment

Evidence of P2 (iv)

The General Equal Treatment Act includes the exception laid down in Article 5(2), which was held unlawful by the ECJ, meaning German law contains an exception that is considered invalid by the ECJ.

Hu, Ha – There are no other real explanations for the exception being in law other than it being legally present, and this exception directly clashes with the judgment which renders the exception illegal. High accuracy comes from comparing direct report of judgment with legal reporting, two highly accurate sources.

Evidence of P2 (v)

Article 13 of Schedule 1 of the Regulations that implements Article 5 of the Gender Directive. This schedule adds multiple sub-sections to the Article of the Sex Discrimination Act dealing with insurance. The newly-inserted Subsection 3(a)(i) allows discriminatory treatment if ‘the use of sex as a factor in the assessment of risk is based on relevant and accurate actuarial and statistical data’. British law contains an exception annulled by the ECJ.

Hu, Ha - There are no other real explanations for the exception being in law other than it being legally present, and this exception directly clashes with the judgment which renders the exception illegal. High accuracy comes from comparing direct report of judgment with legal reporting, two highly accurate sources.

Evidence for and against P2 in the Léger case

Evidence for P2 (vi)

German blood policy, laid down by the Federal Chamber of Doctors, included a permanent exclusion on MSM blood donors by classifying them as ‘criteria ‘people whose sexual behaviour constitutes a clear high risk for the general population of serious infections.¹⁴⁰ transferred by blood’

Hu, Ha - There are no other real explanations for the exception being in law other than it being legally present, and this exception directly clashes with the judgment which renders the exception illegal. High accuracy comes from comparing direct report of judgment with legal reporting, two highly accurate sources.

Evidence against P2 (i)

There was no policy misfit between the *Léger* case and the UK policy, as it the permanent exclusion was removed by the case.

Hu, Ha – High accuracy comes from comparing direct report of judgment with legal reporting, two highly accurate sources.

Chapter 5 – Europeanisation Through ECJ Judgments

Who's afraid of the ECJ?

Institute for Government, December 2017.¹

The fact that a prominent British think tank felt the need to title a piece of research in such a manner illustrates the extent of anti-ECJ thought that proliferates in the UK. As the UK builds a new relationship with the EU post-Brexit, the ECJ and its role in dispute resolution is a key point of contention in negotiations.

Testing some of these fears and predictions, in particular around the Charter, is one of the driving aims behind the thesis. What does the Charter do, how is it used by judicial and legislative actors, and what effects does this have on national health policy and health systems? It is already clear from the previous chapter that fears of top-down control and major change are overblown, due to the already small number of cases available to study that rely on the Charter. But despite the previous chapter finding more noteworthy developments in *increasing* Member State control rather than decreasing it as predicted in the top-down Europeanisation mechanism, there are still several cases which need further analysis.

Policy misfit was found in some cases, and the thesis therefore needs to empirically test whether this policy misfit, as predicted, has led to policy change i.e. national policy being changed by the ECJ's use of the Charter. Who is really in charge of future developments? To use and extrapolate a famous phrase, who are the 'masters of the treaty', and the laws it generates? The most important contribution this chapter makes is answering that question in the context of this thesis. Has the Charter caused judicially-driven policy change in the form of Europeanisation, in the cases where policy misfit has already been found?

This chapter is a continuation of the analysis in the previous chapter, and together the two chapters form a complete analysis of the Europeanisation process taking place through ECJ judgments. It begins by laying out the predicted third and fourth part of the Europeanisation mechanism, both in terms of

¹ Hogarth, Lloyd, 'Who's Afraid of the ECJ? Charting the UK's relationship with the European Court' IfG analysis Institute for Government (2017).

what is predicted and what evidence is expected. Sections 2 and 3 discuss parts 3 and 4 of the mechanism deployed in the thesis, and the evidence found for each part across each of the three studied courses of litigation where policy misfit was found – *Brüstle*², *Test-Achats*³, and *Léger*⁴. Finally, the chapter will discuss any findings of policy change, and any further significance that emerges.

1. Mechanism and Methodological Elements

Parts 1 and 2 of the mechanism were explored in the previous chapter, which concluded after part 2 in order to explore some of the significance of the unexpected form of increased significance found. Only some of the cases studied resulted in policy misfit, and the analysis of those cases continues into this chapter. Parts 3 and 4 of the mechanism, response to policy misfit and policy change, differ based on the distinctions between rational choice and sociological institutionalism, as seen by the differing corresponding sections of table 5.1.

Rational choice institutionalism relies upon rational actors responding to adaptational pressure based on their best interests. This rationality means there are a number of specific ways actors can be expected to respond to the aforementioned misfits. National courts are required to implement EU law under the legal obligations of EU membership, and governments seek to avoid the sanctions that follow non-compliance with EU law, either through damages imposed by national courts, or infringement proceedings initiated by the Commission⁵. Rational-acting individual citizens and applicants can be expected to rely upon the other side of this relationship in order to bring about change, relying upon the Charter as a ground in legal cases before the ECJ, seeking to promote their own interests using the judiciary. This risk of sanctions alters the cost-benefit analysis of actors with regards to the specific issue.

Sociological institutionalism relies on actors doing what is ‘expected’ of them. In this circumstance, judicial and governmental actors are expected to comply with the law, so would generally comply with the law. This interaction is an area where the Charter’s greater normative weight alters the outcome - fundamental rights are one of the most basic norms with which actors are expected to comply, so the Charter’s normative weight as a fundamental rights document would more severely alter

² Case C-34/10, *Brüstle*, ECLI:EU:C:2011:669.

³ Case C-236/09, *Test-Achats*, ECLI:EU:C:2011:100.

⁴ Case C-528/13, *Léger*, ECLI:EU:C:2015:288.

⁵ Consolidated version on the Treaty of the Functioning of the European Union [2012] OJ C/326/01, Article 258.

expectations. Therefore, part 3 of the prediction predicts changed expectations.

Part 4 predicts compliance with the changes of part 3 – national actors changing national laws and policies to either fit their altered cost-benefit analysis, or to meet their changed expectations.

1.1 Evidence expected at Part 3

The two separate models of rational choice and sociological institutionalism predict different developments in part 3 of the mechanism. Helpfully however, the process-tracing methodology allows testing of both of these theories simultaneously. At this point evidence of responses to the ECJ judgment is expected – either altered cost-benefit analyses or altered expectations for national actors. The empirical observations at this part are discussions of these cost-benefit analyses or changed expectations of national actors. These discussions come directly from varying actors who are well placed to elucidate upon the motivations of various actors, including: commentary directly from governmental and quasi-governmental sources themselves, forming the strongest source; commentary from legal academics; and reports from industry and media bodies.

There is high confidence in this part of the theory. The response to policy misfit is well-studied and understood in the Europeanisation literature⁶, and the two options that are laid out in table 5.1 represent the two clear options in the literature. The evidence in this section has low certainty but high uniqueness – a smoking gun test. It is not certain that the evidence will be found. For example, various actors could alter their expectations of cost-benefit analyses without public discussion, or even somewhat subconsciously in terms of expectations. There is therefore little certainty that evidence of this part will manifest. If the expected evidence is found however, it will be fairly unique, especially if it is linked directly to the ECJ judgment. There would be few other reasons to discuss cost-benefit of analyses of a particular judgment unless the calculus of your own position changed. The same is similarly true for changed expectations – publicly discussing what is expected of you in the context of an ECJ judgment seems unusual if it is not also linked to how that judgment changes expectations. Therefore only a few pieces of this type of evidence are required to confirm this part of the theory.

⁶ Eg. Börzel, Risse, 'Conceptualizing the Domestic Impact of Europe' in Featherstone, Radaelli, *Politics of Europeanization* (OUP, 2003), 63; see chapter 3 for further analysis.

1.2 Evidence Expected at Part 4

Again due to the pre-existing Europeanisation literature, there is high confidence that part 4 of the mechanism will be reflected in reality. The literature frequently demonstrates and expects policy change to follow either changed expectations or changed cost-benefit analyses. In terms of what evidence is being sought at this stage, it is evidence of policy change – changes such as new laws, new policies, new regulations, or changes to the existing arrangements. Due to the high confidence disconfirmatory evidence is again appropriate – incidences where the previous three parts did not lead to policy change.

The evidence has high certainty but low uniqueness. If there is some policy change, it is relatively certain there will be evidence of this. Policy change is almost always formally declared by a governmental or regulatory authority, in a way that leaves clear evidence that can be understood through comparing the new position with the old one. However, the evidence will have very low uniqueness. There are many reasons why laws and policies might change, and a large number could be unconnected to the process of complying with the ECJ judgment – a wide range of political considerations exist at any time.

A high certainty, low uniqueness piece of evidence is a hoop test. This is suitable for disconfirmatory evidence– if policy change is at any point not found after the initial three parts (failing to get through the metaphorical hoop), that then constitutes strong evidence that the theory is incorrect.

2. Europeanisation

The chapter now moves onto empirical analysis of parts 3 and 4 of the causal mechanism. There are three cases where both parts 1 and 2 of the causal mechanism were found to be present in the previous chapter. This section compares the theoretical expectations and expected empirical observations with the actual evidence – using the qualities of certainty and uniqueness to properly weigh the evidence within the process-tracing mechanism.

Table 5.1 : Causal mechanism and observable manifestations

RCI: Rational choice institutionalism

SI: Sociological institutionalism

	Cause	Part 1	Part 2	Part 3	Part 4	Outcome
Theory: RCI	Charter creation	Greater Significance	Policy misfit	Changed cost-benefit analysis	Policy change	Europeanisation
Observable manifestations: RCI	Charter created	Citation or influence	Comparison between policies/norms	Discussion of sanctions/costs	New laws/policies etc	New laws/policies
Theory: SI	Charter creation	Greater Significance	Policy misfit	Changed expectations	Policy change	Europeanisation
Observable manifestations: SI	Charter creation	Citation or influence	Comparison between policies/norms	Discussion of expectations	New laws/policies etc	New laws/policies

Source: author's own elaboration of Europeanisation research

2.1 Part 3 - Changed Analysis and Expectations

Part 3 is where the two competing predictions differ between rational choice and sociological institutionalism. The two competing predictions can be tested by assessing the evidence found, and the extent to which it supports one of the competing parts 3 of the mechanism. Looking at the type of evidence expected, it is low certainty and high uniqueness. So any one piece of evidence that is present forms a strong indicator of the correctness of the theory.

2.1.1 *Brüstle*

For the relevant analysis pertaining to Germany concerning the *Brüstle* case, the chapter again turns to the German Supreme Court judgment.

In order to analyse the motivations of the German Supreme Court, the language used in the case in reference to the ECJ judgment needs to be assessed. The German Supreme Court judgment was primarily concerned with analysing whether the specific facts of the *Brüstle* patent fitted the definitions laid down by the ECJ. There is a distinct lack of specific language discussing the judges'

motivations. Unlike in other circumstances (see discussed in the rest of the section), there is no specific language which can indicate their motivations. The position of the ECJ is merely laid out, and applied to the facts of the case.

Practitioners analysing the decision give us some indirect evidence of the motivations of the Supreme Court. One specialist commentator stated that⁷: ‘The full reasoning makes apparent that, surprisingly, the prior CJEU considerations on this important field of technology were not applied in a narrow and strict manner as could have been expected’. This level of surprise, and the flexibility displayed, indicated that the German Supreme Court did not feel especially tightly bound by the specific strictures of the ECJ.

This manoeuvrability indicates sociological institutionalism as an appropriate explanatory framework. Where the German Supreme Court feels a relatively high degree of flexibility, sociological institutionalism suggests that subtler processes than cost-benefit analyses shape actors’ actions. By contrast, rational choice institutionalism is based on more apparent sanctions and compliance. However, as an interpretation of a piece of secondary evidence, this only forms fairly weak evidence, even within a framework of sociological institutionalism.

The new practice note⁸ issued by the UK patent-granting body after the judgment provides evidence in the UK context. The case itself is mentioned in the practice note, both in the ‘background’ section and the substantive content.

In terms of expectations, the ‘background’ section of the note states that:

‘The Directive has been implemented into UK law by virtue of amendments to the Patents Act 1977. Paragraph 3(d) of Schedule A2 to that Act corresponds to Article 6(2)(c) of the Directive. Any interpretation of the Directive by the CJEU is therefore binding on the UK.’

Looking at the wording used by the IPO – particularly the word ‘binding’ – indicates towards an explanation based on rational choice institutionalism. The word binding, in a legal context, implies coercion and compulsion – the sort of cost-benefit analysis you find in rational choice institutionalism,

⁷ Oser, <http://www.lexology.com/library/detail.aspx?g=00bf462b-c485-4c40-8716-c01cc1281ee9>, first accessed 08/07/2015.

⁸ <http://webarchive.nationalarchives.gov.uk/tna/20140603104256/http://www.ipo.gov.uk/pro-types/pro-patent/p-law/p-pn/p-pn-stemcells-20120517.htm>, first accessed 26/01/2017.

as opposed to sociological institutionalism, where expectations are shaped more subtly. It would seem an unusual expression to declare expectations ‘binding’, where is quite normal for something where one might face sanctions. This evidence is useful – as a neutral body, the IPO’s primary motivation would be to inform. Therefore, this interpretation of the statement of their motivations can be taken as accurate.

There is other, more general evidence that the practice note was influenced by the *Brüstle* judgment.

Firstly, the new definition (discussed in section 3.2.1 of the previous chapter) now reflects almost word-for-word the definition given by the ECJ in *Brüstle*, which makes it highly likely that *Brüstle* is the definition’s source. It would be an implausibly unlikely coincidence for the IPO to have adopted such a similar definition without at least some ECJ influence – at the very least the *Brüstle* judgment influenced the IPO in some manner.

Secondly, both academics and lawyers practising in the field have noted that the judgment caused changes in the actions of the IPO⁹. Whilst this outside commentary is less useful than direct analysis (in that it is perhaps less useful than the IPO’s own declarations of their motivations), it can be added to the evidence base for this part.

2.1.2 Test-Achats

Here evidence comes from the actions of the German legislature. In 2013, they passed the SEPA-Begleitgesetz¹⁰, a law containing various amendments to other areas of German law, generally designed to ensure compliance with various EU legal instruments as part of the Single Euro Payments area. As part of the legislative process, the finance committee of the Bundestag produced a report on the SEPA-Begleitgesetz¹¹. They highlighted the judgment as relevant as part of the running process of moving to the Single Euro Payments Area (the connection being through insurance). The precise phrase used was as follows:

⁹ Bently, Sherman, *Intellectual Property Law* (Oxford, 2014, 4th Edition), 524; Scott York, http://www.scott-york.com/index.php?action=content&content_id=309, first accessed 09/07/2015; Fazal, Ingram, https://www.ashurst.com/publication-item.aspx?id_Content=8309, first accessed 09/07/2015.

¹⁰ Gesetz zur Begleitung der Verordnung (EU) Nr. 260/2012 zur Festlegung der technischen Vorschriften und der Geschäftsanforderungen für Überweisungen und Lastschriften in Euro und zur Änderung der Verordnung (EG) Nr. 924/2009 (SEPA-Begleitgesetz).

¹¹ Deutscher Bundestag, 17. Wahlperiode, Drucksache 17/11395, 07.11.2012.

'What is more, the Solvency II Directive must not be transposed as originally envisaged. This [the judgment] makes it necessary to bring forward the planned amendments to the insurance control laws. For this we are now prepared to also stipulate measures to strengthen the capability of German life insurers'¹².

It is later explicitly stated that there are no alternatives to the proposed action.

Again, the language is not that of expectations, rather that of compliance. The finance committee argues that something 'must' be done. They argue that something is 'necessary', and they argue that there is no alternative. This again differs from the logic of expectations, which would more subtly direct actors towards a particular course. This is another piece of evidence in favour of the existence of part 3 of the mechanism in that it shows the policy misfit has changed expectations, in a way that is explained by rational choice institutionalism. In terms of the quality of the evidence, this is again valuable direct evidence. Whilst the Finance Committee is politically motivated, the extent to which it would likely let politics or public perception influence its judgment seems minimal, given the relatively obscure nature of the report.

Analysis of the motivations of the British government reveals a similar explanation. The British government, in opening a consultation on how best to implement the *Test-Achats* judgment, first proposed the aforementioned changes as their response to the judgment itself¹³. The response opens by highlighting the government's negative opinions on the ruling¹⁴, and section 1.3 is crucial in detailing the motivation behind the change. It states that:

'The Government believes that the proposed approach is the simplest, minimising the risk of any conflict between UK and European law.'

So the government's main concern is minimising conflict between UK and EU law. This again drives towards the idea of rational choice compliance. Given the ruling was relatively unpopular in the British

¹² Ibid, page 2. Own translation, original text: Darüber muss die sog. Solvabilität-II-Richtlinie nicht wie ursprünglich vorgesehen zum 31. Oktober 2012 umgesetzt werden. Dies macht es notwendig, Teile der geplanten Novelle des Versicherungsaufsichtsgesetzes vorzuziehen. Damit sind bereits jetzt auch Maßnahmen zur Stärkung der Leistungsfähigkeit der deutschen Lebensversicherer vorgesehen.

¹³ HM Treasury, 'UK response to the 1 March European Court of Justice ruling that insurance benefits and premiums after 21 December 2012 should be gender-neutral', July 2012.

¹⁴ Ibid S 1.1-1.13

media and politics.¹⁵, it is hard to envisage reputational damage stemming from the ‘conflict’ discussed above. Rational choice institutionalism does however analyse various consequences of non-compliance that could motivate the British government, for example the risk of infringement proceedings from the Commission or a case brought by a citizen before a national court. So when the government talks about fear of conflicts, it is reasonable to consider this evidence that they are motivated by fear of sanctions, and with cost-benefit analyses. This conclusion therefore provides direct evidence that the government’s actions are motivated by policy misfit, and specifically the risk of sanctions or a national court judgment.

2.1.3 Léger

When looking at the response to the *Léger* judgment in Germany, it makes sense to look at the interactions surrounding the Federal Chamber of Doctors, as they are the regulatory body in this particular case.

Various actors sought to directly influence the Federal Chamber of Doctors. Andreas Storm, health minister for the state of Saarland, had reportedly repeatedly been attempting to change the policy of the Federal Chamber for years and according to some sources, at his ‘suggestion’ or ‘encouragement’, the Chamber reviewed its position¹⁶. This follows the judgment being fairly widely covered by the media, both in terms of neutral reports of the outcome of the case and potential consequences for Germany¹⁷, and opinion pieces criticising both the ECJ and German government allowing the possibility of a permanent ban and implementing one respectively¹⁸.

Some of the mechanics of potential Europeanisation appear in the interaction between the Federal Chamber of Doctors and the ‘Lesbian and Gay Association’. On 6 May 2015, approximately a week

¹⁵ Eg. <https://www.theguardian.com/commentisfree/2011/mar/01/insurance-human-rights-premiums-europe>, first accessed 16/05/15; <http://www.telegraph.co.uk/finance/personalfinance/insurance/motorinsurance/8354074/Lower-insurance-premiums-for-women-unfair-European-court-rules.html>, first accessed 16/05/15.

¹⁶ <http://www.dw.com/de/schwule-blutspender-nicht-diskriminieren/a-18418122>, first accessed 26/02/2016

¹⁷ Eg. <http://www.sueddeutsche.de/gesundheit/eugh-urteil-blutspende-verbot-fuer-schwule-ist-rechtens-unterbedingungen-1.2457917>, first accessed on 26/02/2016.
<http://www.faz.net/aktuell/gesellschaft/blutspende-verbot-fuer-homosexuelle-maenner-ist-rechtens-13565724.html>, first accessed 26/02/2016; <http://www.dw.com/de/schwule-blutspender-nicht-diskriminieren/a-18418122>, first accessed 26/02/2016.

¹⁸ Eg. <http://www.zeit.de/wissen/gesundheit/2015-04/blutspende-homosexuelle-sicherheit>, first accessed 26/02/2016.

after the judgment, the spokesperson of the Association wrote to the President of the Federal Chamber of Doctors. In this letter, he highlights the details of the judgment at length, and the end of the letter details the policy changes expected by the Association. Specifically, the altering of the permanent exclusions of MSM individuals, and the equalisation of treatment between MSM and non-MSM individuals.

This letter both relies upon shaming language such as: ‘to our knowledge, sexual behaviour that led to infection has no influence on the length of the ‘window period’ in which a fresh infection cannot be detected’; ‘that the reworking of the haemotherapy Directive is delayed no longer’; and other such similarly strong rhetoric. They also threatened to ‘encourage’ and ‘provide assistance’ for any legal complaints against the organisation.

Here there are elements explicable by both rational choice and sociological institutionalism. The shaming language can be understood as evidence of attempts to change expectations, and the attempts to highlight the likelihood of legal complaints represent the attempt to change the cost-benefit analysis of the Federal Chamber of Doctors. National actors seeking to use the ECJ judgment to promote their own position through shaming and through threats of legal action form part of the Europeanisation process - in both circumstances highlighting the perceived need to change.

However, with the lack of response from the federal chamber of doctors, the conclusion is that in spite of some attempts, their motivations remain relatively similar to the pre-*Léger* status quo. Therefore, whilst interesting, this does not constitute evidence for part 3 of the causal mechanism.

Part 2 of the mechanism was not present in the case of the UK – there was no policy misfit. Without that policy misfit, there is no chance of a response to policy misfit.

2.1.4 Overall Assessment

The evidence sought in this section was ‘smoking gun’ evidence – low certainty, high uniqueness. So the positive evidence that is present is of fairly high value.

There are several evidence points in the responses to the *Test-Achats* judgment. Both the German legislature and the British government highlight the need to comply with the judgment, and the British government especially appears motivated by the risk of legal sanction. This evidence comes from high

accuracy sources, in particular *P3 (a) (iv)* and *P3(a) (v)*.

Similarly, in the responses to the *Brüstle* case, the IPO response highlights the binding nature of the judgment (*P3(a)(i)*). Given the high uniqueness of this evidence, the multiple pieces of positive evidence are sufficient proof of part 3 of the causal mechanism. The low certainty of the evidence means that despite of a lack of evidence resulting from the *Léger* case and the relative lack of clear evidence in the German Supreme Court application of *Brüstle*, the evidence found in the previous two cases is of sufficient weight that to demonstrate sufficient evidence to indicate the presence of part 3 of the mechanism.

Additionally, the evidence points towards rational choice institutionalism over sociological institutionalism. Looking at the evidence, there is a larger amount of higher accuracy evidence for rational choice institutionalism compared to sociological institutionalism (*P3(a)* over *P3(b)*). The significance of more concretely demonstrating one theory over another will be discussed in the conclusions of the chapter.

2.2 Part 4 – Policy Change

Here evidence is again sought fitting a hoop test – high certainty, low uniqueness. In particular, evidence that the changed attitudes discussed in the previous section have led to policy change.

2.2.1 *Brüstle*

As noted earlier, the German Supreme Court redefined ‘human embryo’ when implementing the ECJ judgment. This in of itself constitutes policy change – a shift in the definition used in interpreting a key, politically sensitive piece of legislation.

This policy change can also be seen when looking at the patents granted. The *Brüstle* patent was previously denied. Unfortunately for *Brüstle* himself, the patent was then disallowed on a technicality by the European Patent Office, as unlike the German court they did not allow patents based on technology unavailable the time of filing. However, the German interpretation of the Directive was still Europeanised, as represented by the change in implementation of German law. Even though the specific patent was not in the end granted, the policy text changed, as represented by the changed law. Had *Brüstle* filed a patent after the technology to generate the relevant cells without destruction

of human embryos was developed, this would have been patentable in Germany as a result of the implementation of the *Brüstle* decision.¹⁹ This direct comparison of policies before and after the judgment is good evidence of policy change – it is readily apparent from comparing primary sources.

Other commentators have noted this, adding to the evidence base. The increase in patentability was widely noted at the time, with practitioners and commentators stating: that patents ‘seem[ed] worth filing’²⁰ and that ‘Patents on the basis of embryonic stem cells are therefore possible as long as the cell lines from which the stem cells are extracted are obtained without the destruction of an embryo’²¹. Whilst this is not direct evidence, the above stated evidence being supported by other actors increases its relevance.

This change represents a liberalisation in that it ‘opens up the prospect of patents on embryonic stem cell technology that did not involve destruction of an embryo’²². The eventual outcome at a German level was a judgment from the German Federal Supreme Court which allows the patent at stake in *Brüstle*. In addition to this, it opens up the possibility for other similar cells and processes to be patented, provided they did not involve destruction of the embryo. This latter development could be significant, depending on future scientific innovations, but was met with muted reaction from within Germany, as it was perceived as merely representing a small change.²³

Looking at the framework laid out in the research design, the changes in German law can be explained as absorption. There is no concrete change to statute, but a new interpretation of pre-existing law was passed down to national courts, i.e. being developed and given by the ECJ and subsequently applied by German courts. The consequences of this new interpretation of the statutory text is a change to when patents will or will not be granted in Germany for inventions coming from certain types of cells.

Evidence of policy change in the UK context can be found by looking at the new practice note issued by the IPO following the *Brüstle* ruling for more textual evidence of the applicable policy.

¹⁹ Chung, Klimanskaya, Becker, Li, Maserati, Lu, Zdravkovic, Genbacevm Fisher, Krtolica, Lanza, ‘Human Embryonic Stem Cell Lines Generated without Embryo Destruction’ 2 *Cell Stem Cell* 2 (2008), 113.

²⁰ Oser, *supra* note 7.

²¹ <http://www.drze.de/in-focus/stem-cell-research/modules/the-brustle-case>, first accessed on 16/06/15.

²² Moran, ‘Brüstle patent holds up in Germany’ 31 *Nature Biotechnology* 94 (2013), 1057.

²³ Eg. <http://www.sueddeutsche.de/wissen/bundesgerichtshof-urteil-zu-stammzellen-hat-begrenzte-wirkung-1.1536530>, first accessed 20/05/2015.

Firstly, a more specific definition of embryo is provided for the purpose of patents. In the *Pre-Brüstle* guidance, no specific definition is given of embryo, and the guidance merely states that ‘the Office will not grant patents for processes of obtaining stem cells from human embryos’. Following *Brüstle*, an ‘embryo’ is defined in three different ways with regards to patents²⁴.

- A human ovum as soon as fertilised, if that fertilisation is such as to commence the process of development of a human being;
- A non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted, insofar as it is capable of commencing the process of development of a human being;
- A non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis, insofar as it is capable of commencing the process of development of a human being.

This is a far more specific definition than previously existed – policy change, even if to the limited extent of more concretely stating an existing definition.

Secondly, the IPO will now not patent an invention if at any stage it involves the destruction of a human embryo. In the previous statutory guidance, the prohibition dealt only with ‘processes of obtaining stem cells from human embryos’. Now however, even if the invention does not involve an embryo itself, it is prohibited if the destruction of human embryo is involved anywhere in the process. This definition is not only more specific, but excludes a greater number of inventions from patentability. This direct comparison between the practice notes again provides direct evidence of policy change, again representing a minor change best described as ‘absorption’.

2.2.2 Test-Achats

As mentioned, the SEPA-Begleitgesetz²⁵ contains the relevant amendments to German law.

Article 8 of this implementing law amended the Allgemeine Gleichbehandlungsgesetz²⁶. The first paragraph of Article 8 of the SEPA-Begleitgesetz repealed the aforementioned first sentence of paragraph 20(2), removing the exception from German law. In addition, it added an additional sub-

²⁴ Ibid.

²⁵ SEPA-Begleitgesetz, *supra* note 10.

²⁶ SEPA-Begleitgesetz, *supra* note 10, Article 8.

paragraph to Article 33 of the Allgemeine Gleichbehandlungsgesetz ensuring that the exception applies to insurance relationships that existed before 21 December 2012, in order to respect the deadline and time period laid out by the Commission guidelines on applying the decision. This is again evidence of policy change - the implementing law altered the German law on insurance and gender equality, with policy being determined by statute.

In terms of the research framework, the changes in Germany as a result of the *Test-Achats* case are accommodation. There has been moderate domestic change as a result of the decision, taking the form of statutory change. Depending on the financial effects on insurers within the German system, the change could constitute transformation.

Looking at the UK - between the initial transposition of the Gender Directive and the *Test-Achats* judgment, there was a shift in UK anti-discrimination law. Various Acts designed to combat discrimination were consolidated into one act - the Equality Act 2010²⁷. Therefore when looking at the amendments introduced in order to implement the *Test-Achats* judgment, it is necessary to look at the changes made to the Equality Act 2010.

The Equality Act was amended by the Equality Act 2010 (Amendment) Regulations 2012²⁸. Article 2 of the Amendment Regulations removes Paragraph 22 of Schedule 3 of the Equality Act 2010. Looking at Paragraph 22 of Schedule 3 of the Equality Act, it is this paragraph that contains what was previously sub-section 3(a)(i), allowing exceptions to the prohibition on discrimination based on 'actuarial or other data from a source upon which it is reasonable to rely'. Thus an exception that could previously be relied upon no longer existed. Article 3 of the amending regulations maintains the provision's application to contracts concluded before the 21st December 2012. This is again evidence of policy change – amendments were made to statute, resulting in a different policy. This is again clear evidence, as it is a direct legislative comparison based upon primary evidence. Similarly to in Germany, and for similar reasons, this change could be described as either accommodation or perhaps transformation.

2.2.3 Léger

In Germany, there was a lack of policy change. The response from the federal chamber of doctors was to state 'due to both the judgment of the ECJ... and your note', discussions were opened as to the

²⁷ Equality Act 2010.

²⁸ The Equality Act 2010 (Amendment) Regulations 2012.

revision of the regulations and establishing discussion with the relevant bodies. This constitutes a notable lack of evidence – the three previous parts were present in this context, but it did not translate into direct policy change.

Here again, there is a lack of policy change following the lack of policy misfit in the UK, as explained in the previous chapter.

2.2.4 Overall Assessment

The evidence considered in this section is mixed and contradictory. There is evidence of policy change in four out of six circumstances. The UK *Léger* response can be eliminated from consideration – the lack of evidence of policy change here is not due to the lack of evidence at this part, but due to the lack of earlier policy misfit. But for the other cases and the German response to *Léger*, at this point the disconfirmatory evidence needs to be balanced against the positive evidence, to draw conclusions about the empirical evidence for part 4 of the mechanism in these specific circumstances.

The positive evidence passes through several of the required metaphorical hoops, with each piece of evidence increasing our confidence in the empirical existence of part 4 of the mechanism. There is reasonable confidence that part 4 of the mechanism is present in at least two of the cases studied here. Importantly, the pieces of evidence being used in the hoop tests are high accuracy evidence, with the analysis generally relying on changes in the law or direct statements of policy (eg *P4(i)* or *P4(ii)*). Looking at the overall accuracy of the mechanism (whilst still considering the limited cases at hand), it can still be argued that part 4 is empirically proven. Even in spite of the negative evidence of the lack of German response to *Léger*, this is outweighed by the multiple pieces of evidence in favour, significantly increasing confidence in the theory – increasing confidence that policy change and thus Europeanisation has taken place.

3. Conclusions

This chapter has continued the analysis of chapter 4 - where the cases in the previous chapter caused policy misfit (*Brüstle*, *Test-Achats*, and *Léger*), this chapter has analysed whether the following two parts of the mechanism were also present.

There is sufficient evidence for the final two parts of the mechanism, response to policy misfit and

policy change, as applied to the actors and cases studied in this chapter, and following on from the policy misfit found in chapter 4. There are sufficient pieces of smoking gun evidence for part 3 – where even some evidence is sufficient, there are several ample pieces of evidence. The evidence is marginally less clear for part 4 due to the impact of the *Léger* case. Whilst the weight of the individual evidence is sufficient to state the correctness of the mechanism, and thus demonstrates Europeanisation, the significance of the missing evidence in the circumstances surrounding *Léger* can be analysed.

It is worth noting that even with some policy misfit between German policy and the result of the *Léger* judgment, Europeanisation did not take place in that instance. Even though some of the evidence of changed expectations (part 3) exists in that case, there was insufficient adaptational pressure generated. This is due to the low level of policy misfit. As it is the ECJ judgment that is in and of itself the source of policy misfit, the missing evidence in *Léger* again demonstrates the importance of the ECJ judgment to Europeanisation, which continues a trend of the ECJ playing an important health policy role.²⁹ It also enables future research into this area to be better directed towards the Charter and ECJ judgments – knowing that with sufficient policy misfit Europeanisation is likely to follow, means research can be more clearly directed towards the likelihood of CFREU-inspired judgments resulting in policy change, and particularly policy change resembling Europeanisation.

This chapter further contributes to the debate on the Charter as, despite the prevailing political wisdom being that the UK enjoys an effective ‘opt-out’ from the Charter³⁰, the ECJ takes the Charter into account in important decisions and these decisions lead to national policy change. This chapter provides evidence that the claims made about the ‘opt-out’ do not translate into empirical reality, validating the prevailing academic wisdom on the matter.³¹

²⁹ See for example Sieveking, ‘ECJ Rulings on Health Care Services and Their Effects on the Freedom of Cross-Border Patient Mobility in the EU’ 9 *European Journal of Migration and Law* 1 (2007), 25; Sokol, ‘Entitlement to Socially-Covered Health care vs Priority Setting: ECJ’s Decomposition of the NHS?’ 13 *European Journal of Social Security* 3 (2011), 317; Brooks, ‘Crossing Borders, A critical Review of the European Court of Justice in EU health Policy’ 105 *Health Policy* 1 (2012), 33.

³⁰ <http://www.theguardian.com/politics/2013/nov/19/chris-grayling-clarification-eu-charter-rights>, first accessed 16/06/2015.

³¹ Peers, ‘The ‘Opt-out’ that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights’ 12 *Human Rights Law Review* 2 (2012), 375; Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP, 2010), 237–40; Pernice, ‘The Treaty of Lisbon and Fundamental Rights’, in Griller, Ziller, *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008), 244–9; Anderson, Murphy, ‘The Charter of Fundamental Rights’, in Biondi, Eeckhout, Ripley, *EU Law after Lisbon* (OUP, 2012), 166–9; Layden, Lock, ‘Protection of Fundamental Rights Post-Lisbon: The Interaction

It is also worth noting that the sort of Europeanisation being analysed in this chapter, specifically Europeanisation through judicial action, raises different issues from conventional Europeanisation through the political sphere. National political actors, particularly in the context of supranational courts, are sensitive to the perceptions that so-called ‘unelected judges’ are driving policy. Withdrawal from the jurisdiction of the ECJ has formed a key Brexit demand, and some of the cases discussed in this chapter were received exceptionally negatively in UK media³². On multiple occasions, concerns have been expressed about the integrationist nature of the ECJ clashing with the prevailing political will in Britain³³. Whatever normative stance is taken on this issue, this empirical contribution is useful in that debate, providing some evidence of how the ECJ’s policy-making plays out in this specific policy area – new evidence of the ECJ’s ‘undemocratic’ influence (as many may refer to it) is unlikely to be well-received in many quarters.

The actual, as opposed to perceived, significance of the empirical findings is more nuanced. When Europeanisation takes place entirely through the political sphere, even when actors follow rational choice models and act in their own interest, there remains present a majoritarian check upon the EU’s influence, due to input on policy-formation from the political sphere. The more the judicial process is involved, the less political input is available as opposed to judicial, as compliance with judicial action is frequently subject to less discussion in national parliaments. See for example, the fact that in order to comply with the *Test-Achats* judgment, the British parliament passed a statutory instrument instead of a full Bill in parliament. This makes the finding of the Charter’s Europeanising effects through judicial action particularly noteworthy, as it demonstrates the Charter driving policy change in a way with limited political choice as to the change.

Generally speaking, policy in democracies requires a combination of majoritarian representation and institutional checks, with substantial debate on the precise balance between these elements. The chapter shows that judicial norms are generated that override the agreed upon norms set by the EU legislature in the Directives in question, leading to specific policy change. At the very least the chapter demonstrates the judiciary adding increased specificity to definitions in areas left undefined by the legislature. As Stone Sweet notes at the beginning of the previous chapter, the ECJ is one of the most

between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions (FIDE National Report for the United Kingdom), October 7 2011.

³² Eg. *supra* note 15.

³³ Eg. <https://www.theguardian.com/law/2010/aug/10/european-court-justice-legal-political>, first accessed 19/03/2017.

heavily studied courts in the world. It has ‘no rival as the most effective supranational judicial body in the history of the world’³⁴. This effectiveness has been widely analysed and criticised, and its integrationist effects heavily debated³⁵ – as ‘the ECJ’s judicial policy-making has become known in almost all policy areas’³⁶ and is a process through which reduces the amount of ‘political’ policy-making compared to non-political forces³⁷. Other work has linked the ECJ’s actions into wider debates on judicial policy-making and the constitutional role of the judiciary³⁸.

The chapter also provides evidence that, in these circumstances, rational choice institutionalism is a more accurate explanatory model of compliance than sociological institutionalism. There is more evidence that actors respond to rational motivations as opposed to changed expectations. Beyond this, the evidence in favour of rational choice institutionalism has a higher level of accuracy. There is some significance in adding to the empirical base on this matter. From this data there is more evidence that in the context of ECJ judgments, national actors are more likely to respond to threats of sanctions than expectations. Those national actors seeking to use ECJ judgments to promote a specific agenda would likely achieve greater success rely on legal means as opposed to seeking to change perception and expectations.

Finally worth noting however is that, contrary to the perceptions of some discussed in the previous chapters and any potential objections generated by any of the findings of the chapter, Europeanisation in this area has occurred infrequently through the mechanism of ECJ judgments. So whilst the above paragraphs are true, and the chapter does demonstrate Europeanisation driven by undemocratic elements and threat of sanctions for non-compliance, the overall impact is specifically quite limited in this context. Looking again at the British opt-out from the Charter – it is the case that the Charter continues to have policy effects in spite of the opt-out, but again these effects are fairly limited.

³⁴ Stone Sweet, Brunell, ‘Constructing a supranational constitution’ in Stone Sweet, *The Judicial Construction of Europe* (OUP 2004), 1,

³⁵ Eg. Weiler, De Búrca, *The European Court of Justice* (OUP, 2001); Kuper, *The Politics of the European Court of Justice* (Kogan, 1998); Tridimas, *The European Court of Justice and the EU Constitutional Order: essays in judicial protection* (Hart, 2005); Wasserfallen, ‘The Judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union’ 17 *Journal of European Public Policy* 8 (2010), 1128.

³⁶ Martinsen, ‘Judicial policy-making and Europeanization: the proportionality of national control and administrative discretion’ 18 *Journal of European Public Policy* 7 (2011), 944, 946.

³⁷ Eg. Scharpf, ‘Notes towards a theory of multilevel governing in Europe’ 24 *Scandinavian Political Studies* 1 (2001), 1; Scharpf, ‘Legitimacy in the multilevel European polity’ 1 *European Political Science Review* 2 (2009), 173.

³⁸ Eg. Stone Sweet, ‘Constructing a supranational constitution’ in Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, 2000), 154.

On the one hand, the limited effects will provide comfort to national authorities and health providers. Knowing that the Charter's effects will be fairly limited mean it is not a significant consideration - it is not a significant factor to be taken into account when planning or implementing policy, distributing public funds, or considering the EU's impacts on the finances of Member States' health systems. On the other hand, it is unclear whether the limited nature of these effects would provide succour to politicians or the media – in Britain at least, views on EU influence tend towards binary and absolute positions. Any Charter influence may be seen as unacceptable, and any judicial policy-making also. Thus the rhetorical impact of the thesis might extend beyond the strict impact of the findings.

5. Appendix 5.1 – Evidence Appendix

Proposition 3(a)

Policy misfit leads to changed cost-benefit analyses

Expected Evidence

There will be discussions of the risk of non-compliance, or more specifically for sanctions by the relevant actors.

Evidence of P3 (a) in Brüstle

Evidence of P3(a) (i)

Looking at the practice note issued by the IPO following the *Brüstle* case states that any interpretation of the Directive (implicitly including the *Brüstle* case) is ‘binding’ on the UK.

Lu, Ha – There are multiple other reasons that the IPO could have described the judgment as ‘binding’ that were not a changed cost-benefit analysis based on the judgment, leading to low uniqueness. As a neutral body, the IPO’s primary motivation would be to inform. Therefore this statement of their motivations can be taken as accurate.

Evidence of P3 (a) (ii)

The new definition in the new IPO practice note matches word for word the definition given in *Brüstle*.

Hu, Ha – It would seem an implausible coincidence for the definitions to match without at least some influence from the judgment itself. However, it only provides indirect evidence for P3(i), as it only proves influence as opposed to changed cost-benefit analyses. As a neutral body, the IPO’s primary motivation would be to inform. Therefore this statement of their motivations can be taken as accurate.

Evidence of P3(a) (iii)

Academics and practicing lawyers in the field also noted the influence of the *Brüstle* judgment in the decision of the IPO. Again however, this is just evidence of influence as opposed to direct evidence of the proposition.

Mu, Ha – There are many reasons the various academics and commentators would note the influence of the judgment. Expert analysis ensures high accuracy.

*Evidence of P3 (a) in Test-Achats**Evidence of P3(a) (iv)*

The finance committee of the German Bundestag, when discussing the judgment, described the action taken as ‘necessary’ and acknowledged there was no alternative to the proposed action.

Mu, Ha – There are some other reasons to use ‘necessary’ and the language of compliance, other than the finance committee felt the government was bound by the judgment. However this only provides moderate evidence for the proposition – again it does not provide explicit confirmation of the proposition. The direct report of the finance committee is a highly accurate source.

Evidence of P3(a) (v)

In the British response to *Test-Achats* judgment, the government states that its objective is to minimise conflicts between UK and EU law, despite their negative response to the ruling. Given the unpopularity of the ruling highlighted in the document, it is difficult to imagine any reputational benefit gained from compliance, therefore it can be assumed that they felt an obligation to comply.

Mu, Ha – Some other potential reasons behind the quote, so medium uniqueness. Direct statement of government motivations leads to high accuracy.

*Evidence of P3(a) in Léger**Evidence of P3(a) (vi)*

The Lesbian and Gay Association threatened the federal chamber of doctors, threatening to ‘encourage’ and ‘provide assistance’ for any legal complaints against the organisation

Mu, Ma – The Association could just be threatening legal action as opposed to be fully willing to

engage in the action, which would be an alternative to them seeking to use legal action as expected by P3(a). The letter is a public letter, and so is shaped by the need to put across a specific public image, resulting in medium accuracy.

Proposition 3 (b)

Policy misfit leads to changed expectations

Expected Evidence

There will be discussions of the changed expectations, and any reputational cost incurred due to non-compliance

Evidence of P3 (b) in Brüstle

Evidence of Proposition 3(b) (i)

Specialist commentators noted with the surprise that the ECJ considerations on the matter ‘were not applied in a narrow and strict manner as could have been expected’ by the German Supreme Court. This flexibility indicates that the German Supreme Court did not feel strictly bound by in a rational choice manner

Lu, Ha – This piece of evidence only speaks very weakly towards the proposition, and in a world of complex judicial relations between German and supranational courts there are many alternative reasons the German court could have displayed this flexibility. Expert analysis provides high accuracy

Evidence of P3(b) in Léger

Evidence of Proposition 3(b) (ii)

Lesbian and Gay Association relies on shaming language such as “to our knowledge, sexual behaviour that led to infection has no influence on the length of the ‘window period’ in which a fresh infection cannot be detected”, and ‘that the reworking of the haemotherapy Directive is delayed no longer’. This shaming points towards sociological institutionalism – using shaming to alter expectations.

Mu, Ma – The shaming language is some evidence towards the proposition, but there are multiple

alternative explanations other than attempts to change expectations. The letter is a public letter, and so is shaped by the need to put across a specific public image, resulting in medium accuracy.

Proposition 4

Changed cost-benefit analyses lead to policy change

Expected Evidence

New laws and policies introduced to avoid risks of sanctions or reputational damage

Evidence from the Brüstle judgment

Evidence of P4(i)

The German Supreme Court judgment redefined the term 'human embryo' in the context of the Directive's implementation in Germany

Mu, Ha – There are some reasons the German Supreme Court may have redefined the term or other reasons, but there is at least a reasonable chance this was motivated by the policy misfit caused by the judgment. Direct reporting of court judgment ensures high accuracy.

Evidence of P4 (ii)

Brüstle patent granted, albeit disqualified on a technicality by the European Patent Office.

Hu, Ma – There are few reasons that the patent would later be granted, other than that the policy had changed, given patent-granting is bound by policies. Own interpretation of policy change, so medium accuracy

Evidence of P4 (iii)

Practitioners and commentators noted the increased in patentability at the time.

Mu, Ha – Increase in patentability shows change but not necessarily directed by changed expectations or cost-benefit analyses. Expert analysis leads to high accuracy.

Evidence of P4(iv)

The IPO practice note introduced following the judgment includes a three-part definition of embryo with regards to patents, where the previous note did not include an explicit definition

Mu, Ha – The new definition does not prove extensive change, as this could have been the implicit unstated definition before the judgment. Practice note is an accurate reflection of behaviour of policy-granting body.

Evidence of P4 (v)

Previous practice note only dealt with ‘processes of obtaining stem cells from human embryos’, compared to new practice note which excludes inventions that destroy an embryo anywhere in the process, even if the invention does not involve an embryo itself.

Mu, Ha - The new practice note provides clear evidence of policy change, but there are some reasons why the policy could have changed without linking directly to proposition. Practice note is an accurate reflection of behaviour of policy-granting body.

*Evidence of P4 in the Test-Achats judgment**Evidence of P4 (vi)*

The SEPA-Begleitgesetz amended a number of legal instruments, including the repeal of the exemption annulled by the ECJ in general yet applying it to relationships before 21 December 2012 – respecting the deadline and time period laid down by the Commission.

Mu, Ha – Policy change clearly indicated by the change in law, but limited indication of the motivations behind that change lower uniqueness. Direct comparison of published laws is a high accuracy source.

Evidence of P4 (vii)

The Equality Act 2010 (Amendment) Regulations 2012 removed the annulled exception from applicable UK non-discrimination law, whilst similarly maintaining it for pre-21 December 2012 insurance relationships.

Mu, Ha - Policy change clearly indicated by the change in law, but limited indication of the motivations behind that change lower uniqueness. Direct comparison of published laws is a high accuracy source.

Chapter 6 – Increased Significance in National Court Judgments

*The process of European legal integration has been characterized by considerable variation in the timing and the extent of acceptance of key doctrines of EC law among different national courts.*¹

Walter Mattli, Professor of International Political Economy, Oxford University

Anne-Marie Slaughter, Emerita Professor of Politics and International Affairs, Princeton University, 1994

Unlike in many other international organisations, national courts have played an unusually large role in the history of the EU.² Since early cases such as *Van Gend en Loos*³ and *Costa v ENEL*⁴, national courts have been key venues for the enforcement of EU law, something that has been extensively analysed⁵. However, the impact of the Charter on national courts, a key area of EU law enforcement, remains under-assessed. To truly understand the impact of the Charter on national health law and policy, it is necessary to understand its enforcement and application beyond the ECJ and down to a national level.

This chapter is testing whether similar impacts to the previous chapter can be found at the purely national level. Advocates for a human rights-based approach⁶ frequently assume that creating new international and European fundamental rights documents affect these rights nationally. The main

¹ Mattli, Slaughter, 'Constructing the European Community Legal System from the Ground Up: The Role of Individual Litigants and National Courts' *The Jean Monnet Center for International and Regional Economic Law and Justice* The NYU Institutes on the Park (1994).

² Leczykiewicz, 'Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability', in Chalmers, Arnall, *The Oxford Handbook of European Union Law* (OUP, 2015).

³ Case 2/62 *Van Gend en Loos*, ECLI:EU:C:1963:1.

⁴ Case C-6/64 *Costa v ENEL*, ECLI:EU:C:1964:66.

⁵ Eg. Cremona, *Compliance and Enforcement in EU Law* (OUP, 2012).

⁶ Discussed further in chapter 2 and in chapter 3, see for example: Yamin, 'Our place in the world: Conceptualizing obligations beyond borders in human rights-based approaches to health' 12 *Health and Human Rights* 1 (2010), 6 Mok, 'International assistance and cooperation for access to essential medicines' 12 *Health and Human Rights* 1 (2010), 72; Ruggie, A/HRC/8/5, 7 April 2008, UNHRC; Hervey, 'The Right to Health in the EU Charter and the ESC', in De Búrca, De Witte, *Social Rights in Europe* (OUP, 2005); Eide, 'Economic, Social, and Cultural Rights as Human Rights' in Eide, Krause, Rosas, *Economic, Social, and Cultural Rights* (Brill, 2001), 23.

task the chapter undertakes is testing this assumption – if international human rights documents fail to impact the national level, they are lacking effects in one of the main areas of human rights enforcement. This chapter empirically tests the effects of the Charter in order to establish whether it has increased significance of fundamental rights at a national judicial level, and whether this has led to policy change and any subsequent loss of control by Member States.

Despite the reasonable evidence of some Europeanisation as a result of ECJ judgments, this chapter shows that this is not replicated on the national court level. Over both studied countries, Germany and the UK, the theorised mechanism breaks down at part 2, in that there is insufficient evidence of policy misfit. This finding counts as a decisive rejection of the hypothesis for this chapter – the significance of this will be discussed in the conclusion.

Following this introduction, the chapter will proceed in several sections. Firstly, section 1 will lay out the relevant methodological elements required for this chapter – applying the overall causal mechanism to the specific chapter, and analysing the expected evidence and tests, with the full body of evidence and its accuracy discussed in appendix 6.1. Section 2 covers the course of litigation of the various cases being discussed in the chapter, and provides context to the choice of cases. The next section is the substantive analysis of the chapter, which weighs up the evidence for each part of the causal mechanism. Finally, the conclusion considers the implications of the chapter's findings for the UK and Germany, as well as its wider effects on national litigation.

1. Mechanism and Methodological Elements

This chapter begins by laying out the causal mechanism and applying it to the specific actors in this chapter, in order to empirically test it.

Chapter 3 explained how the institutional nature of the Charter was key to understanding its effects within the framework of Europeanisation. An important part of the theoretical prediction in the chapter is that conceptualising the rights in the Charter as fundamental rights causes actors to treat them with increased significance⁷.

⁷ Section 2.4 of chapter 3 discussing the prediction, for wider literature see Franck, 'Legitimacy in the International System' 82 *American Journal of International Law*, 705; Rawls, *The Law of Peoples* (Harvard University Press, 1999); Raz, 'Human Rights without Foundations' in Besson, Tasioulas, *The Philosophy of International Law* (OUP, 2010), 321; Skorupski, 'Human

Part 1 is therefore that national courts will treat the rights in the Charter with increased significance due to two elements of an institution – the regulatory element and the normative element⁸. Firstly, the regulatory element means that when national courts see the Charter as binding (in some circumstances), they will therefore consider it as an important factor in cases with fundamental rights implications⁹. Secondly, the normative element of institutionalism creates a social obligation of compliance, which is increased by the Charter¹⁰. The Charter is considered a ‘pan-European political consensus’ and something that has ‘improved the centrality and weight of fundamental rights’¹¹. Consequently, the Charter joins a list of European and international fundamental rights documents and standards that a national court would feel a social obligation to follow, eg. the European Convention on Human rights, European Social Charter, etc.

Part 2 of the mechanism is policy misfit. The Charter leads to a differing interpretation of existing law or norms, either due to the regulatory or normative element of institutionalism. The difference between this interpretation and existing interpretations or norms is the misfit that will generate the adaptational pressure required for Europeanisation¹². There are two potential types of misfit that could be expected in this chapter: either the Charter constitutes something at a supranational level which clashes with a national level; or application of the Charter at a national level creates a new interpretation which clashes with the pre-existing national status quo.

Parts 3 and 4 of the mechanism differ between rational choice and sociological institutionalism, but both can be analysed using the process-tracing methodology.

Rational choice institutionalism theorises that rational actors will act in their own best interest¹³. Part

Rights’ in Besson, Tasioulas, *The Philosophy of International Law* (OUP, 2010), 357; Dworkin, *Justice for Hedgehogs*, (Harvard University Press, 2011), 335.

⁸ Section 2.2 of chapter 3 discussing the prediction; for analysis of institutions, see Scott, *Institutions and Organizations* (Sage Publications, 2001, 2nd Edition), 51.

⁹ Greenwood, Royston, Hinings, ‘Understanding Radical Organizational Change: Bringing Together the Old and New Institutionalism’ 21 *Academy of Management Review* 5 (1996), 1022.

¹⁰ Ibid.

¹¹ Opinion of AG Colomer in Case C-208/00, *Überseering*, ECLI:EU:C:2001:655, para. 59.

¹² Börzel, Risse, ‘Conceptualizing the Domestic Impact of Europe’ in Featherstone, Radaelli, *Politics of Europeanization* (OUP, 2003), 69-73.

¹³ Ibid, 63.

3 under rational choice institutionalism is that policy misfit raises risk of sanctions for non-compliance – various mechanisms at a national judicial level exist to ensure compliance, including financial sanctions. Other national actors can potentially use the increased opportunities by the Charter to pursue specific policy positions through the judicial system.¹⁴, for example claiming a policy they oppose is in breach of a Charter right. Policy misfit therefore raises the risk of these sanctions for national actors for non-compliance with EU law - altering national actors' cost-benefit analysis of the specific issues.¹⁵ The following part 4 is that actors alter their actions in order to comply and avoid any threatened sanctions, leading to policy change.

Sociological institutionalism relies on actors doing what is 'expected' of them.¹⁶. Various judicial and governmental actors are expected to comply with the law, so would generally comply with the law.¹⁷. Here are the effects of the Charter's normative weight – fundamental rights are one of the most basic norms with which actors are expected to comply, so the Charter's greater normative weight as a fundamental rights document would more severely alter national actors' views on what is 'expected' of them. Part 3 of the mechanism under sociological institutionalism is therefore changed expectations – judicial actors seeing compliance with the Charter as something that is expected of them, and thus changing expectations. Following this, national actors see compliance with national court judgments as something that is expected of them, which changes expectations again. Part 4 of the mechanism is thus policy change – actors altering their actions to meet these changed expectations. As noted in chapter 3, these theories can interact both chronologically and otherwise, but methodologically process-tracing allows us to lay out their separate theorised effects to be measured against empirical reality (as explained in chapter 1).

¹⁴ Ibid.

¹⁵ Börzel, Dudziak, Hofmann, Panke, Sprungk, 'Why Member States do (not) comply with European law' *CES Working Paper* 148 (Harvard, 2007).

¹⁶ Börzel, Risse, *supra* note 12, 63; Börzel, Risse, *supra* note 12, 66.

¹⁷ Berglund, Gange, van Waarden, 'Mass production of law. Routinization in the transposition of European directives: a sociological-institutionalist account' 13 *Journal of European Public Policy* 5 (2006), 692, 701; Falkner, Treib, Hartlapp, Leiber, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (CUP, 2005); Sverdrup, 'Compliance: a matter of ability?', Paper presented at 'Transposition and Compliance in the European Union' (2004); Börzel, Hofmann, Sprungk, 'Why do states not obey the law? Non-compliance in the European Union' Paper presented at the workshop 'Transposition and Compliance in the European Union', (2004).

1.1 Evidence Expected and Priors

Analysis of each part of the causal mechanism and our prior confidence in the likelihood of each step is the next step in the process-tracing methodology. The relevant test is then selected, and how this affects the evidence-gathering process of the chapter is discussed. The full body of evidence is laid out in the evidence appendix, in order to transparently display the data used and its accuracy. This transparency avoids selective analysis or personal bias.

1.1.1 Evidence Expected at Part 1

Part 1 is that conceptualising a right or policy as a fundamental right results in the right or choice being treated with greater significance in a national judgment than the same right prior to the fundamental rights classification, particularly in a binding fundamental rights document. Here evidence is required that demonstrates the Charter was involved in the decision being studied, specifically in a way that showed increased significance of the right in question. For example: a direct citation in judicial reasoning or analysis of the Charter's influence through comparisons with other primary legal sources (cases, statutes, etc.), or through doctrinal legal analysis.

There is a medium level of confidence in part 1 of the mechanism. Some literature predicts an EU-level fundamental rights document increasing significance of fundamental rights at a national level, but this is disputed by other academics.¹⁸ This level of confidence means that the existence of this part of the mechanism cannot merely be assumed – multiple pieces of confirmatory evidence are required.

Here a 'smoking gun' test is required in terms of the process-tracing methodology. The evidence has a high level of uniqueness due to a lack of alternative reasons why the sort of increased significance would occur. However, there is considerably lower certainty. It is not certain that clear evidence of this will manifest even if there is increased significance for fundamental rights – judges' reasoning is

¹⁸ See chapter 3 for in-depth analysis of this issue. In favour of increased significance include: Iglesias Sánchez, 'The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights' *CMLRev* 49 (2012), 1565, 1565-1612 ; O'Neill, 'The EU and Fundamental Rights – Part 2' 16 *Judicial Review* 4 (2015), 374; Menéndez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' 40 *JCMS* 3 (2002), 471; and human rights theory including Dworkin, *supra* note 7. Against the idea of increased significance, include Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' 6 *European Law Journal* 2 (2000), 95; De Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' *EL Rev* 126 (2001), 129.

often left unexplained. Therefore high uniqueness and low certainty evidence is expected, for example a direct citation of the Charter or a clear explanation of it causing increased significance. However even a lack of clear evidence does not damage the theory too heavily due to the aforementioned low certainty.

1.1.2 Evidence Expected at Part 2

Part 2 of the mechanism is policy misfit, the studying of which is simpler than part 1. What is required here is evidence that existing policies and norms at a national level differ from the new outcome of the national judgment. This evidence comes from directly comparing policies as they existed at different points in time – either through comparing legislation or policy statements from relevant bodies.

There is moderate confidence in part 2 of the mechanism, as both parts of the mechanism are supported by the same theories. Judgments of the relevant national courts will show increased significance if it is present. However, as discussed above these theories are not universally accepted¹⁹, so again confirmatory evidence as opposed to disconfirmatory evidence is required.

The evidence in this section will form a hoop test – high certainty, low uniqueness. Policy misfit is an observable phenomenon in that the outcome of the judgment can be directly compared to laws and policies. If the policy misfit step exists, there will very likely be evidence of it. However, there are many reasons policy misfit could occur, separate from the Charter, as a result of a given judgment. Indeed, it may have existed previously, with national policy clashing with other pieces of EU law. These multiple alternative explanations thus classify these pieces of evidence as low uniqueness.

Given the hoop test only provides a mild version of the confirmatory evidence sought at this part, there will need to be multiple pieces of evidence order to provide sufficient confirmation of this part of the mechanism, i.e. the evidence will have to pass through multiple metaphorical hoops.

1.1.3 Evidence expected at Part 3

Rational choice and sociological theories of institutionalism branch at this point. However, the process-tracing methodology allows us to test both theories' predictions for part 3 of the mechanism.

¹⁹ Ibid.

At this point, either altered cost-benefit analyses or altered expectations for relevant actors are expected, both of which would come in response to the judgment. The empirical observations at this step are discussions of these cost-benefit analyses or changed expectations of national actors. These discussions come directly from sufficiently informed actors, including: commentary directly from governmental and quasi-governmental sources themselves, forming the strongest source; commentary from legal academics; and reports from industry and media bodies.

There is high confidence in this part of the mechanism, with the two options that are laid out in table 6.1 representing the response to policy misfit clearly established in the Europeanisation literature²⁰. The evidence in this section is another smoking gun test. It is not certain that the evidence will be found – the way actors alter cost-benefit analyses or expectations is not always guaranteed to be publicly discussed. There is therefore little certainty that evidence of this step will manifest.

However, due to the high level of uniqueness, only a few pieces of this type of evidence are required to confirm this part of the mechanism. There would be few other reasons to discuss cost-benefit analyses of a particular judgment unless the calculus of your own position changed. The same is similarly true for changed expectations – publicly discussing what is expected of you in the context of a judgment seems unusual if it is not also linked to how that judgment changes expectations. Thus, any evidence found will be fairly unique, especially any evidence that is directly linked to the specific judgment under analysis.

1.1.4 Evidence expected at Part 4

The literature frequently demonstrates policy change to follow either changed expectations or changed cost-benefit analyses, again leading to strong confidence in the empirical existence of part 4 of the mechanism. Here evidence of policy change is sought – changes such as new laws, new policies, new regulations, or changes to the existing arrangements. Due to the high confidence, again disconfirmatory evidence is needed (see chapter 1 and earlier sections) – incidences where the previous three steps did not lead to policy change, for example a judgment that was not subsequently complied with.

If there is some policy change, it is relatively certain there will be evidence of this. Policy change is almost always formally declared by a governmental or regularly authority, in a way that leaves clear

²⁰ Eg. Börzel, Risse, *supra* note 12, 63; see chapter 3 for further analysis.

evidence that can be understood through comparing the new position with the old one. Thus the evidence has high certainty. There are many reasons why laws and policies might change, and a large number could be unconnected to the process of complying with the judgment – a wide range of political considerations exist at any time. Thus the evidence has very low uniqueness.

A high certainty, low uniqueness piece of evidence again fits the required disconfirmatory evidence— if policy change is at any point not found after the initial three steps that then constitutes strong evidence that the theory is incorrect. Thus for the final part of the mechanism the evidence forms a ‘hoop test’. The more certain that the evidence will exist if the theory is correct, the more a lack of evidence indicates that the theory must be incorrect.

Table 6.1 : Causal mechanism and observable manifestations

RCI: Rational choice institutionalism

SI: Sociological institutionalism

	Cause	Part 1	Part 2	Part 3	Part 4	Outcome
Theory: RCI	Charter creation	Increased Significance	Policy misfit	Changed cost-benefit analysis	Policy change	Europeanisation
Observable manifestations: RCI	Charter created	Citation or influence	Comparison between policies/norms	Discussion of sanctions/costs	New laws/policies etc	New laws/policies
Theory: SI	Charter creation	Increased Significance	Policy misfit	Changed expectations	Policy change	Europeanisation
Observable manifestations: SI	Charter creation	Citation or influence	Comparison between policies/norms	Discussion of expectations	New laws/policies etc	New laws/policies

Source: own elaboration of Europeanisation research

2. National Cases Studied

The chapter once again begins by assembling the cases studied as evidence in the chapter. Similarly to the previous chapter, the evidence base is a list of cases that cited the Charter articles studied in the thesis. UK courts are non-regional and non-specialist, so all levels of the judicial architecture are thus included in the search. In the German section, due to the more specialised legal system, I focused

my research on the Federal Administrative and Federal Social Courts, as these are the courts likely to be dealing with cases falling within health law and policy. As explained in chapter 1, the thesis is not studying state-level developments in Germany, thus excluding regional courts from the analysis. The full list of cases from these courts can be found in the evidence base appendix. Cases were then removed from consideration if they did not fall within health law and policy.

Given there is also potential for the Charter to influence judgments without being specifically cited, as outlined in chapter 3, the evidence base also includes domestic cases identified by health law literature²¹ as notable cases with a fundamental rights element occurring during the timeframe of the thesis. Given some of these cases have dealt with the rights and principles covered by the Charter rights, analysis any effects the Charter has had on these cases is useful.

Only a few cases remain after this process – five individual cases, and three clusters of cases in the same courses of litigation. The individual cases are: *A & Ors v East Sussex County Council*²²; *The London Borough of Tower Hamlets v TB*²³; *The Queen (On the application of Spink) v Wandsworth Borough Council*²⁴; *B 11 AL 5/14 R*²⁵; *Ahmad v Secretary of State for the Home Department*²⁶. The clusters of cases are: a series of litigation in Northern Ireland under the heading JR65²⁷; a series of judicial reviews of plain packaging regulations²⁸; and a series of judicial reviews of cigarette vending

²¹ Eg Herring, Wall, *Landmark cases in medical law* (Hart, 2015); McHale, Fox, *Healthcare Law: Texts and Materials* (Sweet and Maxwell, 2007, 2nd Edition); Veshi, Neitzke, 'Advance Directives in Some Western European Countries: A Legal and Ethical Comparison between Spain, France, England, and Germany.' 22 *European Journal of Health Law* 4 (2015), 321; Ravenstein, 'Discontinuation of Life Supporting Measures in Germany' 9 *European Journal of Health Law* 4 (2002), 231; Wolf, *Entscheidungen über Leben und Tod: Vergleich der Entscheidungsfaktoren für die Positionierung gesellschaftlicher Akteure zu den Themen Sterbehilfe, Schwangerschaftsabbruch und Stammzellforschung* (Grin Publishing, 2008).

²² *A & Ors. v East Sussex County Council & Anor* [2003] EWHC 167 (Admin).

²³ *London Borough of Tower Hamlets v TB and Others* [2014] EWCOP 53.

²⁴ *Regina (Spink and another) v Wandsworth London Borough Council* [2004] EWHC 2314 (Admin)

²⁵ BSG B 11 AL 5/14 R, proclaimed on 6th August 2014.

²⁶ *Ahmad v Secretary of State for the Home Department* [2014] EWCA Civ 988.

²⁷ *In the Matter of an Application by JR65 for Judicial Review v In the Matter of Decisions of the Department and Minister for Health, Social Services and Public Safety* [2013] NIQB 101; *In the Matter of an Application by JR65 for Judicial Review v In the Matter of Decisions of the Department and Minister for Health, Social Services and Public Safety* [2015] NIQB 1; *In the Matter of an Application by JR 65 for Judicial Review* [2016] NICA 20.

²⁸ THE QUEEN On the application of (1) BRITISH AMERICAN TOBACCO (UK) LIMITED (2) BRITISH AMERICAN TOBACCO (BRANDS) INC. (3) BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED v SECRETARY OF STATE FOR HEALTH; And Between : THE QUEEN On the application of (1) PHILIP MORRIS BRANDS SARL (2) PHILIP MORRIS PRODUCTS SA (3) PHILIP MORRIS LIMITED v SECRETARY OF STATE FOR HEALTH EWHC 1169 (Admin); The Queen on the application of British American Tobacco

machines.²⁹.

Once again, the number of evidential cases for this chapter is small. Substantively this means, before even starting the analysis, it must once again be stated that at best, no matter the weight of evidence found, Europeanisation through national judgments is a rarely occurring phenomenon. Compared to the overall size of the evidence base, and *especially* to the overall number of cases that took place over the studied time period, the number of cases in the chapter is small. The significance of this narrow scope is discussed in the chapter's conclusions, and the chapter will proceed in analysing the process of change following these cases.

Despite this narrow scope, the strength of evidence in these specific cases can still be assessed, and conclusions drawn. For example, if there is sufficient evidence for a phenomenon that nonetheless occurs rarely, that is a different set of conclusions from something with limited evidence.

2.1 A & Ors. v East Sussex County Council

The first case under discussion is that of *A & Ors. v East Sussex County Council & Anor.*³⁰.

The two individuals in this case suffer from severely impaired mobility, to the point where even simple physical movement required them to be moved and lifted by carers.³¹ The crux of the dispute revolved around a difference in opinion between the family and the County Council.³² This dispute decided whether the lifting of A and B required should be done manually, as the family wanted, or using appropriate lifting equipment, as the council wanted.³³

UK Limited, British American Tobacco (Brands) Inc, British American Tobacco (Investments) Limited, JT International SA, Gallaher Limited, Imperial Tobacco Limited, Tann UK Limited, Tannpapier GmbH, Benkert UK Limited, Deutsche Benkert GmbH & Co KG v The Secretary of State for Health [2016] EWCA Civ 1182.

²⁹ *R. (on the application of Sinclair Collis Ltd) v Secretary of State for Health* [2010] EWHC 3112 (Admin); *The Queen on the Application of Sinclair Collis Limited v The Secretary of State for Health v The Members of the National Association of Cigarette Machine Operators* [2011] EWCA Civ 437; *Sinclair Collis Ltd v The Lord Advocate P576/10* Extra Division, Inner House, Court of Session 10 October 2012 [2012] CSIH 80; *Sinclair Collis Ltd v Lord Advocate* Court of Session (Outer House), 13 May 2011 [2011] CSOH 80; *R. (on the application of Sinclair Collis Ltd) v Secretary of State for Health* [2010] EWHC 3112 (Admin).

³⁰ *A and Ors.*, *supra* note 22.

³¹ *Ibid.*, para 3.

³² *Ibid.*

³³ *Ibid.*

Due to this difference in opinion, a series of judicial review cases were brought, culminating in the case under discussion in this section. Two issues were being heard:³⁴

i) The first issue (“the user independent trust issue”) is whether care staff may lawfully be provided to the family by ESCC by means of a vehicle known as a ‘user independent trust’. This raises a short but important point of pure law.

ii) The second issue (“the manual handling issue”) concerns the legality of what is said to be ESCC's policy of not permitting care staff to lift A and B manually. This is a much more complicated issue, raising, on one view of the matter, difficult questions of law (by which I mean domestic law, human rights law and European Community law), of policy and of fact.’

The first issue is not relevant to the current discussion. It is in the discussion of the second issue that the Charter begins to play a role.

The High Court extensively lays out the statutory basis for the decision, and the domestic case law. This background of legislation and jurisprudence led the judgment towards deciding in favour of lifting equipment, due to the risks posed to the lifters. However, the High Court noted another potential source of obligations to A and B – fundamental rights.

The judge analyses fundamental rights obligations, utilising Charter rights as well as the ECHR and Human Rights Act.³⁵ In the circumstances of social care, the judge distils the state’s positive obligations to be to protect ‘physical and psychological integrity’ of individuals. This is separated into two principles, ‘human dignity’ and ‘access to essential economic and social activities and to an appropriate range of recreational and cultural activities’. Both of these principles are laid out in greater detail before the judge moves onto setting out balancing these competing interests into a framework to be applied in circumstances similar to those being discussed in the case.

2.2. The London Borough of Tower Hamlets v TB

The second case is that of *The London Borough of Tower Hamlets v TB*³⁶, which further applied *A and Ors.* when considering whether to separate a disabled woman from her husband. Briefly, the case concerned a middle-aged disabled woman of limited mental capacity (TB), her assisted living situation, and whether she should remain in assisted living as opposed to returning to her husband (SA), from

³⁴ Ibid, para. 8.

³⁵ Ibid, para. 67 onwards.

³⁶ *London Borough of Tower Hamlets v TB*, supra note 23.

whom she had previously been separated.³⁷.

The issues that Mostyn J had to decide at final hearing were: where TB should live; what contact with SA was in TB's best interest if she was not to live with him; does TB have the capacity to consent to sexual relations; and does her care regime amount to a deprivation of liberty under Article 5 of the European Convention on Human Rights.³⁸.

Mostyn J decided that the local authority use its best endeavours to ensure placement for TB separate from her family home, due to the risk of contact with SA. However, the judge supported supervised contact with SA once a week. TB was found to not be able to consent to sexual relations, based on the Mental Capacity Act.³⁹ Her confinement was found to be deprivation of liberty under Article 5 ECHR, and required 6-monthly reviews by the Court.⁴⁰.

2.3 *The Queen (On the Application of Spink) v Wandsworth Borough Council*

This case concerned two 'profoundly disabled' boys aged 16 and 12, and a dispute between their parents and the local borough council. Both children required extensive help with dressing, toileting, and bathing as well as extensive assistance on top of this. Specialist reports identified the need for extensive adaptation to the family home, such as various bathroom adaptations and powered lifts. With extensive costs incurred, the issue was whether the Council was entitled to take the parents' income into account when providing financial assistance. The decision made by the civil division of the Queen's Bench was later challenged in the Court of Appeal, but it is this first decision that is discussed in this chapter – the appeal does not reference the Charter.

2.4. Judicial review of Northern Irish Blood Policy

³⁷ <http://www.familylawweek.co.uk/site.aspx?i=ed142176l>, first accessed 08/03/17.

³⁸ *Tower Hamlets v TB*, *supra* note 23, para 19.

³⁹ Mental Capacity Act 2005.

⁴⁰ *Tower Hamlets v TB*, *supra* note 23, paras. 59-60.

In the first of three relevant Northern Irish cases in 2013,⁴¹ an applicant sought to challenge the blood donation policy in Northern Ireland. At the time, men who engaged in sexual activity with men (MSM) were permanently barred from giving blood under the Northern Irish policy. The applicant sought to challenge the outright ban as discriminatory, and additionally sought an order to bring the Northern Irish policy in line with the policy implemented in the rest of the UK - a deferral of one year for MSM individuals. A number of arguments were raised by both parties, and the most significant ones are discussed below.

The applicant submitted that the lifetime ban was *Wednesbury* unreasonable⁴² for a number of reasons including: lack of evidence for the ban; ignoring existing scientific evidence; and the illogicality of maintaining the total ban whilst sharing blood supplies with the rest of the UK, which did not have a total ban. Arguing for such unreasonableness is essentially an argument that a particular administrative decision is wholly irrational.⁴³ The applicant additionally argued that the ban was discriminatory – in breach of the EU’s principles of non-discrimination as well as the Charter.

Having extensively laid out the legal context, the judge eventually concluded that the decision was *Wednesbury* unreasonable due to the decision to import blood from the rest of the UK⁴⁴, devoting only limited space to the issue of discrimination.⁴⁵

The Minister has decided that MSM behaviour creates such a high risk of infection to the donor that such donors must be permanently deferred with the result that such blood cannot enter the Northern Ireland Blood Stock. Importing blood from other places which do accept MSM donors, even in limited quantities, leaves the door open for MSM blood to do just that. There is clearly a defect in reason here. If there is a *genuine* concern about the safety of MSM donated blood such that the blood stock must be protected absolutely from such blood then the security of that blood must actually be maintained absolutely. Applying a different standard to imported blood defeats the whole purpose of permanent deferral of MSM donors. As appears from para 33 above when blood is imported from the rest of the UK the authorities in NI do not request that such blood is not derived from the MSM community.

The decision was held to not be discriminatory, in the following passage⁴⁶:

⁴¹ JR65 [2013] NIQB 101, *supra* note 27.

⁴² For a detailed explanation of this concept, see Jowell, ‘In the Shadow of *Wednesbury*’ 2 *Judicial Review* 2 (1997), 75.

⁴³ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 410.

⁴⁴ JR65 [2013] NIQB 101, *supra* note 27, para. 138.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, para. 141.

Had the decision been rational, it would be unlikely that it would have been discriminatory. As above there is a factual, statistical difference in the risk presented by persons who have engaged in male homosexual intercourse and other groups and a decision maker is entitled to take such facts into account in reaching a decision. For example, if the male homosexual intercourse was non-consensual, and the sexual orientation of the proposed donor was heterosexual, that individual would be subject to the same permanent deferral under the current policy. Also, at all points in the evidence gathering and analysing process the focus has been on the risk attaching to the behaviour. That male homosexual intercourse occurs mostly between men who are homosexual is unavoidable.

However, unreasonableness was sufficient grounds to order a change in policy, and the minister in question was ordered to do so. During the subsequent review of the policy, a case was brought in 2015 as to whether the process and the minister making the final decisions suffered from bias, and seeking to add additional evidence to this claim.⁴⁷ Several statements of the minister in front of the Northern Irish assembly were discussed in this claim, and it was decided that the minister displayed 'apparent bias'.

The judgment was subsequently appealed in 2016 by the Northern Irish government⁴⁸, with the original applicant cross-appealing on the judges' failure to deal with what the applicant considered discriminatory under EU law. Significantly, the *Léger* judgment discussed in the previous chapters was delivered between the 2015 decision and the 2016 appeal thereof, and *Léger* therefore influenced the case.

The actions of the minister in the time after the previous case was discussed, as well as the currently applicable statutory provisions. The majority of the case however engaged in analysis of the fundamental rights element, analysing the Charter and the proportionality of the decision following the *Léger* judgment (a judgment on the blanket ban present in France, discussed in chapters 4 and 5). However, the eventual result of this third case was that as the responsible minister had not yet made a final decision on the matter, it would be inappropriate to declare the decision for a lifetime ban to be disproportionate and in breach of EU law.⁴⁹

When a new minister came into power late 2016, the permanent ban was reduced to a one-year deferral.⁵⁰

⁴⁷ JR 65 [2015] NIQB 1, *supra* note 27.

⁴⁸ JR 65 [2016] NICA 20, *supra* note 27.

⁴⁹ *Ibid*, paras. 130-132; para. 54; paras. 120-124.

⁵⁰ <http://www.bbc.co.uk/news/uk-northern-ireland-36435858>, first accessed 11/05/2017.

2.5 Plain Packaging Judicial Review Cases

In 2015, the UK parliament enacted legislation empowering the Secretary of State to lay regulations before parliament on plain tobacco packaging – limiting advertising on packaging and on the products themselves. Parliament subsequently passed the Standardised Packaging of Tobacco Products Regulations 2015.⁵¹ Manufacturers representing ‘the major part of the world’s supply of tobacco products’ brought a judicial review claim.⁵² against the Regulations, arguing that the regulations were unlawful under international, EU, and domestic common law.⁵³ The Charter is referenced at various points in the judgment, including the claimants specifically arguing that the Regulations infringed upon their Article 16 right to trade and their Article 17 right to property.

The tobacco companies lost their initial judicial review claims on all arguments, and duly appealed.⁵⁴ Again, as the Charter was in and of itself a ground of appeal it was referenced numerous times, but again the tobacco companies failed in their judicial review claims.

Both cases are discussed in the chapter, as both cases cite Article 35 of the Charter as part of the discussion on compliance with the Charter and right to property.

2.6 Cigarette Vending Machine Cases

In 2009, the then Labour government passed the Health Act 2009.⁵⁵, a broad statute dealing with a number of different health concerns. Sections 22 and 23 of this Act empowered the Secretary of State to make Regulations restricting the sale of cigarettes from vending machines in Great Britain.⁵⁶ and Northern Ireland.⁵⁷ The Secretary of State then produced the Protection from Tobacco (Sales from Vending Machines) Regulations 2010.⁵⁸

⁵¹ Standardised Packaging of Tobacco Products Regulations 2015.

⁵² British American Tobacco, [2016] EWHC 1169 (Admin), *supra* note 28.

⁵³ *Ibid* paras. 7-17.

⁵⁴ British American Tobacco, [2016] EWCA Civ 1182, *supra* note 28.

⁵⁵ Health Act 2009.

⁵⁶ *Ibid*, s.22.

⁵⁷ *Ibid*, s.23.

⁵⁸ Protection from Tobacco (Sales from Vending Machines) Regulations 2010.

Sinclair Collis Ltd, as well as the National Association of Cigarette Machine Operators, brought a series of judicial review claims against the regulations.⁵⁹ They lost the initial judicial review case in England⁶⁰, in which they argued: the Secretary of State introduced illegitimate additional aims affecting adult smokers; relevant facts had been omitted; and that the ban was not the least restrictive option that protected health systematically and consistently⁶¹. The Charter was not mentioned in this initial case.

Following their initial defeat, the various tobacco groups appealed⁶². Specifically, they alleged that the regulations infringed against principles of proportionality, which must be respected as the subject matter engages Articles 34 and 36 TFEU as well as Article 1 of the First Protocol of the ECHR⁶³. It is this appeal that is the case studied in the later sections of this chapter. The appeal was subsequently dismissed, with the judges according a reasonably large margin of appreciation to the UK government⁶⁴.

2.7 Ahmad v Secretary of State for the Home Department

In *Ahmad v Secretary of State for the Home Department*, the access to healthcare of EEA nationals in certain circumstances was considered. Mr Shakil Ahmad is a Pakistani national married to an EEA national. When his wife stopped working in 2009, she applied for a student visa. She did not have comprehensive sickness insurance cover. Mr Ahmad sought to challenge the requirement of comprehensive sickness insurance cover in order to avoid his own deportation⁶⁵.

2.8 B 11 AL 5/14 R

The German case under consideration is a judgment from the German federal social court⁶⁶.

The individual concerned in this case suffered from a chronic gastro-intestinal disease (Colitis ulcerosa), and was employed by the judicial authority in the state of Hamburg. In order to qualify for specific

⁵⁹ *Supra* note 29.

⁶⁰ R. (on the application of Sinclair Collis Ltd) v Secretary of State for Health, [2010] EWHC 3112 (Admin), *supra* note 29.

⁶¹ *Ibid*, paras. 42-43; 46-48; 62; 66.

⁶² *The Queen on the Application of Sinclair Collis Limited* [2011] EWCA Civ 437, *supra* note 29.

⁶³ *Ibid*, para. 2.

⁶⁴ *Ibid*, para. 46.

⁶⁵ *Ahmad*, *supra* note 26, para. 2.

⁶⁶ B 11 AL 5/14 R, *supra* note 25.

special measures she applied to the Federal Employment Agency to be legally equated with someone who is ‘severely disabled’⁶⁷, having not passed the medical examination required to take up a place as a civil servant. Several lawsuits were subsequently filed, and the crux of these cases was whether the woman in question was ‘severely disabled’, as well as whether government policy was required to help disabled applicants find a specific job, as opposed to merely *a* job.⁶⁸.

3. Europeanisation

Now the chapter moves onto the substantive analysis, with each section analysing a different part of the causal mechanism - discussing the theoretical expectations, then comparing the expected empirical observations against the actual evidence, using the qualities of certainty and uniqueness to properly weigh the evidence within the process-tracing methodology

3.1 Part 1 – Increased Significance

The first part of the mechanism is that conceptualising a right as a fundamental right is something that leads to the right having increased significance within a national judgment. As discussed in section 1.1.1, any evidence found has a reasonably high significance in of itself, as it is relatively unique piece of evidence in favour of the mechanism.

3.1.1 A & Ors. v East Sussex County Council

There are several direct pieces of evidence found in this case, consisting of direct citations of the Charter. The first citation discusses the legal position of the Charter.⁶⁹:

The Charter is not at present legally binding in our domestic law and is therefore not a source of law in the strict sense. But it can, in my judgment, properly be consulted insofar as it proclaims, reaffirms or elucidates the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the Convention.

Even though the Charter is not legally-binding in English law, the judge accepts it as something ‘reaffirms or elucidates’ the content of generally recognised human rights within Europe. Describing

⁶⁷ Ibid, para 3.

⁶⁸ Ibid.

⁶⁹ *A and Ors.*, *supra* note 22, para 73.

the Charter as elucidating the content of rights is an indication of its increased significance – it lays out more explicitly the content of a particular recognised right. Implicitly, this elucidation was not previously present, otherwise there is no reason the Charter would be required to ‘elucidate’ the right’s content. Several other cases in both EU and English law are cited in support of this proposition in the paragraphs following this extract⁷⁰. This additional citation demonstrates the fixed nature of this idea, that international rights documents affect national cases. Consequently the Charter’s acceptance into this set of international rights documents means it influences national judgments.

The second piece of evidence is another direct reference to the Charter⁷¹.

‘The first [particularly important concept] is human dignity. True it is that the phrase is not used in the Convention but it is surely immanent in article 8, indeed in almost every one of the Convention’s provisions. The recognition and protection of human dignity is one of the core values – in truth *the* core value – of our society and, indeed, of all the societies which are part of the European family of nations and which have embraced the principles of the Convention. It is a core value of the common law, long pre-dating the Convention and the Charter. The invocation of the dignity of the patient in the form of declaration habitually used when the court is exercising its inherent declaratory jurisdiction in relation to the gravely ill or dying is not some meaningless incantation designed to comfort the living or to assuage the consciences of those involved in making life and death decisions: it is a solemn affirmation of the law’s and of society’s recognition of our humanity and of human dignity as something fundamental. Not surprisingly, human dignity is extolled in article 1 of the Charter, just as it is in article 1 of the Universal Declaration. And the latter’s call to us to “act towards one another in a spirit of brotherhood” is nothing new. It reflects the fourth Earl of Chesterfield’s injunction, “Do as you would be done by” and, for the Christian, the biblical call (Matthew ch 7, v 12): “all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets”.’

The Charter’s effect is to re-emphasise human dignity as an important content of human rights, increasing its importance in this context. The Charter is used to highlight the importance of dignity, despite it not being explicitly included in the ECHR. Were the Charter to not exist, there would be less evidence of the importance of human dignity to the sphere of European human rights. By adding to the evidence base used by the judge on this point, the Charter thus increases the significance of dignity within the national case – the expected part 1 of the mechanism.

More direct references to the Charter constitute a third piece of evidence⁷²:

‘This brings out the enhanced degree of protection which may be called for when the human dignity at stake is that of

⁷⁰ Ibid, para 74.

⁷¹ Ibid, para. 86.

⁷² Ibid, para. 93.

someone who is, as A and B are in the present case, so disabled as to be critically dependent on the help of others for even the simplest and most basic tasks of day to day living. In order to avoid discriminating against the disabled – something prohibited by article 21(1) of the Charter – one may, as Judge Greve recognised, need to treat the disabled differently precisely because their situation is significantly different from that of the able-bodied. Moreover, the positive obligation of the State to take reasonable and appropriate measures to secure the rights of the disabled under article 8 of the Convention (and, I would add, under articles 1, 3(1), 7 and 26 of the Charter) and, in particular, the positive obligation of the State to secure their essential human dignity, calls for human empathy and humane concern as society, in Judge Greve's words, seeks to try to ameliorate and *compensate* for the disabilities faced by persons in A and B's situation (my emphasis).” ‘

Here the Charter is used to highlight the need to prohibit discrimination against the disabled. More importantly however, the Charter is being used to emphasise the state's positive obligations. The judge highlights the positive obligations of human dignity under the ECHR, then states that the Charter additionally includes and creates these commitments. The Charter forms additional evidence of the human dignity requirement. By doing so, it increases the significance of human dignity within national law – positive obligations are more likely to be highlighted and followed when they stem from multiple sources.

3.1.2 The London Borough of Tower Hamlets v TB

Looking at the Tower Hamlets case there is further evidence consisting of direct citations of the Charter. The Charter influenced the analysis on the deprivation of liberty issue. The judge initially raised external criticism of one of a previous decision they had delivered. Previous judgments were criticised due to treating the liberty of disabled individuals differently from the liberty of non-disabled individuals.

The judge relied on conceptions of human dignity as a response to this criticism. He initially cited several other judgments⁷³ before relying upon the previous work done in *A and Ors. v East Sussex County Council*. He cites the second extract discussed in the previous section, as well as the third extract on the positive obligations of the state. Having done so, the judge goes onto say that⁷⁴:

This is exactly the point I was trying to make in para 17 of the Rochdale case although, unsurprisingly, Munby J puts it very much better than I did (or could). The state is obliged to secure the human dignity of the disabled by recognising that “their situation is significantly different from that of the able-bodied”. Thus measures should be taken “to ameliorate and

⁷³ *Price v The United Kingdom*, App. No. 33394/96 [2001] ECHR 458; *Thlimmenos v Greece*, App. No. 34369/97 [2000] ECHR 162.

⁷⁴ *Tower Hamlets v TB*, *supra* note 23, para 57.

compensate for [those] disabilities.”

Similarly to the previous case, and by using the direct extracts, this case shows the Charter adding evidence to human dignity forming an important part of the European fundamental rights sphere. Replicating the third extract increases the significance of human dignity within national law – emphasising the significance of the state’s positive obligations. This citation also demonstrates how the Charter, through influencing precedent within a Member State, can have a lasting effect.

3.1.3 *The Queen (On the Application of Spink) v Wandsworth Borough Council*

The references to the Charter (specifically the rights in the thesis’ independent variable) come from a discussion of the claimants’ submissions. The claimants representatives made reference to a number of cases on the positive obligations the state owes disabled individuals, specifically including the *A and Ors.* case discussed in section 3.1.1⁷⁵:

29 Reference is made to a number of cases in which the positive obligations of the state towards the disabled have been considered. One is *R (A) v East Sussex County Council* (2003) 6 CCLR 194, a judgment of Munby J. In an extensive analysis of the protection afforded to the disabled under the Convention for the Protection of Human Rights and Fundamental Freedoms scheduled to the Human Rights Act 1998, in particular under articles 3 and 8, Munby J stated that the physical and psychological integrity which the state may in principle be under an obligation to take positive steps to protect under article 8 included in that case two particularly important concepts. The first was human dignity, the second was the right of the disabled to participate in the life of the community and to have access to essential economic and social activities and to an appropriate range of recreational and cultural activities. As regards human dignity he referred to Convention case law and to the Charter of Fundamental Rights of the European Union (Nice, December 2000), and stated inter alia, at paras 93 and 98:

"93. This brings out the enhanced degree of protection which may be called for when the human dignity at stake is that of someone who is, as A and B are in the present case, so disabled as to be critically dependent on the help of others for even the simplest and most basic tasks of day to day living. In order to avoid discriminating against the disabled-something prohibited by article 21(1) of the Charter-one may ... need to treat the disabled differently precisely because their situation is significantly different from that of the able-bodied. Moreover, the positive obligation of the state to take reasonable and appropriate measures to secure the rights of the disabled under article 8 of the Convention (and I would add, under articles 1, 3(1), 7 and 26 of the Charter) and, in particular, the positive obligation of the state to secure their essential human dignity, calls for human empathy and humane concern as society ... seeks to try to ameliorate and compensate for the disabilities faced by persons in A and B's situation."

⁷⁵ *Spink, supra* note 24, para. 29.

"98. So increasingly high standards are required. The concept of human dignity may be the same as ever, but the practical standards which require to be met are not. Changes in social standards demand better provision for the disabled if their human dignity is not to be impaired."

The *A and Ors.* case is cited, with the Charter adding to supranational standards demonstrating that human dignity forms an important part of the European fundamental rights sphere. However, unlike in the previous two sections, this was an argument made by the claimants. In order to understand whether this attempt to increase significance has succeeded, one must look at the conclusions reached by the judge.

The 'conclusions' section of the judgment does not mention the Charter, and the claimants lost the case. The judge responded specifically to the above-cited section, arguing that it provides⁷⁶:

'a detailed and illuminating analysis of the rights conferred on disabled children, and of the positive obligations imposed on the state, by articles 3 and 8 of the Convention. They emphasise the high degree of protection that may be required in order to respect and secure human dignity.'

However, given the judge did not accept the claimants' construction of the relevant provision, it cannot be said that the Charter practically increased the significance of fundamental rights. Given the causal mechanism looks at Europeanisation through national judgments, the arguments made by the claimants do not constitute evidence towards the mechanism. This case is therefore not considered further in the chapter.

3.1.4 Judicial Review of Northern Irish Blood Policy

Looking at the cases stemming from judicial review of Northern Irish blood policy, there are several more relevant pieces of evidence, some for and some against the mechanism.

The applicants in the first judgment relied upon the Charter to argue (alongside other issues)⁷⁷:

(ii) The Minister's decision and the lifetime ban are contrary to directly effective EU law and/or the general enforceable principles of EU law and/or the relevant transposing provisions of domestic law in that:

(c) The lifetime ban, and its maintenance, is further contrary to Article 21 of the Charter of Fundamental Rights of

⁷⁶ Ibid, para. 60.

⁷⁷ JR65 [2013] NIQB 101, *supra* note 27, para 12.

the European Union, having effect by virtue of the Article 6(1) of the Treaty of European Union.

The government responded merely arguing that Charter rights may be limited if such limitation is justified and proportionate and if it genuinely meets the objectives of general interest recognised by the EU⁷⁸.

The outcome of the first case was to find the ban *Wednesbury* unreasonable, i.e. irrational⁷⁹, due to the fact that the Northern Irish blood supplies included supplies from the rest of the UK, which accepted MSM donors. This acceptance rendered a Northern Irish ban irrational. It was stated that if the decision were rational, it would not be discriminatory as ‘there is a factual, statistical difference in the risk presented by persons who have engaged in male homosexual intercourse and other groups and a decision maker is entitled to take such facts into account in reaching a decision.’ – that it was based on conduct and not prejudice.

This piece of evidence merely demonstrates that even if the Charter increases the significance of a right or principle, in this case non-discrimination, there are still practical limits to its application – where a separate legal principle takes a greater role, there is still a possibility for the Charter to be mostly ignored.

The more significant application of the Charter comes from the third case. The Charter’s influence comes in the 2016 case, in which the Charter is more deeply discussed. The Court was heavily influenced by the *Léger* judgment, as the analysis of the Charter and proportionality is based heavily around this judgment, both in terms of the analysis of the restriction and the proportionality test.

The Court of Appeal observed that the ECJ held that the discriminatory treatment was in breach of the Charter right. The policy thus required a legitimate justification, and needed to be applied in a proportional manner. The Northern Irish Court drew attention to the following passage from the ECJ judgment.

“It is for the referring court to ascertain whether, in such a situation and in compliance with the principle of proportionality, there are effective techniques for detecting HIV in order to avoid transmission to recipients of such a virus, the tests requiring to be performed according to the most recent scientific and technical procedures, pursuant to recital 29 in the preamble to Directive 2002/98 .

⁷⁸ Ibid, para 116.

⁷⁹ *Council of Civil Service Unions*, *supra* note 43.

In particular, it is for the referring court to verify whether scientific or technical progress in the field of science or health, taking account in particular of the cost of systematic quarantining of blood donations from men who have had sexual relations with other men or the cost of the systematic screening for HIV of all blood donations, allows a high level of health protection for recipients to be ensured without the resulting burden being excessive as compared with the objectives of protecting health.

On the other hand, even if, with the current state of scientific knowledge there is no technique satisfying the conditions laid down at [63] and [64] of the present judgment, a permanent deferral from blood donation for the whole group of men who have had sexual relations with other men is proportionate only if there are no less onerous methods of ensuring a high level of health protection for recipients.”⁸⁰

As evidenced by its reliance on this passage, the Northern Irish Court sees its role as analysing the proportionality of the specific national measures due to the breach of the Charter right.

The minister argued that the fundamental rights of MSM individuals were not relevant as the decision was based on conduct as opposed to sexuality— the very argument that the judge had agreed with in a previous case. However, following the case of *Léger*, and a further national case, the Northern Irish Court was no longer willing to accept this argument:

I do not accept those submissions. The suggestion that national measures implementing EU law should not take into account fundamental rights is unsupported by any authority and appears to be plainly wrong. It is contradicted by paragraph 50 of Supreme Court's decision in *Lumsdon*. The analysis of the ECJ in *Léger* comparing the position of gay men who have sex with heterosexual men who have sex appears entirely valid. We were invited to refer a question to the ECJ which would effectively have asked the court to reverse its decision on those issues. I do not consider that there is any basis upon which we should do so.⁸¹

The Court of Appeal eventually found that a complete ban was disproportional, and a year's deferral would be a less onerous method in this specific case.

Regardless of the fact that the case eventually hung on the ongoing decision process of the minister in question, the bulk of the analysis in the case is whether the measure is in compliance with the Charter – whether it is a proportional restriction on the Charter right to non-discrimination, and laying down the limit of one year deferral. This analysis goes beyond what happened in the previous case, where the main issue was irrationality and unreasonableness.

⁸⁰ JR65 [2016] NICA 20, supra note 27, paras. 63-65.

⁸¹ Ibid, para. 40.

The use of the Charter in the latter case demonstrates increased significance, which can be observed by comparing the use of the Charter in the multiple judgments in the context of the ECJ judgment - its use goes beyond mere following of precedential ECJ judgment. The *Léger* case before the ECJ held that a complete ban could be proportional provided it was based on sufficiently sound scientific evidence. The judgment in this case does not reflect this, as it accepted the possibility of a one-year deferral as proportional – different not just on questions of reasonableness but also that of proportionality.

The Court of Appeal is admittedly looking at circumstances different from the *Léger* case, with the interesting factor that Northern Ireland shared blood supplies with a polity that had a different blood donation policy. However, the Court of Appeal felt sufficiently confident not to refer the case to the ECJ, despite being explicitly called upon to do so by the appellant. They did however, feel comfortable using the Charter as a standard against which to review national policy, hence the extensive analysis of whether the new and exceptionally specific set of circumstances constitutes a proportional limit on the Charter right. Regardless of the subsequent outcome of the case, it is this extensive Charter-based analysis that represents increased significance of the right in question. The Charter, in combination with an ECJ judgment on the matter, ensured that non-discrimination and the proportionality of the government's policy were the standard against which the policy had to be measured. This new use as a standard indicates increased significance compared to previously, and this constitutes relevant evidence for this part of the mechanism.

3.1.5 Plain Packaging Judicial Review Cases

Both the initial cases and the appeal were lengthy, with extensive arguments being raised by the claimants. There are 75 direct citations of the Charter in the initial case, a fact explained by the sheer length of the case and that there were several substantive arguments based purely on the Charter - that the Regulations were in breach of the Charter right to property (Article 17), and the Charter right to freedom of trade (Article 16). The discussion below is limited however to the Article 35 of the Charter.

In a discussion on legislative competence, the High Court cites⁸² Recital (59) of the Tobacco Products

⁸² *British American Tobacco*, EWHC 1169 (Admin), *supra* note 28, para. 233.

Directive (TPD)⁸³, in which the text states that ‘The obligation to respect the fundamental rights and legal principles enshrined in the Charter of Fundamental Rights of the European Union is not changed by this Directive.’⁸⁴, before covering the need to ‘guarantee a high level of health and consumer protection’⁸⁵, a clear allusion to Article 35.

The next reference to Article 35⁸⁶ comes in a discussion of an Advocate General’s opinion⁸⁷ on the legality of the TPD, citing the Charter as evidence that high health protection is a task conferred on the Union by primary law⁸⁸. This was replicated on several occasions throughout the judgment⁸⁹, as part of discussing the AG opinion and the subsequent judgment. This included increasing the importance of health in the EU compared to economic interests⁹⁰.

The references discussed in the past two paragraphs do not constitute evidence for the causal mechanism. The mechanism predicts the Charter increasing the significance of fundamental rights at a national level. The aforementioned citations of the Charter come from citations of ECJ cases and Advocate General opinions. It is therefore not increased significance at a national level, rather the national court applying EU law in which the Charter increased significance of fundamental rights.

Importantly, later on in the case the High Court relies upon Article 35 in a consideration of proportionality in the following passage⁹¹:

The Regulations are health measures. This is an area of legislative activity to which immense importance is attached and legislatures and decision makers are habitually accorded a wide margin of appreciation. Health is recognized as a fundamental right. Article 35 of the Fundamental Charter identifies access to health care as a fundamental right but also makes a statement as to the weight to be attached to this right, namely “high”:

⁸³ Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC OJ L 127/1.

⁸⁴ *Ibid*, recital 59.

⁸⁵ *Ibid*.

⁸⁶ *British American Tobacco*, EWHC 1169 (Admin), *supra* note 28, para. 256.

⁸⁷ Opinion of AG Kokott in Case C-547/14, *Philip Morris Brands SARL and Others*, ECLI:EU:C:2015:853.

⁸⁸ *Ibid*, para. 57.

⁸⁹ *British American Tobacco*, EWHC 1169 (Admin), *supra* note 26, para. 269; *British American Tobacco*, EWHC 1169 (Admin), *supra* note 28, para. 268.

⁹⁰ *Ibid*, para. 271.

⁹¹ *Ibid*, para. 438.

This citation is evidence of the precise form of increased significance in the causal mechanism. The judge feels that the Charter article makes a statement about the ‘weight’ attributed to the particular claim, according health claims great significance than would otherwise have existed had the Charter not been present. The concept of a certain ‘weight’ attached to fundamental rights echoes the precise language used by Menéndez, discussed in the theoretical review chapter (chapter 3), as well as the predicted circumstances, in which economic rights are weighed up against social rights.

Article 35 was discussed later in the judgment in further proportionality analysis, supporting the conclusion that fundamental rights were not to be treated in an absolutist manner – if property rights were treated that way, then health rights could not receive sufficient protection and vice versa⁹², as any move to protect one would be an unjust infringement on the other.

Arguably, this is not evidence of the Charter increasing the significance of rights claim at a national level – it is merely a commentary on the interplay between competing fundamental rights. However, the significance becomes clear with further analysis. If the Charter had not increased the significance of health, then there would not be this clash between *fundamental* health rights and fundamental property rights, and the property rights claim would have been considerably more likely to prevail. What happened was in fact a competing rights claim – but that very fact shows an increased significance for health created by classifying it as a fundamental right.

In the subsequent appeal case, the Charter is referenced 36 times, but the first reference to Article 35 cites the aforementioned opinion of AG Kokott in the case on the TPD⁹³:

see this process at work in *Philip Morris* in the opinion of AG Kokott at [179] and [193] and in the judgment of the court at [152]. In that case it was held that the economic interests of tobacco companies were secondary to the protection of human health whose value is recognised in arts 9 , 114 (3) and 168 (1) of the TFEU and art.35 of the Charter.

Here, reference to the Charter’s effects at an EU level as opposed to a national level can again be seen, and similarly to the previous case the Charter is used as evidence that high health protection is a goal of EU law. This again does not constitute evidence of the mechanism being tested in this chapter, as it refers to national courts applying EU law, opposed to the Charter increasing significance of

⁹² Ibid, para. 828.

⁹³ *British American Tobacco*, [2016] EWCA Civ 1182, *supra* note 28, para. 123.

fundamental rights at a national level.

3.1.6 Cigarette Vending Machine Cases

One reference to the Charter is found in the appeal judgment⁹⁴.

110 I note that, in addition to the right of property protected by article 17, article 35 of the Charter of Fundamental Rights of the European Union, which has a status equivalent to that of the fundamental freedoms under the FEU Treaty (pursuant to article 6FEU), contains the following right: “A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.”

111 While this right applies in terms to policies of the European Union's institutions (and restates an earlier provision of the EC Treaty), it is difficult to believe that it would be contrary to European Union law for member states to adopt the same approach.

Here there is evidence of the sort of increased significance of health as a result of classifying it as a fundamental right. The judge highlights that the Charter has given health a higher status at an EU level. As a consequence, he believes that Member States can adopt similar policies without it being contrary to EU law – meaning they are justified in treating health as a fundamental right. This constitutes evidence of the causal mechanism, in that something being classified as a fundamental right has caused that thing to be treated with greater significance at a national level. It is important to note that this goes beyond the stricter application of EU law – it is not that the EU law is being applied, but that increased significance at an EU level makes a judge feel comfortable treating health with greater significance nationally.

3.1.7 *Ahmad v Home Department*

In the *Ahmad* case, the Charter was only raised briefly, but its use is noteworthy when considering the actors and dynamics involved in Europeanisation. In the case can be found evidence countering the analysis in section 3.1.1 and 3.1.2 of this chapter. The judgment mentions the Charter in the following passage⁹⁵:

‘Mr Kadri QC submits that article 35 of the Charter supports his argument about the availability of NHS healthcare, but he accepts that this is not in itself a ground of appeal. Article 35 provides:

⁹⁴ *Sinclair Collis Ltd*, [2011] EWCA Civ 437, *supra* note 29, paras. 110-111.

⁹⁵ *Ahmad*, *supra* note 26, para. 67.

“Health care

“Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.”

The word “everyone” cannot mean literally everyone. As Mr Facenna submits, it must be limited to those persons who have the right to healthcare under the EU treaties (compare *Abdirahman's case* [2008] 1 WLR 254). So the claimant needs to establish a right of residence under the Directive before he can rely on article 35, and article 35 therefore adds nothing to the arguments in support of his case.’

Here, a limit to the increased significance noted in section 3.1.1 and 3.1.2 can be observed. In those previous sections the Charter added to the perception of the state’s positive obligations. Here, whilst the applicant highlights the Charter to support a particular argument, the judgment swiftly dismisses this argument. There are doctrinal limits to the Charter’s influence – any increased significance for positive obligations the Charter might cause cannot extend beyond clear doctrinal limits in the wording of the Charter and the surrounding Treaties. This constitutes evidence against part 1 of the mechanism – if one looks at the clear doctrinal limits discussed by the judges, there can be no argument that the Charter has increased the significance of a right to health in this specific instance.

Given the non-presence of this part of the mechanism, this case will not be further considered until the conclusion.

3.1.8 B 11 AL 5/14 R

In this German case, the Charter was raised when considering the validity of a given interpretation of the statute in question, in the passage below⁹⁶:

⁹⁶ B 11 AL 5/14 R, *supra* note 25, para 21. Translated by the European Fundamental Rights Agency. Original text below.

‘Schließlich spricht der Zweck der Regelung, die Sicherung oder Herstellung von Teilhabe am Arbeitsleben, für diese Auslegung. Die Vorschrift will - wie das LSG zutreffend herausgearbeitet hat - damit auch die Freiheit der Berufswahl des behinderten Menschen schützen. Das Grundrecht aus Art 12 Abs 1 Grundgesetz (GG) will diese Freiheit ua objektivrechtlich gewährleisten (vgl *Jarass in Jarass/Pieroth, GG 12. Aufl 2012, Vorb vor Art 1 RdNr 3 mwN*). Auch Art 27 Abs 1 S 2 Lit a und e UN-BRK und Art 21, 26 der Charta der Grundrechte der Europäischen Union geben (EUGrdRCh) Hinweise zur Auslegung des § 2 Abs 3 SGB IX, denn nach diesen völkerrechtlichen und supranationalen Normen ist ein diskriminierungsfreier Zustand anzustreben. Dieser ist nicht bereits dadurch hergestellt, dass ein behinderter Mensch in irgendeiner Weise eine Tätigkeit ausüben kann, vielmehr muss auch der Zugang zu anderen bzw der Wechsel von Berufsfeldern diskriminierungsfrei ermöglicht werden (vgl *OVG Niedersachsen Urteil vom 25.1.2011 - 5 LC 190/09 - Juris; BSG Urteil vom 1.3.2011 - B 7 AL 6/10 R - BSGE 108, 4 = SozR 4-3250 § 2 Nr 4*)’.

Finally, the purpose of Section 2 (3) SGB IX, securing disabled persons' participation in working life, suggests this interpretation. The provision aims at protecting the freedom disabled person to choose a job. The fundamental right under Article 12 (1) of the Basic Law (GG) will ensure that freedom. Similarly, Article 27 (1) 1 S 2 lit a and e UN CRPD and Article 21, 26 of the Charter of Fundamental Rights of the European Union (EUGrdRCh) provide guidance on how to interpret Section 2 (3) SGB IX, because according to these international and supranational norms a non-discriminatory state should be sought. This is achieved when disabled people have access to other work areas, respectively are able to make a career change in a non-discriminatory manner. Equality rights in the framework of access to the labour market have to be guaranteed not only to unemployed disabled people but also to people with disabilities who have a job and want to make a career change. It does not meet the requirements of Article Art 21 und Art 26 EUGrdRCh to allow disabled people to carry out any kind of activity that civil servants regularly exercise. Instead, the legislator and employer have to modify the requirements for access to the civil service in a way that allows a non-discriminatory access to the exercise of the relevant activity.

This passage cites the Charter in arguing for a specific interpretation of a German constitutional right, citing Articles 21 and 26 of the Charter alongside the UN convention on the rights of the disabled. The Charter is used to give evidence to the argument in question, arguing that this interpretation is an 'international and supranational norm'. A later paragraph returns to the Charter, laying out details of what constitutes a 'non-discriminatory state' in terms of Article 21.⁹⁷

Similarly to some of the cases found within English law, it represents a change in how judges within the legal system consider fundamental rights as a result of the existence of the Charter. The Charter's existence, as with some of the English cases discussed earlier in the chapter, provides pressure for judges to take a certain interpretation of a right more seriously than they otherwise would have done. By adding evidence that something is an international legal and supranational norm, it is more likely to be taken more seriously by judges, meaning the specific interpretation being pushed for was more likely to be implemented. Were the Charter to not exist, there would be less evidence that this interpretation was an international or supranational norm, meaning the specific interpretation would have been less likely to be applied. This usage is clear and direct evidence of the sort of increased significance predicted in the mechanism.

Similar to other cases, by adding weight to the treatment of in this case disability constitutes a passing down of norms. The Charter adds to disability-related fundamental rights law at a European level, and thus through the Charter being used adds to disability-related fundamental rights at a national level. This is however, subtly different from the Europeanisation in the cases in the UK. Here it is not just the relative importance of arguments in question that is altered by European-level standards, but the judges being led towards one specific interpretation of a national fundamental rights over another.

⁹⁷ B 11 AL 5/14 R, *supra* note 25, para. 24.

However, the Charter still increases significance of a fundamental right, merely that in this context it increases its significance compared to other rights claims.

3.1.9 Overall Assessment

Making an overall assessment of the evidence for what is predicted by part 1 of the mechanism, there are several pieces of evidence in favour and some against. The Charter is used as, or highlights, relevant standards of fundamental rights: it 'elucidates' the content of rights; it highlights the importance of dignity across the European fundamental rights sphere; it adds supranational weight to a particular national interpretation of fundamental right; adding metaphorical weight to a rights claim; and it is used as a standard against which to measure national policy. Importantly, in these incidents, the Charter increases the significance of the rights in question – adding weight and evidence to a particular point that would not have been present otherwise and thus providing evidence for what is expected in part 1 of the mechanism.

There is some evidence against what is expected in this part of the mechanism. In the *Ahmad* case, as well as the initial case in the Northern Irish proceedings, there are limits on the extent to which the Charter can increase the practical significance of rights. The Charter still operates within the confines of national and supranational law, so its ability to increase significance of fundamental rights is limited by factors such as the wider Treaty context, or competing areas of national law. For example, where Treaty definitions limit its application or duplicate an area of the Charter too directly, or a domestic point of law is more directly applicable to the issue.

Weighing the positive evidence against the negative evidence, it can still be said with reasonable accuracy that the first part of the mechanism is empirically confirmed. On the face of it, the amount of positive evidence outweighs the negative. But more importantly, methodologically the positive evidence carries greater weight than the negative. The type of evidence being sought is 'smoking gun' evidence. Even a limited amount of evidence, due to its high uniqueness (eg. P1 (i),(iii), and(iv)) strongly increases our confidence in the theory. Therefore, finding three or four pieces of evidence in favour, with each piece significantly boosting the confidence in the theory, means it can be stated with reasonable certainty that part 1 of the mechanism is empirically confirmed.

3.2 Part 2 – Policy Misfit

Policy misfit is expected at part 2 of the mechanism – the Charter causing some sort of clash between existing national policy and the required policy. Specifically, as discussed in section 1.1.2, this section is a hoop test - any evidence that is found has relatively low uniqueness. Therefore multiple pieces of evidence are required in order to accurately prove the existence of part 2 of the mechanism

3.2.1 A & Ors v East Sussex County Council

The first piece of evidence is a comparison between the relevant national policy preceding the *A and Ors*. case and the series of principles laid down by the High Court.

The local authority implemented a policy banning manual lifting of disabled individuals in their own homes and requiring lifting equipment to be used. This policy triggered the litigation discussed here. In order to look for policy misfit, this blanket ban needs to be compared to the relevant principles laid down by the court at the end of the case.

The judge laid out a series of principles covering when manual lifting should and should not be used, across multiple headings: the general approach; reasonable practicalities and the needs of the disabled; assessing reasonable practicality; the balancing exercise; and the assessment. The judge then goes on to discuss how to strike the balance, and the role of the court. The ‘general approach’ section already appears to create policy misfit, ruling out a blanket ban with the following⁹⁸:

i) Regulation 4 bites only on hazardous lifts, that is, those that involve a risk of injury to the care worker. For a lift to be hazardous there must be, in the sense in which the words were used by Hale LJ in *Koonjul*, a real risk of injury. Appropriately in the light of the evidence the parties accept that the lifts with which I am concerned in the present case are all hazardous.ii) In relation to hazardous lifts, regulation 4 establishes a clear hierarchy of safety measures: (a) avoid hazardous lifts so far as is reasonable practicable; (b) having made a suitable and sufficient assessment of any hazardous lifts that cannot be avoided, reduce the risk of injury from those lifts so far as is reasonably practicable. It is to be emphasised that this is *not* a ‘no risk’ regime or a ‘risk elimination’ regime, nor is there an absolute prohibition on hazardous lifting: it is a ‘risk reduction’ or ‘risk minimisation’ regime. There is no absolute requirement to make the situation absolutely “safe” for workers. The employer’s obligation is to avoid or minimise the risk so far as reasonably practicable.

iii) It follows that the task for the employer is to: (a) assess the lifts that are to be undertaken; (b) decide whether there is a real risk of injury; and (c) if there is such a risk (that is, if the lift is “hazardous”) undertake an assessment, applying his mind

⁹⁸ *A & Ors*, *supra* note 22, paras. 123-155.

to possible ways of avoiding or minimising the risk. The essential task here is to decide whether it is “reasonably practicable” either to avoid or, as the case may be, to minimise the risk.⁹⁹

By implementing a series of principles for consideration, there is already a misfit between the court’s assessment and the previous policy of a blanket ban – a blanket ban is not something that assesses the range of lifts required, etc.

Klug and Wildbore, in discussing a wide variety of cases on ‘equality, disability, and discrimination’, summate the case and also note that ‘A lifting policy is most unlikely to be lawful where either on its face or its application it imposes a blanket proscription of all manual lifting or imposes a blanket proscription except in circumstances where life is in issue, or where any other means are a physical impossibility’¹⁰⁰.

Policy misfit is present here between the previous blanket ban and the outcome of the court case influenced by the Charter and principles of human dignity.

3.2.2 *Tower Hamlets v TB*

There is evidence of policy misfit by comparing the policy situation pre-judgment and post-decision. In 2012, the Court of Protection decided it was in TB’s interests to live in supported accommodation. This had proven unsuccessful in its goal of greater integration, and thus a further decision was required.

In this further decision, the judgment affected by the Charter and the one discussed in this chapter, the judge was required to make an overall decision on TB’s living, and the Charter impacted on the deprivation of liberty issue – did TB’s living arrangements constitute a deprivation of liberty under Article 5 ECHR. The outcome was that the current accommodations constituted deprivation of liberty¹⁰¹. This policy outcome markedly differs from the policy before this case – the previous court did not consider this a deprivation when making the order.

3.2.3 Judicial Review of Northern Irish Blood Policy

To find policy misfit in the Northern Irish cases, the policy situation before and after the judgments must again be compared. In 2011, there was not a permanent ban on MSM blood donors in England,

⁹⁹ Ibid, para 126.

¹⁰⁰ Klug, Wildbore, ‘Equality, Dignity and Discrimination under Human Rights Law; selected cases’ Centre for the Study of Human Rights LSE, 22.

¹⁰¹ *Tower Hamlets v TB*, *supra* note 23, para. 59.

Scotland, or Wales. However, Northern Ireland maintained a permanent ban on MSM blood donors. In the first judicial review, it was held that the minister acted irrationally – the safety concerns being undermined by the fact that the Northern Irish blood supply also included donations from the rest of the UK¹⁰². However, the ban had not changed even after a policy review, so a further judicial review was brought, and a finding of bias made¹⁰³. This was subsequently appealed, leading to the third judicial review case¹⁰⁴, the case most heavily influenced by the Charter.

In this third judgment, it was found that, following a discussion of the *Léger*¹⁰⁵ case, a permanent ban on MSM blood donors was disproportionate. There was also a finding that the minister did not act in a biased manner. However, given there was a lack of clarity over the proper decision maker, the minister having changed since (also resolved in the case), so it was held to be inappropriate to judge the policy without allowing the now relevant minister sufficient time to fully consider the issue.

In terms of policy misfit caused by the Charter, the pre-existing policy of a permanent ban would have been held disproportionate were it made by the relevant minister at the time of the second review. Given the *Léger* case indicating that fundamental rights are at issue¹⁰⁶, the Court of Appeal considering the Charter as a relevant standard¹⁰⁷, and finding that changing to a one-year deferral would not have affected safety, the policy is disproportionate¹⁰⁸. There is a clear misfit between the existing policy and the acceptable policy as a result of the judgment's interpretation – regardless of the additional time given to the minister, the Court of Appeal could not consider a continuation of the existing policy acceptable.

3.2.4 Plain Packaging Judicial Review Cases

There is little evidence that the increased significance discussed in the previous section has led to policy misfit. Starting with the first plain packaging case, increased significance is only one of many factors considered – hardly evidence of decisive change. Article 35 and public health is one of fifteen

¹⁰² JR 65, [2013] NIQB 101, *supra* note 27, paras. 138-140.

¹⁰³ JR 65, [2015] NIQB 1, *supra* note 27, para. 12.

¹⁰⁴ JR 65 [2016] NICA 20, *supra* note 27.

¹⁰⁵ Case C-528/13, *Léger*, ECLI:EU:C:2015:288.

¹⁰⁶ JR 65 [2016] NICA 20 *supra* note 27, paras. 30-34.

¹⁰⁷ *Ibid*, para. 35.

¹⁰⁸ *Ibid*, para. 53-54.

different ‘general principles of proportionality’ considered.¹⁰⁹ Were there any policy change, it would be difficult if not impossible to attribute it to the Charter. Beyond this, the policy was found to be a proportionate restriction, and thus no policy change occurred in this area of the case.

Further increased significance comes later in the case, but again there is not policy misfit as expected by the causal mechanism. Article 35 is used to argue that the right to property is not absolute, and must be balanced against other considerations.¹¹⁰ Firstly however, this is done in support of the existing policy, so in succeeding the argument did not bring policy change. Additionally, even if there were policy misfit, there are many other previous examples of fundamental rights being balanced against other considerations, both in the Charter (Article 52), and elsewhere. It therefore cannot be said the Charter has caused policy change, as expected in the causal mechanism.

In the appeal judgment, there is a similar use to the above paragraph. Again, health rights are balanced against property rights, and again there are multiple grounds of consideration.¹¹¹ So therefore once again the same conclusion is reached - that the increased significance has not led to policy misfit caused by the Charter.

3.2.5 Cigarette Vending Machine Cases

The Charter is used in this case in the same way as the previous case – emphasising high level of human health protection in weighing up fundamental rights to property against other public interests. However, again there is a lack of policy misfit, as the High Court upheld the existing policy. Additionally, the paragraph before the mention of the Charter (para 109), describes the following section as ‘miscellaneous points to be made for the sake of completeness’. This is relatively clear evidence that the Charter did not have a notable effect on the judgment on the policy in question. This case does not therefore provide evidence of the causal mechanism.

3.2.6 B 11 AL 5/14 R

The previous policy, expressed by a disability classification as well as several lower court judgments,

¹⁰⁹ *British American Tobacco*, EWHC 1169 (Admin), *supra* note 28, paras. 424-472.

¹¹⁰ *Ibid*, paras. 813-843.

¹¹¹ *British American Tobacco*, [2016] EWCA Civ 1182, *supra* note 28, paras. 117-124.

was that the applicant was not ‘several disabled’...¹¹². The applicant sought to switch between supported professions, and could not take up the new job due to health concerns – something which would not have occurred to an applicant classified as more severely disabled. The case thus turned on whether the relevant legislation was designed to aid disabled individuals towards a pursuit of a job of their choice, or merely a job in of itself.¹¹³.

The Federal Social Court, influenced by the Charter, held that non-discrimination required that policy lead towards choice for disabled individuals. Given the government’s previous policy of not providing someone with particular assistance for the applied job led to the case, and they subsequently lost on the principle discussed in the previous paragraph. This is policy misfit, as there is a clash between the previous formal policy and that which results after the interpretation taking place in the judgment – the particular situation expected in this step of the empirical analysis.

3.2.7 Overall Assessment

The evidence expected here is a hoop test, as there is high confidence in the existence of policy misfit. Due to the high certainty and low uniqueness of the pieces of evidence, two conclusions can be drawn: any positive evidence only minimally increases confidence in the prediction, so multiple pieces of positive evidence are required to prove it empirically; any lack of evidence is strongly disconfirmatory, as failing to get through the metaphorical hoop is strong evidence against a prediction.

Looking at the weight of evidence laid out in the previous sections, there are several incidences of policy misfit, but very little evidence the policy misfits are caused by the Charter. It is on multiple occasions unclear whether in the absence of the Charter, the decision would likely have been decided differently. The Charter is rarely used except in a supportive capacity: it is used as supporting evidence of one specific interpretation of a German constitutional provision; it is used to emphasise the dignity content of ECHR rights, but the Charter’s influence is not noted by third parties discussing the case (eg. Klug and Wildbore discussing the East Sussex case). To elaborate on one example – in the first two cases, the ECHR provides the relevant right used as a standard, not the Charter. Even though the Charter increases the significance of the right, it is not unreasonable to presume that without its existence, the ECHR would have led to the same result as the dignity content was still present in ECHR and national jurisprudence.

¹¹² B 11 AL 5/14 R, *supra* note 25, para. 3.

¹¹³ *Ibid*, para 17.

It is almost impossible to prove that the Charter led to the policy misfit in a number of the above-discussed misfits. In order to assess the impact this has on our confidence in the empirical theory, the analysis returns to the methodological tools being used. As specified in section 1.1.2, the test being applied here is a 'hoop test' – high certainty, low uniqueness. Given it was highly certain that the evidence would exist if the theory was correct, not finding it therefore must strongly affect our confidence in the theory. This decrease in confidence illustrates the extent to which a lack of concrete evidence acts in a similar way to direct evidence against a proposition, in this specific methodological instance.

Therefore, it is not evidence of the mechanism, i.e. not evidence of the Charter-caused increased significance *causing* policy misfits. There is thus arguably only have the one piece of positive evidence, coming from the Northern Irish blood policy cases. Looking again at the methodology however, this positive evidence has low uniqueness – there are multiple other reasons that evidence of policy misfit may exist. There would need to be multiple pieces of evidence to strongly increase our confidence – this one piece of evidence is insufficient. Weighing up the evidence therefore, there is one piece of moderately confirmatory evidence against multiple pieces of strongly disconfirmatory evidence. This therefore significantly increases the confidence that the causal relationship does *not* hold.

The Charter, whilst increasing significance of the rights and principles contained within, does not create policy misfits with national courts' interpretations of law and policy in any of the areas being studied by the thesis: financing of healthcare systems; public health; regulation of healthcare; or social care.

4. Conclusions

The mechanism has barely played out in these empirical circumstances at all, and this fact has to be the first conclusion of the chapter. The evidence of policy impact is minimal at best. Already this leads us to the conclusion that the Charter does not have a significant impact on national health policy through the mechanism of national courts. National judicial action based on the Charter is not and should not be a significant consideration for policy-makers, and once a policy is enacted policy makers can rest easy and assume that the policy will be implemented regardless of the Charter – particularly in the post-Brexit UK environment, in which the government will be seeking to reduce the influence of the ECJ within the UK legal system. The more the influence of the ECJ is removed from the British

judicial system, the less likely a case involving the Charter is to affect the UK, and thus the more control over health policy.

It also reduces the confidence that creating an international or supranational fundamental rights document will meaningfully impact national-level fundamental rights protection. The chapter does show the Charter contributing to international fundamental rights standards, in a way that would meet with approval from many human rights academics. But without substantial impact on a policy level, even with the increased binding mechanisms of EU law, any concrete benefits this might provide are minimal. Additionally, those who sought to use the Charter to improve fundamental rights protections within the EU are, at least within national health law and policy, likely to find little solace.

Why the theorised mechanism broke down at this part? On the face of the evidence, it appears that the degree and size of policy misfit is important. Comparing this chapter to the results of the previous chapter, in which increased significance did lead to policy misfit, there is one notable difference. In the previous chapter, the Charter is used far more of a standard in of itself, as opposed to in this chapter where the Charter is used far more as supplementary evidence. Additionally, the only piece of positive evidence *for* policy misfit comes from the Charter being used as a standard in and of itself similar to the previous chapter in the various Northern Irish cases. It is in these standards cases that the Charter increases the significance to the extent required to cause policy misfit. Considering how this finding would impact future hypotheses, there are reasons to focus future research into the Charter's impact onto areas that only it covers.

Despite the overall theorised mechanisms breaking down at part 2 - policy misfit - an empirical finding in favour of part 1 has its own significance. Similarly to the previous chapter, the findings of this chapter could potentially impact litigation strategies in the area of health law and policy. There is some evidence in this chapter that, to a certain extent, highlighting the Charter bolsters particular interpretations of European Union fundamental rights (as in the *A and Ors.* or *Tower Hamlets* case) or specific interpretations of national fundamental rights (as in the German case). When considering how to litigate on fundamental rights issues, or issues with a fundamental rights element, the Charter is significant. Judges have been shown to consider it as additional weight, and it is thus worth considering the greater weight potentially given to raising the Charter in an argument. The difference between supplementary evidence and as a standard is also relevant here – this chapter provides evidence that greater success will be had by trying to use the Charter as a standard in and of itself.

5. Appendix 6.1 – Evidence Appendix x

Causal Relationship

Causal mechanism by which the Charter causes Europeanisation through ECJ judgments

Moderate Prior confidence

Contested initial step but well theorised responses thereafter

Proposition 1

Creation of Charter of Fundamental Rights causes national court to treat rights with greater significance

Expected Evidence

Direct citations of the Charter in a way that makes increased influence clear.

Alternatively, legal or institutionalist analysis that demonstrates the Charter's influence on the judgment (common doctrinal evidence)

Evidence of P1 from the East Sussex judgment

Evidence for P1 (i)

Direct citation of the Charter, stating that although the Charter is not legally binding, it 'reaffirms or elucidates' the content of human rights.

Hu, Ha – Stating the Charter 'elucidates' the content of human rights is relatively unique evidence, there would be few reasons to state this point if the judge did not feel the Charter did this. The direct court report is a highly accurate piece of evidence.

Evidence for P1 (ii)

Own doctrinal analysis. Implicitly above elucidation was not previously present, demonstrating the Charter increased significance.

Mu, Ma – This is medium uniqueness, other reasons the phrase 'elucidation' could have been used. Medium accuracy – my own doctrinal analysis

Evidence for P1(iii)

Charter directly cited to reemphasise human dignity content of ECHR rights, increasing significance of dignity compared to had the Charter not existed.

Hu, Ha – Few reasons to include Charter citation unless it added to substantive point being made, thus high uniqueness. The direct court report is a highly accurate piece of evidence.

Evidence for P1 (iv)

Charter directly cited to emphasise the state's positive obligations stemming from human dignity.

Hu, Ha – Few reasons to include Charter citation unless it added to substantive point being made, thus high uniqueness. The direct court report is a highly accurate piece of evidence.

*Evidence for P1 from the Tower Hamlets judgment**Evidence for P1 (v)*

Direct citation of P1 (iii) and P1 (iv), followed by argument that these extracts made a point about positive obligations

Hu, Ha – Few reasons to include Charter citation unless it added to substantive point being made, thus high uniqueness. The direct court report is a highly accurate piece of evidence.

*Evidence against P1 from the Spink judgment**Evidence against P1(i)*

Claimants cited the East Sussex judgment, arguing that this case (and thus the Charter) increased the significance of the state's positive obligations and thus fundamental rights. However, this claim was not accepted by the judge.

Hu, Ha – Few reasons to include Charter citation unless it added to substantive point being made, thus high uniqueness. The direct court report is a highly accurate piece of evidence.

*Evidence for and against P1 from Northern Irish Blood cases**Evidence against P1 (ii)*

Despite applicants raising non-discrimination and the Charter, the issue was barely covered in initial judgment.

Mu, Ha – Potential other reasons for Charter only being discussed minimally, does not necessarily

prove it could and did not increase significance. The direct court report is a highly accurate piece of evidence.

Evidence for P1 (vi)

Repeated citations of the Charter in the third case, as a standard against which a policy should be measured.

Mu, Ha – The repeated direct citations of the Charter are relatively unique evidence – there are few other reasons the Charter would be cited other than it influenced the case. However the mere citations themselves do not prove the proposition as there are still other reasons it could have been cited that was not directly the proposition. The direct court report is a highly accurate piece of evidence

Evidence for P1 (vii)

Looking doctrinally at *how* the Charter was used, it was used in a way that differentiated from merely applying ECJ judgment, indicating it separately increased significance at national level.

Hu, Ma – High uniqueness – unless the Charter did increase the significance of fundamental rights beyond merely applying ECJ judgment, it would not be possible to demonstrate this using doctrinal analysis. The analysis is my own, so could be prone to bias.

Evidence for and against P1 from the Plain Packaging Judicial Review cases

Evidence against P1(iii)

Court cites Recital (59) of the TPD, which combines references to the Charter and high levels of human health, implying a reference to Article 35 of the Charter. However this does not constitute evidence for the mechanism in this chapter, as it is increased significance at a supranational not national level

Hu, Ha – Little reason to discuss Charter in this context unless it was to illustrate specific point. High accuracy due to direct court reporting

Evidence against P1(iv)

Repeated references to Article 35 Charter in discussing the AG Kokott opinion on the TPD. However

this does not constitute evidence for the mechanism in this chapter, as it is increased significance at a supranational not national level

Hu, Ha – Little reason to discuss Charter in this context unless it was to illustrate specific point. High accuracy due to direct court reporting

Evidence For P1(viii)

In a discussion of proportionality, the Charter is said to attach a ‘high weight’ to access to healthcare, echoing the precise language used by Menéndez in the theoretical chapter of this thesis.

Hu, Ha – Little reason to discuss Charter in this context unless it was to illustrate specific point. High accuracy due to direct court reporting

Evidence for P1(ix)

Article 35 used in a proportionality analysis explaining that clashing fundamental rights demonstrates that they cannot be treated in an absolutist manner. Evidence of increased significance comes from the fact that the property right would more clearly take precedent were health not assigned fundamental status.

Mu, Ma – Could be other reasons for this discussion that were not the increased significance, so medium uniqueness. Medium accuracy as this is my own analysis.

Evidence against P1(v)

Appeal case contains reference that the Charter in the context of the AG Kokott opinion and the subsequent judgment on the same case. However this does not constitute evidence for the mechanism in this chapter, as it is increased significance at a supranational not national level

Hu, Ha – Little reason to discuss Charter in this context unless it was to illustrate specific point. High accuracy due to direct court reporting

Evidence For P1 from the Cigarette Vending Machines Cases

Evidence for P1(x)

The judge highlights that the Charter has given health a ‘higher status’ at an EU level, and thus he feels comfortable applying the same status at a national level.

Hu, Ha – Little reason to discuss Charter in this context unless it was to illustrate specific point. High accuracy due to direct court reporting

Evidence against P1 from Ahmad Case

Evidence against P1 (vi)

In this case, an attempt to use the Charter failed due to doctrinal limitations on its application – it could not be used in a way that went against the EU treaties

Mu, Ha – Potential other reasons for Charter only being discussed minimally, does not necessarily prove it could and did not increase significance. The direct court report is a highly accurate piece of evidence.

Evidence for P1 from B 11 AL 5/14 R

Evidence for P1(xi)

Charter cited in favour of one specific interpretation of German fundamental rights over another.

Mu, Ha – Charter did not necessarily increase significance of the specific right, could just have determined one right over another without increasing overall significance. Alternative explanation leads to medium uniqueness. The direct court report is a highly accurate piece of evidence.

Proposition 2

Greater significance leads to policy misfit

Expected Evidence

The evidence of policy misfit will be a difference between the policy as a result of the judgment and pre-existing national level policy – either legislative change or changes in the actions of relevant bodies.

Evidence against P2 from the East Sussex Case

Evidence against P2 (i)

The local authority implemented a full ban, and the outcome of the judgment involved a series of case-by-case principles, clashing with a permanent ban. However it is unclear if this was caused by

the Charter as opposed to the ECHR

Mu, Ha – There is potential for the Charter to have influenced the policy misfit even if not readily apparent, doubt leading to medium uniqueness. The direct court report is a highly accurate piece of evidence.

Evidence against P2 from the Tower Hamlets Case

Evidence against P2(ii)

The judgment held that TB's living conditions amounted to deprivation of liberty, clashing with the previous policy. Given this was delivered in a previous judgment, the previous judge did not consider it a deprivation of liberty. However again, the ECHR plays a greater role than the Charter, so it cannot reasonably be stated the Charter caused the policy misfit.

Mu, Ha – There is potential for the Charter to have influenced the policy misfit even if not readily apparent, doubt leading to medium uniqueness. The direct court report is a highly accurate piece of evidence.

Evidence for P2 from Northern Irish cases

Evidence for P2(i)

The Charter was used as a standard to assess the national policy, with the previous policy of a permanent ban being declared disproportional. Regardless of the extra time given to the minister, the previous policy would not be acceptable.

Hu, Ha – Repeated citations of the Charter in explaining misfit-creation would not have occurred were the Charter not being used as a standard. The direct court report is a highly accurate piece of evidence.

Evidence against P2 from B 11 AL 5/14 R

Evidence against P2(iii)

The judgment leads to a policy outcome designed to enable disabled individuals to choose a specific job for themselves, as opposed to merely *a* job, which was the previous policy. However, this is based on a German constitutional provision, so there is insufficient evidence the Charter *caused* the policy misfit.

Mu, Ha – There is potential for the Charter to have influenced the policy misfit even if not readily

apparent, doubt leading to medium uniqueness. The direct court report is a highly accurate piece of evidence.

Chapter 7 – The Charter in National Legislatures

National Parliaments contribute actively to the good functioning of the Union

Article 12, Treaty on the Functioning of the European Union

National parliaments have always played an important role in EU law. Large sections of EU law are implemented through Directives, which require transposition at a national level¹. With the practical effects of these Directives thus subject to some variations at a national level (see for example the phenomenon of ‘gold-plating’²), the attitudes and reactions of national parliaments to EU legislation have always affected the way EU law functions in society. Going beyond this, these attitudes thus affect the way the EU is seen by national populations – the practical consequences of EU law affect views of the EU, and national parliamentarians using the EU to justify a wide variety of positions, popular or otherwise.

National parliaments’ role was greatly increased by the Treaty of Lisbon³. Seeking to ameliorate the European Union’s supposed democratic deficit, steps were taken bringing national parliaments closer to the heart of the legislative process – national parliaments now receive extensive updates on the EU’s legislative programme, with agendas and minutes being provided and time taken for them to consider their opinions⁴. Parliaments can also cause a Commission proposal to be reconsidered, should a sufficient number of them wish so⁵.

Not only is EU law and its enforcement affected by national parliaments, the domestic activities of national parliaments are affected by the EU. Much literature has been written on the EU’s effects, with significant Europeanisation texts covering the effects the EU has on political parties and national

¹ Consolidated version on the Treaty of the Functioning of the European Union [2012] OJ C/326/01, Article 288.

² Miller, ‘EU Legislation: Government action on ‘gold-plating’, (House of Commons Library, 19 April 2011), SN/IA/5943.

³ Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No 2) on the application of the principles of subsidiarity and proportionality [2012] OJ 115; Consolidated version of the Treaty on the Functioning of the European Union – PROTOCOLS – Protocol (No 1) on the role of national parliaments in the European Union, [2012] OJ 115.

⁴ Protocol on subsidiarity and proportionality, *ibid*, Article 6.

⁵ *Ibid*, Article 7(2).

legislatures.⁶. National parliaments thus experience a two-way relationship with the EU, both shaping its laws and being shaped by them. This chapter studies that relationship, focusing on the effects of the Charter and testing the theoretical predictions made in chapter 3.

As national parliaments shape and are shaped by EU law, they are thus a key facet of the legal and political relationship between the EU and its Member States. Therefore, national parliaments are an important mechanism for translating EU law changes into practical policy effects, and thus by studying national legislatures the thesis is able to establish the Charter's effects..

Chapter 3 predicted that the Charter's institutionalist effects would result in an increase in the significance of fundamental rights compared to the previous status quo, to be followed by Europeanisation through national legislatures. At the heart of this prediction lies an interesting contradiction. Fears of EU overreach can proliferate amongst national parliamentarians, particularly in the UK and particularly in terms of Europeanisation – national legislators are among those whose agency is constrained by external EU-level factors. Therefore, any findings of Europeanisation would be noteworthy, with actors who traditionally lose out from top-down Europeanisation participating in it, and contributing the very loss of control they fear. Testing this theory ties back into one of the overall benefits of the thesis – to what extent has the Charter taken control away from national legislators?

Following this introduction the chapter will proceed in several steps. Firstly, section 1 will lay out the relevant methodological elements required for the chapter – applying the overall mechanism to this specific chapter and discussing the expected evidence and tests. Section 2 covers the course of the discussions and legislation discussed in this chapter, providing context to the choices of cases as well as the necessary background required to understand the run of events. Section 3 is the substantive analysis of the chapter, weighing up the evidence for each part. Finally, the conclusions consider the implications of the findings for the UK and Germany, as well as for wider research.

⁶ Eg. Geddes, 'Political Parties and Party Politics', in Bache, Jordan, *The Europeanization of British Politics* (Palgrave, 2006); Mair, 'Political Parties and party Systems', in Graziano, Vink, *Europeanization: New Research Agendas* (Palgrave MacMillan, 2007), 154; Ladrech, 'Europeanization and Political Parties' in Bulmer, Lequesne, *The Member States of the European Union* (OUP, 2012, 2nd Edition).

1. Mechanism and Methodological Elements

This section lays out the causal mechanism and applies it to the specific actors under discussion in this chapter, in order to test the mechanism empirically. Having been laid out in greater detail in the previous chapters, merely a brief version of the mechanism is presented here.

Part 1 of the mechanism suggests that legislators will treat the rights in the Charter with increased significance due to one of the two elements of an institution – the regulatory element and the normative element⁷. Firstly, the regulatory element means that if legislators see the Charter as binding, they will therefore consider it as a factor in decision-making⁸. Secondly, the normative element of institutionalism creates a social obligation of compliance with international fundamental rights, which is increased by the Charter⁹. Part 2 of the mechanism expects policy misfit, specifically: highlighting the incompatibility of existing legislation with the Charter; or the Charter being used as a reason not undertake a specific desired policy or legislative change.

Part 3 of the mechanism under rational choice institutionalism implies that policy misfit raises risk of sanctions for non-compliance - one would expect concern about this to be reflected within the legislature¹⁰, altering national actors' cost-benefit analysis of the specific issues, and prompting particular types of action¹¹. The following part 4 of the model is that actors alter their actions in order to comply and avoid any potential for threatened sanctions, leading to policy change.

Sociological institutionalism relies on actors doing what is 'expected' of them as an explanatory theory of action or change¹². Thus legislators, despite being lawmakers, also feel bound to comply with international and supranational legal norms¹³. Part 3 of the mechanism under sociological

⁷ Section 2.2 of Chapter 3 discussing the prediction; for analysis of institutions, Scott, *Institutions and Organizations* (Sage Publications, 2001, 2nd Edition), 51.

⁸ Greenwood, Royston, Hinings, 'Understanding Radical Organizational Change: Bringing Together the Old and New Institutionalism', 21 *Academy of Management Review* 5, (1996).

⁹ Ibid.

¹⁰ Ibid, 63.

¹¹ Börzel, Dudziak, Hofmann, Panke, Sprungk, 'Why Member States do (not) comply with European law' *CES Working Paper* 148 (Harvard, 2007).

¹² ibid 63; 66.

¹³ Berglund, Gange, van Waarden, 'Mass production of law. Routinization in the transposition of European directives: a sociological-institutionalist account' 13 *Journal of European Public Policy* 5 (2006), 692; Falkner, Treib, Hartlapp, Leiber, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge, 2005); Sverdrup 'Compliance: a

institutionalism therefore expects changed expectations – legislatures and legislators seeing compliance with the Charter as something that is expected of them, thus altering their expectations of what they should do. Part 4 of the mechanism is thus policy change – actors altering their actions can be explained by their desire or felt duty to meet these changed expectations.

1.1 Evidence Expected and Priors

Having established the theory, the chapter analyses expectations of each part of the causal mechanism and the prior confidence in its likelihood. The relevant test and confidence in the mechanism affect the evidence-gathering in the chapter. The full body of evidence is laid out in the evidence appendix for transparency – an important step for avoiding selective analysis or personal bias.

1.1.1 Evidence Expected at Part 1

Part 1 holds that conceptualising a legal right or a policy choice as a fundamental right, especially in a binding fundamental rights document, results in the right or choice being treated with greater significance by the national legislature than the same right previously. In terms of the empirically observable manifestations of part 1, what is required is pieces of evidence that demonstrate the Charter was involved in domestic law-making, specifically in a way that showed increased significance of the right in question. Direct citations of the relevant Charter articles within legislative discussions are expected. An alternative form of evidence would be literature analysis that demonstrates the Charter's relevance within the legislative discussion.

There is moderate prior confidence in this part - scholarship in this area is contested, with some predicting increased significance at a national level and others disputing this.¹⁴ This lower level of

matter of ability?', Paper presented at 'Transposition and Compliance in the European Union' (2004); Börzel, Hofmann, Sprungk, 'Why do states not obey the law? Non-compliance in the European Union' Paper presented at the workshop 'Transposition and Compliance in the European Union', (2004).

¹⁴ See chapter 3 for in depth analysis of this issue. In favour of increased significance include: Iglesias Sánchez, 'The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights' *CMLRev* 49 (2012), 1565, 1565-1612 ; O'Neill, 'The EU and Fundamental Rights – Part 2' 16 *Judicial Review* 4 (2015), 374; Menéndez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' 40 *JCMS* 3 (2002), 471; and human rights theory including Dworkin, *Justice for Hedgehogs*, (Harvard University Press, 2011), 335. Against the idea of increased significance, include Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?'

confidence means that multiple pieces of confirmatory evidence are required.

This part thus requires a ‘smoking gun’ test¹⁵. The evidence has a high level of uniqueness. There are few alternative explanations (such as a fundamental rights approach winning greatly increased popular democratic support) for an increased significance of a fundamental right or fundamental rights approach, other than being triggered by an external event such as the Charter. However, there is considerably lower certainty. Even if increased significance for fundamental rights is present, clear evidence is not certain – legislators do not always explain their full range of motivation give full justifications. The evidence is therefore highly unique, but uncertain. Either a direct citation or clear explanation of the Charter causing increased significance is strong evidence of the theoretical expectations of part 1. However, if there is no clear evidence, it does not necessarily heavily affect due to the low certainty.

1.1.2 Evidence Expected at Part 2

Part 2 is policy misfit caused by the Charter. In this part evidence is sought that policies and norms at a national level differ from those formed by the Charter. This evidence takes the form of actors highlighting the difference between the Charter and national legislation, either existing or proposed, the result of which being a specific position caused by the Charter. Alternatively, wider policy misfit could involve a clash between national circumstances and EU-level documents.

There is again moderate confidence in this part of the mechanism, as the same theories support both this and the previous part. Any increased significance will be seen in the acts and discussions of the legislature. However, as discussed above these theories are not universally accepted¹⁶, so again the chapter seeks confirmatory evidence as opposed to disconfirmatory.

The evidence in this section will form a hoop test – high certainty, low uniqueness. Policy misfit is an observable phenomenon - policies can be simply and directly compared. If the policy misfit step exists, there will very likely be evidence of it. However, it is not very unique evidence. There are many reasons policy misfit could occur, and indeed it may have existed even before the Charter’s influence.

⁶ *European Law Journal* 2 (2000), 95; De Búrca, ‘The Drafting of the European Union Charter of Fundamental Rights’ *EL Rev* 126 (2001), 129.

¹⁵ See chapter 1 for more detail.

¹⁶ *Supra* note 14.

Given the hoop test only provides mildly confirmatory evidence, there will need to be multiple pieces of evidence (passing through several metaphorical hoops) in order to provide sufficient confirmation. If there is insufficient evidence in this section, that in of itself is strongly disconfirmatory, due to the initially high level of certainty in the evidence (see chapter 1 for further explanation).

1.1.3 Evidence Expected at Part 3

Here, rational choice and sociological institutionalism differ. However, the process-tracing methodology allows testing of both of these theories simultaneously. At this part of the mechanism responses to the Charter in the legislature are expected - either altered cost-benefit analyses or altered expectations for national actors. The empirical observations at this part are therefore discussions of the above. These discussions come from various sources including: direct reports of legislative discussions, forming the strongest source; or alternatively media reports on legislation.

There is high confidence in this part of the mechanism, as the response to policy misfit is well-studied and understood¹⁷ - the two options in Table 7.1 show the two clear options in the literature. The evidence in this section has low certainty but high uniqueness – a smoking gun test. For example, various actors could non-publicly alter their cost-benefit analyses, or even subconsciously act in terms of their expectations of themselves. This ambiguity results in the aforementioned low certainty. It is therefore unclear that evidence of this step will manifest. If the expected evidence is found however, it will be fairly unique, especially if it is linked directly to the Charter. There would be few other reasons to discuss cost-benefit of analyses in relation to the Charter unless the calculus of your own position changed. The same is similarly true for changed expectations – publicly discussing what is expected of you in the context of the Charter would be unusual if not linked to how that document changes expectations. Therefore only a few pieces of this type of evidence are required to confirm this part of the theory.

1.1.4 Evidence Expected at Part 4

There is again high confidence that part 4 of the model will be reflected in reality, as the literature frequently demonstrates and expects policy change following the previous part of the mechanism.

¹⁷ Eg. Börzel, Risse, 'Conceptualizing the Domestic Impact of Europe' Featherstone, Radaelli, *Politics of Europeanization* (OUP, 2003), 63; see chapter 3 for further analysis.

Evidence of policy change will be evidence such as changes to existing laws inspired by the Charter, or legislative or policy decisions made in a way they otherwise would not have been.

Due to the high confidence, again disconfirmatory evidence is being sought. The evidence has high certainty but low uniqueness. If there is some policy change, it is relatively certain there will be evidence of this. Policy change is almost always formally declared by a governmental or regulatory authority, in a way that leaves clear evidence that can be understood through comparing the new position with the old one. In particular discussions of legislation are well documented, both within parliamentary records and media analysis of politics.

However, the evidence will have very low uniqueness. Parliaments change laws and policies for many reasons, and these changes could be wholly unconnected to the process of complying with the Charter – a wide range of political considerations exist at any time. A high certainty, low uniqueness piece of evidence is once again a hoop test - ideal for the required disconfirmatory evidence. If policy change is at any point not found after the initial three steps, that then constitutes strong evidence that the theory is incorrect.

2. National Legislation Studied

The evidence base for this chapter is a list of discussions in the legislature. As explained in chapter 1, the overwhelming majority of references to the Charter did not reference any one specific right, with legislators referring to ‘the Charter’ more generally. An evidence base that was limited to specific articles would be too narrow to gauge the full range of influence of the Charter. Therefore, the evidence base includes every reference to the Charter, regardless of whether it references the specific articles of the independent variable (although some do). However, in order to be included in the main analysis, the evidence must cover the content of the articles in the independent variable – the studied variable does not change, merely the manifestation of it in the specific circumstances of this chapter.

These references were found using Hansard for the UK House of Commons and House of Lords and the specific documents and information system for the Bundestag and Bundesrat, searching for ‘Charter of Fundamental Rights of the European Union’ or ‘Charta der Grundrechte der Europäischen Union’ as appropriate. As discussed in chapter 1, the thesis does not cover UK devolved parliaments or the Länder parliaments in Germany. That is, of course, a limitation of its overall findings.

Table 7.1 : Causal mechanism and observable manifestations

RCI: Rational choice institutionalism

SI: Sociological institutionalism

	Cause	Part 1	Part 2	Part 3	Part 4	Outcome
Theory: RCI	Charter creation	Increased Significance	Policy misfit	Changed cost-benefit analysis	Policy change	Europeanisation
Observable manifestations: RCI	Charter created	Citation or influence	Comparison between policies/norms	Discussion of sanctions/costs	New laws/policies etc	New laws/policies
Theory: SI	Charter creation	Increased Significance	Policy misfit	Changed expectations	Policy change	Europeanisation
Observable manifestations: SI	Charter creation	Citation or influence	Comparison between policies/norms	Discussion of expectations	New laws/policies etc	New laws/policies
Institutional Actor	EU	National Legislators	Policies/norms	National Legislators	National legislators	

Source: author's own elaboration of Europeanisation research

There is also potential for the Charter to influence legislation and discussion without being specifically cited, as outlined in the chapter 3. The evidence base therefore also includes notable legislation with a fundamental rights element, as identified by academia, NGOs, state and industry bodies¹⁸. Given

¹⁸ <http://nhstimeline.nuffieldtrust.org.uk/>, first accessed 08/08/2017; <http://www.hra.nhs.uk/resources/research-legislation-and-governance/>, first accessed 08/08/2017; McHale, Fox, Gunn, Wilkinson, *Health Care Law* (Sweet and Maxwell, 2007); <https://www.england.nhs.uk/about/equality/equality-hub/resources/legislation/>, first accessed 08/08/2017; <https://www.kingsfund.org.uk/sites/default/files/media/commission-background-paper-social-care-health-system-other-countries.pdf>, first accessed on 08/08/2017; <http://aok-bv.de/hintergrund/reformgeschichte/index.html>, first accessed on 08/08/2017; Toth, 'Healthcare policies over the last 20 years: reforms and counter-reforms' 95 *Health Policy* 1 (2010), 82; Simonet, 'Healthcare reforms and cost reduction strategies in Europe: The cases of Germany, UK, Switzerland, Italy, and France' 23 *International Journal of Health Care Quality Assurance* 5 (2010), 470; <http://www.eurostemcell.org/regulation-stem-cell-research-germany>, first accessed on 08/08/2017; The EFGCP Report on The Procedure for the Ethical Review of Protocols for Clinical Research Projects in Europe (Update: April 2012).

some of these pieces of legislation have dealt with the rights and principles in the independent variable (the Charter rights), analysis of any effects the Charter has had here could provide valuable empirical evidence. The full list of references can be found in the evidence base appendix.

It is important to narrow down which parliamentary documents I was looking at. The records of each parliament under consideration, over the 17-year period, contain tens if not hundreds of thousands of documents. A purposive approach was taken, focusing on the documents that provided the broadest understanding of the chapter's subject matter. The aim of the chapter is to study the effects that the Charter has had on specifically the national legislative process on health law and policy. This consideration led to multiple specific choices, elaborated below.

Firstly, documents were excluded where they specifically related to the transposition of EU legislation. Whilst there would be some potential for the Charter's influence to be felt in this transposition, the purpose of the chapter is to study the national legislative process, as opposed to the national elements of the EU legislative process. This choice resulted in the exclusion of many documents pertaining to the Bundesrat - one of the main functions of the Bundesrat is to enable the states to participate in the business of the European Union¹⁹, as opposed to the national legislative process.

Secondly, the aims of the chapter also affected which parliamentary committees were studied. In the UK, select committees are non-legislative, but instead focus on scrutinising governmental actions²⁰. Legislative amendments are made in public bill committees²¹, which are thus included in the analysis. In contrast to this, the Bundestag committees are relatively powerful²², and engage in both executive scrutiny and legislative discussion²³. To ensure the committee discussion studied covered health law and policy, the discussion was narrowed down to several committees, specifically: health; food and agriculture; and education, research, and technology assessment. The Committee on the affairs of the European Union was not included, as its work is non-legislative and focuses on scrutiny of EU-level

¹⁹ *Basic Law for the Federal Republic of Germany*, 23 May 1949, Article 50, paras. 2-3.

²⁰ <http://www.parliament.uk/about/how/committees/select/>, first accessed on 15/09/2017.

²¹ <http://www.parliament.uk/mps-lords-and-offices/offices/commons/scrutinyunit/public-bill-committees/>, first accessed on 15/09/2017.

²² Miller, Stecker, 'Consensus by Default? Interaction of Government and Opposition Parties in the Committees of the German Bundestag' 17 *German Politics* 3 (2008), 305, 307.

²³ <https://www.bundestag.de/en/committees?url=L2VuL2NvbW1pdHRIZXMvMTk3Njcw&mod=mod479046>, first accessed on 15/09/17.

actions²⁴.

Thirdly, the choice was made to focus on plenary and floor debate, in contrast to reports produced by either the executive or non-legislative committees. Whilst this does limit the scope of the chapter and thus any findings, it narrows the focus to where the theoretical elements of this thesis predict results. To reiterate, chapter 3 suggests three different ways that ‘increased significance’ could appear: actors being more likely to use arguments based on fundamental rights; these arguments being more likely to be accepted; and fundamental rights being favoured in trade-offs between competing claims. Given these effects, floor debate provides evidence of the behaviour of the largest, most diverse group of actors by studying hundreds of individual legislators at once. Additionally, the main focus of the UK legislative process is floor debate in the Houses of Commons and Lords²⁵, so a research focus on that area is justified.

The result is an extensive list of documents referencing the Charter, to be found in the evidence base appendix. However, a surprisingly small proportion of these references can be considered evidence in the chapter.

Starting with the UK, there are extensive references to the Charter. A committed core of Eurosceptic legislators saw the Charter as an unacceptable threat to national sovereignty, and so regularly sought to clarify the constitutional status of the Charter and hold the executive accountable on past promises. These efforts account for the substantial majority of references in the evidence appendix, and fall outside of a health context and thus the dependent variable of this thesis.

Several of these constitutional-related discussions overlapped with the dependent variable, but in a way that is not substantially related to the content of health law, for example: the same question being asked to 14 different ministers coincidentally including the health minister²⁶; mentioning health but merely to hypothesise about expansion of ECJ powers²⁷, or about EU powers generally²⁸; a reference to ‘broken promises’ in general on the Charter that happened to be made in discussion of

²⁴ <https://www.bundestag.de/en/committees/a21>, first accessed 12/09/2017.

²⁵ Arter, *The Scottish Parliament: A Scandinavian-Style Assembly?* (Routledge, 2004), 16.

²⁶ European Constitution (Health), HC Deb 2 December 2004, Volume 428.

²⁷ Orders of the Day – Foreign Affairs and Defence, HC Deb 11 December 2000, Volume 359; EU Charter of Fundamental Rights, HL Deb 16 June 2000, Volume 613.

²⁸ Charter of Fundamental Rights (EUC Report), HL Deb 20 June 2003, Volume 649.

health-related legislation.²⁹.

Where the Charter was used to make a substantive point in a health context, often it was not one of the Charter rights included within the independent variable and thus is excluded from the practical analysis, for example: the right to property³⁰, freedom of expression³¹; freedom of scientific research³²; freedom of work establishment³³; or restrictions on retrospective legislation³⁴.

There are however many substantive references, explicitly or implicitly referring to the relevant Charter Articles, and these are discussed in the chapter.

There were many references to the Charter³⁵ made in the two chambers of the German parliament, but only some of them are worthy of substantive study in the chapter. Generally speaking, the Charter was referenced more specifically, and more directly related to other subject matter as opposed to discussions of its constitutional role or the wider relationship between national law and EU law. However, the vast majority of this discussion did not fall within health law or policy, or cited Charter articles that were not Articles 1, 3, 20, 21, or 35.

Many times, suggested legislation merely came with a short reference that it was compliant with the Charter³⁶. On many other occasions, the Charter was cited in discussions of ‘social rights’ more generally, but without a specific health context³⁷. On some occasions, a right in the German Basic Law was referenced alongside the Charter, but not Articles 1, 3, 20, 21, or 35. Often the European Social Charter was used as a source when discussing social rights related issues.

²⁹ Clause 1 Health Bill Deb, HL Deb 16 June 2009, Volume 494.

³⁰ Children and Families Bill, HL Deb 29 January 2014, Volume 751.

³¹ Animal Welfare: Methods of Slaughter, HL Deb 16 January 2014, Volume 751.

³² European Affairs, HC Deb 15 December 2004, Volume 428, (specifically column 1715); EU Charter of Rights, HL Deb 12 October 2000, Volume 617, column WA49; Stem Cell Research, HC Deb 24 February 2005, Volume 431.

³³ Treaty of Lisbon (No. 3), HC Deb 5 February 2008, Volume 471; Health: Complementary and Alternative Medicine, HL Deb 10 November 2009, Volume 714.

³⁴ Mental Health (Approval Functions) Bill, HC Deb 2012, Volume 552.

³⁵ Eg. Plenarprotokoll 17/213 Deutscher Bundestag Stenografischer Bericht 213. Sitzung Berlin, Mittwoch, den 12. Dezember 2012.

³⁶ Eg. Deutscher Bundestag, Drucksache 18/11546 18. Wahlperiode 16.03.2017 Gesetzentwurf der Bundesregierung.

³⁷ Eg. Plenarprotokoll 18/212 Deutscher Bundestag Stenografischer Bericht 212. Sitzung Berlin, Donnerstag, den 19. Januar 2017.

There were however, some references to the specific EU Charter Articles within the context of health law and policy. Additionally there are some more general discussions of the Charter which indicate the relevant Articles of the Charter and health context.

Where pieces of evidence cover similar themes, the discussion has been grouped together to better understand the Charter's impact on a specific area of policy. The substantive analysis is thus grouped into the following sections: debates on Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015; Bundestag discussions on health and asylum seekers; Bundestag discussions on clinical trials regulations; Bundestag discussions of the EU's 7th Research Programme; and discussions on social rights in the EU, and a singular reference in a discussion on a Water Bill referencing fluoridation.

Compared to previous chapters, there are slightly more pieces of evidence. However, the significantly larger total number of documents considered must be compared with the smaller total number of judgments. In that context, a minor increase in the amount of relevant evidence does not reflect the large overall increase in the size of the evidence base. Therefore the frequency of any Europeanisation found in this chapter is less compared to other chapters.

Despite this narrow scope, the strength of evidence in these specific incidences can still be assessed, and conclusions drawn. For example, if there is sufficient evidence for a phenomenon that nonetheless occurs rarely, that is a different set of conclusions from something with limited evidence.

2.1 UK Parliament Discussions on Human Fertilisation and Embryology: 2008 Act and Mitochondrial Donation Regulations 2015

The Charter was discussed in the context of mitochondrial transfer and so-called 'three parent children'. The Human Embryology and Fertilisation Act 1990³⁸ prohibited the implantation of embryos in which the mitochondrial or nuclear DNA has been altered. However, the Act was amended in 2008³⁹ to allow implantation of embryos with altered mitochondria to prevent the transmission of serious mitochondrial disease, even in otherwise proscribed circumstances⁴⁰. Parliamentary approval was required for this implantation to be permitted and specific regulations were brought forward in

³⁸ Human Embryology and Fertilisation Act 1990.

³⁹ Human Fertilisation and Embryology Act 2008.

⁴⁰ *ibid* Section 3(5); consequently inserted into S. 3ZA(5) of Human Embryology and Fertilisation Act 1990.

2015.⁴¹. The Regulations, and mitochondrial process in general, were controversial, with many commentators raising fears and ethical objections to ‘three-parent children’. It is some of the parliamentary discussion of this legislation that is studied in the chapter.

2.2 Bundestag Discussions of Health and Asylum Seekers

German laws on asylum-seekers⁴² limit their right to medical treatment to acute illnesses and painful states associated with pregnancy and motherhood⁴³. The application of these laws was particularly limited in the states of Bremen and Hamburg⁴⁴. Die Linke (the left-wing socialist party) proposed amendments to the law on asylum seekers⁴⁵ to expand the health access of asylum seekers. Specifically, they proposed a three-month health card be given to applicants, and full access to the German health system after three months. They also encouraged more consistent application of the existing law. This initial motion contains the first citations of the Charter discussed in the chapter.

In late 2015, the German parliament passed a law⁴⁶ designed to: accelerate the asylum process; bring in benefits in kind instead of cash payments; designate several more countries as ‘safe’ destination zones; reform integration policies; facilitate the building of refugee housing; and reduce the financial burden on various branches of local government⁴⁷. As a parliamentary grouping, Die Linke again sought to condemn the law, and sought to amend the law on asylum seekers⁴⁸. The Charter was again cited in this discussion.

2.3 Bundestag Discussions of Clinical Trials Regulations

The proposed new Regulation on clinical trials, which eventually became the EU’s Clinical Trials

⁴¹ Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015.

⁴² Asylbewerberleistungsgesetz in der Fassung der Bekanntmachung vom 5. August 1997 (BGBl. I S. 2022), das zuletzt durch Artikel 4 des Gesetzes vom 17. Juli 2017 (BGBl. I S. 2541) geändert worden ist.

⁴³ Ibid, para. 4.

⁴⁴ Deutscher Bundestag, 18. Wahlperiode, Drucksache 18/5370, 30.06.2015, p. 2.

⁴⁵ Ibid.

⁴⁶ Asylverfahrensbeschleunigungsgesetz vom 20. Oktober 2015 ist am 23. Oktober 2015 im Bundesgesetzblatt (BGBl. I S. 1722) verkündet.

⁴⁷ <https://www.loc.gov/law/help/refugee-law/germany.php>, first accessed 02/06/2017.

⁴⁸ Deutscher Bundestag Drucksache 18/7413 18. Wahlperiode 28.01.2016.

Regulation⁴⁹, sought to address various criticisms⁵⁰ of the previous Clinical Trials Directive on the issue⁵¹. Article 23 Paragraph 3 of the German Basic Law gives the German parliament the opportunity to comment on the EU legislative process, and to give an opinion which the government has to take into account during subsequent negotiations⁵². In January 2013, two separate motions on the proposed legislation were discussed – one tabled by Die Linke and the other tabled by the CDU/CSU (centre-right), the SPD (social democrats), the Greens, and the FDP (liberal). The references to the Charter are found in the joint discussion of these motions.

2.4 Bundestag Discussions of the EU's 7th Research Programme and Stem Cell Research

The EU funds various aspects of scientific research through a series of framework programmes - instruments which are also designed to address employment needs, competitiveness, and quality of life⁵³. A wide variety of scientific research projects are funded, including many related to health law and policy⁵⁴. Bundestag members formally raised sixteen different questions⁵⁵ about the 'controversial'⁵⁶ area of research involving biotechnology and embryonic stem cells. The government issued a point by point formal response to each question⁵⁷, and it is the formal response that is the subject of the discussions in this chapter as it contains references to the Charter.

2.5 Bundestag Discussions of Social Rights in the EU

There were multiple discussions and much legislative activity in the German parliament on the topic of 'social rights' or 'social fundamental rights'.

The European Social Charter is another prominent European fundamental rights document, and as

⁴⁹ Regulation 536/2014/EU of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing /EC [2014] OJ L158/1.

⁵⁰ For detail see Hervey, McHale, *European Union Health Law: Themes and Implications* (CUP, 2015), 301-319.

⁵¹ Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use [2001] OJ L121/34.

⁵² Basic Law, *supra* note 19 Article 23(3).

⁵³ https://ec.europa.eu/research/fp7/index_en.cfm?pg=understanding, first accessed 03/06/17.

⁵⁴ https://ec.europa.eu/research/fp7/pdf/fp7-factsheets_en.pdf, first accessed 30/06/2017.

⁵⁵ Deutscher Bundestag Drucksache 16/1607 16. Wahlperiode 26. 05. 2006.

⁵⁶ Own translation, original text 'umstritten'.

⁵⁷ Deutscher Bundestag Drucksache 16/1806 16. Wahlperiode 13. 06. 2006.

such was subject to multiple discussions in the German parliament. There are several overlaps between the EU Charter and the European Social Charter⁵⁸. Thus discussions of the European Social Charter in the German parliament involve references to the EU Charter. The chapter covers discussions taking place on the 50th anniversary of the social charter and Germany's continuing duties⁵⁹. A group of Bundestag members also raised a general question on the issue of social rights in the EU, with both the question⁶⁰ and the government's answer⁶¹ being discussed in the chapter. Several legislative attempts by Die Linke to bring in stronger protections for social rights are also discussed, specifically: one attempt to change the constitution; and a further motion on social rights protection.

2.6 House of Commons Discussion of Water Bill

In 2003, the UK government introduced a bill dealing with various aspects of water regulation, including introducing a new Water Services Regulation Authority⁶². Some members of the British parliament raised points about fluoridation of water, and the Charter was referenced in these discussions.

3. Europeanisation

This section analyses whether Europeanisation has taken place through the aforementioned legislative discussions and parliamentary proceedings. In the process-tracing methodology this is done by investigating the empirical existence of each of the individual parts of the mechanism.

⁵⁸Eg. European Social Charter (revised) 1996, Article 11, 13 and Article 35 Charter of Fundamental Rights of the European Union [2012] OJ 326/391, Article 27 and Charter of Fundamental Rights of the European Union [2012] OJ 326/391, Article 20, 21; Charter of Fundamental Rights of the European Union [2012] OJ 326/391, Article 1 and European Social Charter (revised) 1996, Article 26.

⁵⁹ Deutscher Bundestag Drucksache 18/4092 18. Wahlperiode 24.02.2015.

⁶⁰ Deutscher Bundestag Drucksache 16/13568 16. Wahlperiode 24. 06. 2009.

⁶¹ Deutscher Bundestag Drucksache 16/13781 16. Wahlperiode 13. 07. 2009 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums für Arbeit und Soziales vom 9. Juli 2009 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Manuel Sarrazin, Brigitte Pothmer, Jürgen Trittin, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 16/13568.

⁶² Research Paper 03/67 4 September 2003 The Water Bill [HL] Bill 149 of 2002-03.

3.1 Part 1 - Increased Significance

The first part of the mechanism holds that conceptualising a claim as a fundamental right is something that causes a right to be treated with increased significance by national legislative actors. This increased significance is caused by either: the regulatory element of an institution, with the Charter making a right more binding than it otherwise would have been; or the normative element of an institution, when the Charter increases the social obligation of compliance with the specific right. As discussed in section 1.1.1, any evidence found is ‘smoking gun evidence’. With any positive evidence being highly unique, even one piece of evidence strongly increases our confidence in the causal mechanism.

3.1.1 UK Parliament Discussions of Human Fertilisation and Embryology: 2008 Act and Mitochondrial Donation Regulations 2015

The Charter featured in the Lords debate on the 2008 Act amending the original piece of legislation. As part of the debate on the legislation in the House of Lords, Baroness Knight sought to ensure cells could not be used without the consent of the person providing them – a separate amendment provided some circumstances which would allow this non-consensual use. Lord Neill spoke in support of Baroness Knight’s amendment⁶³. He focused on the fundamental rights implications of non-consensual donation. Previous government statements had discussed the Article 8 ECHR implications of the legislation, and the government’s changing opinion over time. He then discusses the opinion of a Scottish QC he has obtained⁶⁴.

In particular, he focuses on the charter of rights, which your Lordships will recall from the many days that we spent discussing the treaty of Lisbon and its adjunct, the charter of rights. It is a familiar text to us all. Article 1 of the Charter of Fundamental Rights states:

“Human dignity is inviolable. It must be respected and protected”.

Article 3 on the,

“Right to the integrity of the person”,

states:

⁶³ Human Fertilisation and Embryology Bill, HL Deb 29 October 2008, Volume 704.

⁶⁴ Ibid, col. 1662.

“Everyone has the right to respect for his or her physical and mental integrity ... In the fields of medicine and biology, the following must be respected in particular ... the free and informed consent of the person concerned, according to the procedures laid down by law”.

He then moves onto making similar points about other international documents such as the Oviedo Convention, before concluding:

In other words, all of those provisions are aimed at protecting the rights of the individual and are a direct objection to the proposal now being made. They add weight to my first contention that we do not know why the Government have changed their mind on the scope of Article 8. We have now received the opinion and provisions that I referred to, which we need to consider calmly, and send the matter back to the other place.

Here it can be seen that, similar to other occasions in this thesis, the Charter is adding to supranational standards on a specific issue. The Charter, among other rights documents, is described as ‘adding weight’ to a particular fundamental rights based argument. This use of the Charter does constitute some evidence of the hypothesised theoretical mechanisms. If the Charter did not exist, there would be less evidence of the importance of human dignity as well as bodily integrity. By adding evidence, the Charter has increased the significance of fundamental rights within national parliamentary discussion, thus fulfilling the prediction of part 1 of the causal mechanism.

Six years later, the government sought to add further regulations. A debate was requested by Jacob Rees-Mogg, a Eurosceptic Conservative backbencher, and took place away from the main chamber in a separate debating venue.

Among a wide variety of points (political, ethical, and safety-based), he raised a legal argument in his speech. The passage is below⁶⁵:

‘The third risk is legal, and I am slightly reluctant to raise it because it concerns the European Union charter of fundamental rights. It is not a document I often quote in support of an argument, but there is a question about its applicability in the United Kingdom. It is not directly applicable in UK law except when it coincides with EU law. There is considerable debate about how far the overlap between UK and EU law goes. Article 3(2) refers to the ‘prohibition of eugenic practices, in particular those aiming at the selection of persons’’. I have established that this is eugenics, so it would be in contravention of the Charter of Fundamental Rights. I do not believe that the Government would want to contravene that accidentally.’

Rees-Mogg raises the Charter as something that needs to be followed by the UK government, and

⁶⁵ Mitochondrial Transfer (Three-Parent Children), WH Deb, 12 March 2014, Volume 577.

argues that the proposed procedures are in breach of the prohibition of ‘eugenic practices’ in Article 3(2) of the CFREU.

This is an attempt by an individual MP to use the social obligation of compliance to increase the significance of norms prohibiting ‘eugenic practices’. Rees-Mogg argues that the government would not want to be in breach of the Charter, implying that they think they *should* comply – that they feel or should feel some sort of social obligation.

However, given the relevant under-secretary attending the debate responded to many arguments but did not respond to Jacob Rees-Mogg’s specific citation of the Charter⁶⁶, it seems unlikely that the relevant representative of the UK government considers the Charter an important factor. This supposition is supported by the fact that in the debate before the full vote on the regulations, the Charter was not mentioned by the representative health minister⁶⁷. Nor was it brought up by any of the other participants in the debate⁶⁸. The Regulations then passed the House of Commons and moved onto the Lords. This lack of further Charter discussion indicates that at best, any increased significance is minimal – it was not sufficient to merit any specific response or further action. More likely however, the lack of response indicates the attempt to increase significance failed.

In the Lords (second chamber) debate on the regulations⁶⁹, several Lords raised the Charter as an issue. A motion was proposed to insist the government reported on several aspects of the procedure, including: safety; compliance with EU law; and key definitions⁷⁰. Baroness Scotland raised some concerns about compliance with the Charter, with the main thrust of the objections below:

‘Can I just help the noble and learned Lord by saying that the thing that concerns me is Article 6.3 of the treaty and the way in which the charter has been incorporated to consolidate all the other European laws that were there before the making of the charter? It was the charter itself, and the way in which it has changed things, which makes the difference. I am not focusing primarily on the issues that have been referred to by my noble friend Lord Brennan in his opinion. I am really looking at those issues that arise as a result of the charter. I do not believe that their proper interpretation has been dealt with. I know that the House will not like me very much if I go through the whole charter, but I am very happy to share the issues

⁶⁶ Ibid, 170-173 WH.

⁶⁷ HC Deb 03 February 2015 volume 592 col 160-191.

⁶⁸ Ibid.

⁶⁹ Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015, HL Deb 24 February 2015, Volume 759 col. 1569-1625.

⁷⁰ Ibid, col. 1572.

which really concern me with the noble Earl, Lord Howe.’⁷¹

As can be seen here, the regulatory elements of institutionalism are present. Specifically, the Baroness highlights Article 6(3) of ‘The Treaty’ (presumably the TEU) and that this Article made the Charter relevant. This is some evidence of the regulatory element of institutionalism, with the Charter being perceived as a binding regulatory factor. However, it is difficult to argue that the Charter has in this case increased the significance of any one rights claim. It is discussed in a very general sense, without specific consideration of any one Charter right.

These concerns were in part answered with arguments as to why the Charter does not apply in these specific circumstances as the Regulations were not implementing EU law⁷², again without reference to a specific Charter article. Other members of the House of Lords were happy with government and Wellcome Trust legal opinions that the Regulations comply with the Charter⁷³.

The questions and responses do provide some evidence of the regulatory elements of institutionalism. However, the causal mechanism predicts the Charter increasing the significance of specific rights. Therefore, generally discussing the need to comply with the Charter does not fully fit with what was predicted, so therefore the citations and discussions here to not constitute evidence of what would be expected in this part of the causal mechanism.

3.1.2 Bundestag Discussions of Health and Asylum Seekers

Starting with the first motion by Die Linke⁷⁴, there is some evidence of increased significance of the Charter, in a way that is comparable to previous chapters. The reasoning offered for the motion includes references to the Charter, and the second paragraph of the reasoning is below⁷⁵:

‘The basic and human right to health is guaranteed in: Article 25 of the Universal Declaration of Human Rights (UDHR); Article

⁷¹ Ibid col. 1601.

⁷² Ibid col. 1617.

⁷³ Eg. Ibid, col .1608.

⁷⁴ Drucksache 18/5370, *supra* note 44.

⁷⁵ Own translation, original text:

‘Das Grund- und Menschenrecht auf Gesundheit ist in Art. 25 der Allgemeinen Erklärung der Menschenrechte (AEMR), Art. 12 des Internationalen Paktes über wirtschaftliche, soziale und kulturelle Rechte (WSK-Pakt), Art. 6 des Internationalen Paktes über politische und bürgerliche Rechte, Art. 11 der Europäischen Sozialcharta sowie Art. 35 der Europäischen Grundrechtecharta garantiert.’

12 of the International Covenant on economic, social, and cultural rights (ICESC); Article 6 of the International Covenant on Civil and Political Rights (ICCPR); Article 11 of the European Social Charter (ESC) as well as Article 35 of the Charter of Fundamental Rights.’

The Charter was not referred to during the specific debate on the motion.⁷⁶ The debate focused on other political arguments about asylum seekers and health as opposed to the application of fundamental rights documents. The motion was then referred to the relevant committee, but no further progress was made on the law.

Looking at the second relevant attempt by Die Linke to change asylum law on health⁷⁷ and the justifications given, there is the same sentence referencing the Charter in the same manner. The Charter is not mentioned in the debate on the motion.⁷⁸ or in the resulting health committee debate on the issue.⁷⁹ No further progress was made on the law.

Looking at these repeated references to the Charter, the Charter is being used to add to international and supranational standards on a specific issue, with the specificity of citing an individual article separating this usage from those in the previous section. Die Linke are trying to use the Charter to add to the social obligation of compliance created by international norms – the normative element of an institution. With the Charter adding evidence that something is an international legal and supranational norm, it is more likely to be taken more seriously by legislators who respect international norms. If the Charter did not exist, there would be less evidence that this principle was an international or supranational norm, meaning the specific norm would have been less likely to be applied. This is evidence of the sort of ‘increased significance’ predicted by the causal mechanism. It is additionally worth noting that this is relatively similar to the use of the Charter in the previous chapter, where it added to the supranational standards considered by judges (eg. section 3.1.8 of chapter 6).

⁷⁶ Plenarprotokoll 18/115 Deutscher Bundestag Stenografischer Bericht 115. Sitzung Berlin, Donnerstag, den 2. Juli 2015

⁷⁷ Drucksache 18/7413, *supra* note 48.

⁷⁸ Plenarprotokoll 18/158 Deutscher Bundestag Stenografischer Bericht 158. Sitzung Berlin, Donnerstag, den 25. Februar 2016.

⁷⁹ Protokoll-Nr. 18/80 18. Wahlperiode Ausschuss für Gesundheit 18. Wahlperiode Seite 1 von 14 Wortprotokoll der 80. Sitzung.

3.1.3 Bundestag Discussions of Clinical Trials Regulations

As mentioned in section 2.3, the German constitution enables the German parliament to comment on the EU legislative process, and they did so on new proposed clinical trials legislation⁸⁰, with the Charter being referenced in these discussions⁸¹.

Three separate references were made to the Charter during the debate by three different Bundestag members, translated below:

'Our concluded motion today clearly lays out that instrumentalisation of patients would not be compatible with the European Convention on Human Rights or the Charter of Fundamental Rights of the EU'⁸².

'These changes [concerning the rules on certain vulnerable groups] mean an instrumentalisation of patients, which is incompatible with fundamental rights according to the European Convention on Human Rights as well as the Charter of Fundamental Rights of the European Union'⁸³.

'Without changes it could be for example, that patients unable to consent could have to bear not only minimal but large risks without expecting a benefit for themselves. In my view that is incompatible with European Convention on Human Rights as well as the Charter of Fundamental Rights of the European Union'⁸⁴.

Looking at the citations of the Charter, individual members of the Bundestag are raising the Charter as an issue. They are questioning whether a new piece of legislation is compatible with the Charter. Similarly to the debate on mitochondrial regulations discussed in section 3.1.1, the Charter is used as

⁸⁰ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC, Brussels, 17.7.2012 COM(2012) 369 final 2012/0192 (COD).

⁸¹ Plenarprotokoll 17/219 Deutscher Bundestag Stenografischer Bericht 219. Sitzung Berlin, Donnerstag, den 31. Januar 2013.

⁸² Ibid, 27730 Own translation, original text:

'Unser heute zu beschließender Antrag stellt darüber hinaus klar, dass eine Instrumentalisierung von Patientinnen und Patienten nicht mit den Grundrechten der Europäischen Menschenrechtskonvention sowie der Charta der Grundrechte der EU vereinbar wäre.'

⁸³ Ibid, Own translation, original text:

Diese Änderungen bedeuten eine Instrumentalisierung von Patientinnen und Patienten, die nicht mit den Grundrechten gemäß der Europäischen Menschenrechtskonvention sowie der Charta der Grundrechte der Europäischen Union vereinbar ist.'

⁸⁴ Ibid, Own translation, original text:

„Ohne Änderungen könnte es beispielsweise sein, dass nicht einwilligungsfähige Patientinnen und Patienten nicht nur minimale, sondern größere Risiken zu tragen hätten, ohne dass ein Nutzen für sie zu erwarten ist. Das ist aus meiner Sicht nicht mit der Europäischen Menschenrechtskonvention sowie der Charta der Grundrechte der EU vereinbar.'

a non-specific standard, without citing any one specific Article. However, the German parliament engages in more substantive analysis than the British parliament in section 3.1.1. All three Bundestag Members discuss the issue of ‘instrumentalisation’ (one indirectly). Given questions of instrumentalisation of people are a frequent topic of cases and discussions of human dignity⁸⁵, it can be inferred that this is the substantive article to which the parliamentarians are referring. Here the Charter is again adding to existing supranational standards to which governmental authorities are expected to adhere.

Again, if the Charter did not exist, there would be less evidence that this was an international or supranational norm, meaning the specific norm would have been less likely to be applied. This is again evidence of the sort of ‘increased significance’ predicted by the causal mechanism. This fulfils the mechanism despite concerning EU-level legislation – the Charter caused a specific right to be treated with greater significance by a national legislature, even if in the context of EU regulation.

3.1.4 Discussions of the EU’s 7th Research Programme

As mentioned in section 2.4, members of the Bundestag raised 16 different questions about the funding of the EU’s 6th and 7th research framework programme⁸⁶, with the official government response⁸⁷ containing the reference to the Charter.

Question 12 was submitted as follows:

‘In the negotiations on the 7th Research Programme, does the government take the position that projects, in which the voluntary and uncompensated donation of tissues and cells for research is not secured, should be excluded from sponsorship?’⁸⁸

This question does not explicitly reference the Charter or fundamental rights, but raises issues relevant

⁸⁵ Eg. BVerfG E 87, 209/228, proclaimed on 20 October 1992; Pieroth, Schlink, *Grundrechte Staatsrecht II* (C.F. Müller, 2011, 27th Edition), 86.

⁸⁶ *Supra* note 55.

⁸⁷ *Supra* note 57.

⁸⁸ Deutscher Bundestag Drucksache 16/1607, *supra* note 57, S. 2. Own translation, original text:

‘Setzt sich die Regierung bei den Verhandlungen über das 7. FRP dafür ein, dass Projekte von einer Förderung ausgeschlossen werden, bei denen die freiwillige und unentgeltliche Spende von Geweben und Zellen für die Forschung nicht sichergestellt ist?’

to fundamental rights. The government responded separately to each question, and the response to question 12 mentions the Charter:

‘The participants in EU research projects are already, due to the regulations of the 6th Research Programme, bound to follow the provisions of the EU Charter of Fundamental Rights, the agreements of the European Council on human rights and biomedicine, and the Tissues and Cells Directive, which require the voluntary and uncompensated donation of tissues and cells.’⁸⁹

The German government refers to the Charter, but not in a way that relates to national law. They merely highlight that the projects are already bound by the Charter (and other instruments) as part of already existing EU law.

This citation therefore does not represent the increased significance of fundamental rights at the national level predicted by the causal mechanism. There is no impression from the legislature that the Charter has added an additional binding nature to a specific right, nor increased the social obligation of compliance. The government highlights the Charter as a defence against the point raised by the legislature – Charter protections are worked into law at an EU level, but this does not fall within the top-down Europeanisation model studied in this thesis.

3.1.5 Bundestag Discussions of Social Rights in the EU

The Bundestag discusses social rights on multiple occasions during the time frame covered by this study. Looking into wider issues of social rights, several members of the Bundestag raised questions.⁹⁰ The questions point out that the EU is committed to social rights and their promotion. Following this they highlight several CJEU judgments with perceived negative effects on social rights (*Laval*⁹¹ and *Rüffert*⁹²). They then substantively question the government on various possible responses to this judgment.

⁸⁹ Deutscher Bundestag Drucksache 16/1806, *supra* note 57, S. 5. Own translation, original text: ‚Die Teilnehmer an EU-Forschungsprojekten sind bereits aufgrund der Regelungen des 6. FRP dazu verpflichtet, die Bestimmungen der EU-Grundrechte- charta, des Übereinkommens über Menschenrechte und Biomedizin des Europa- rates und der EU-Geweberichtlinie einzuhalten, welche eine freiwillige und unentgeltliche Spende von Gewebe und Zellen verlangen.‘

⁹⁰ *Supra* note 60.

⁹¹ Case C-341/05 *Laval*, ECLI:EU:C:2007:809.

⁹² Case C-346/06, *Rüffert*, ECLI:EU:C:2008.

Looking at the initial references to the Charter by the Bundestag, in the opening paragraphs before getting to the substantive questions:

‘Social fundamental rights were also strengthened with the Treaty of Lisbon and the binding legality of the European fundamental rights Charter’⁹³.

Several Charter references are found in the government’s answer⁹⁴. In response to a question on what they would recommend in response to the judgments, the government stated that:

‘social fundamental rights and values are additionally enhanced through the Treaty, in particular through the binding nature of the social fundamental rights of the fundamental rights Charter, and the clear commitment to a social market economy, to be aimed at full employment and social progress’⁹⁵.

In response to a similar later question, the government reiterated:

‘social fundamental rights and values such as employee protection are additionally enhanced through the Treaty, in particular through the binding nature of the social fundamental rights of the fundamental rights Charter and the clear commitment to a social market economy, to be aimed at full employment and social progress and the new social transverse clause.’⁹⁶

Looking at these responses, the general belief with regards to the Charter appears to resemble those discussed in the previous section. The government once again highlights the role of the Charter in increasing the strength of social rights protection within EU law. But again this increase in significance is not taking place at a national level. Whilst it has overall legal significance that the Charter increases the significance of fundamental rights, and it has noteworthy consequences for EU law, it is outside of the top-down Europeanisation model of the thesis. There is therefore no evidence of increased significance as predicted by the mechanism.

⁹³ *Supra* note 60, Own translation, original text: ‚Mit dem Vertrag von Lissabon und der Rechtsverbindlichkeit der Europäischen Grundrechtecharta werden auch die sozialen Grundrechte gestärkt.’.

⁹⁴ *Supra* note 61

⁹⁵ *Ibid* p. 4, Own translation, original text: ‚Soziale Grundrechte und Werte werden durch den Vertrag zusätzlich aufgewertet, insbesondere durch das Verbindlichwerden der sozialen Grundrechte der Grundrechtecharta und das klare Bekenntnis zu einer sozialen Marktwirtschaft, die auf Vollbeschäftigung und sozialen Fortschritt abzielt.’.

⁹⁶ *Ibid* p. 4. Own translation, original text: ‚Soziale Grundrechte und Werte sowie der Arbeitnehmerschutz werden durch den Vertrag zusätzlich aufgewertet, insbesondere durch das Verbindlichwerden der sozialen Grundrechte der Grundrechtecharta, das klare Bekenntnis zu einer sozialen Marktwirtschaft, die auf Vollbeschäftigung und sozialen Fortschritt abzielt, und die neue soziale Querschnittsklausel’.

There are several more references to the Charter in the Bundestag's discussions of social rights. In 2014, several MPs from Die Linke proposed a motion against austerity politics, seeking to defend the social achievements of Europe⁹⁷. The motion repeatedly mentions healthcare as a European ideal, and an area of solidarity under threat from the politics of cuts. The Charter is specifically mentioned as something that binds EU institutions to the protection of social rights⁹⁸:

'The European Institutions and organs such as the European Commission or the European Central Bank are, also during the financial crisis, legally bound by the Charter of Fundamental Rights to compliance with the social fundamental rights contained there'

This is elaborated with much greater specificity in the debate on the motion⁹⁹. Here, MdB Harald Weinberg cited the Charter. He simply stated the text of Article 35, followed by the phrase 'This is not the case in Europe – on the contrary'. He then goes into significant detail as to the present health conditions in Greece, which he attributed to 'the Troika'.

Here there are some of the regulatory elements of institutionalism – the Charter is seen as binding on European institutions, and something that should consequently affect their actions in a specific way. This represents the hypothesised increased significance - the institutions are bound in a way that they would not otherwise have been, had the Charter not existed.

Moving onto another discussion of social rights, in 2017 Die Linke sought to amend the German constitution to improve the protection of social rights¹⁰⁰, wanting to better protect 'inviolable and inalienable rights' and discussing the need to translate international obligations into domestic law. The health context of this document is clear, with health forming an important social right mentioned on multiple occasions.

⁹⁷ Deutscher Bundestag Drucksache 18/1116 18. Wahlperiode 09.04.2014 Antrag der Abgeordneten Sabine Zimmermann (Zwickau), Wolfgang Gehrcke, Matthias W. Birkwald, Dr. Diether Dehm, Andrej Hunko, Katja Kipping, Jutta Krellmann, Azize Tank, Alexander Ulrich, Kathrin Vogler, Harald Weinberg, Birgit Wöllert, Pia Zimmermann und der Fraktion DIE LINKE.

⁹⁸ Ibid, own translation, original text: 'Die europäischen Institutionen und Organe wie die Europäische Kommission oder die Europäische Zentralbank (EZB) sind - gerade auch während der Finanzkrise - rechtsverbindlich an die Europäische Grundrechtecharta (GRCh) und die Einhaltung der darin verbrieften sozialen Grundrechte gebunden.'

⁹⁹ Plenarprotokoll 18/33 Deutscher Bundestag Stenografischer Bericht 33. Sitzung Berlin, Donnerstag, den 8. Mai 2014.

¹⁰⁰ Deutscher Bundestag Drucksache 18/10860 18. Wahlperiode 17.01.2017 Gesetzentwurf der Abgeordneten Azize Tank, Katja Kipping, Sabine Zimmermann (Zwickau), Matthias W. Birkwald, Annette Groth, Inge Höger, Kathrin Vogler, Harald Weinberg, Birgit Wöllert, Pia Zimmermann und der Fraktion DIE LINKE.

Section II of the proposal document details the ‘International Obligations of the Federal Republic of Germany and the interdependence and equivalency of economic, social, and cultural rights to civil political rights’. Separate sections are devoted to: The Universal Declaration of Human Rights; the International Covenant on Economic, Social, and Cultural rights; The agreements of the International Labour Organisation; the European Social Charter; the European Convention on Human Rights; and the Charter of Fundamental Rights. The section does not explicitly mention any of the articles in the independent variable of this thesis, however it does explicitly highlight the fourth chapter of the Charter on ‘solidarity’, which includes Article 35. The explicit rights mentioned are described as ‘amongst others’, thus including Article 35.

Again, if the Charter did not exist, there would be less evidence that the right to health care was an international or supranational norm, meaning the specific norm would have been less likely to be applied - the sort of ‘increased significance’ predicted by the causal mechanism. This fulfils the prediction of the causal mechanism – the Charter caused a right (or in this case a set of rights implicitly including Article 35) to be treated with greater significance by a national legislature.

Later that year, the Linke fraction again moved that the German parliament should do more to protect social rights in Europe.¹⁰¹, constituting a ‘new start’. The motion begins by discussing how EU Member States have committed themselves to economic, social, and cultural rights through mechanisms such as those in the TEU, the statutes of the central bank, the Maastricht criteria, the internal market regulation, and the EU Charter of Fundamental Rights. The motion then moves onto describing the current state of social policy in the EU, which it finds to be sub-optimal, before proposing several specific changes. The health policy context is again demonstrated through repeated references to health systems of various countries.

As above, the Charter is added to a list of supranational and international standards on social rights that the national legislature seeks to uphold. Again, if the Charter did not exist, there would be less evidence that the rights covered by Article 35 constituted an international and supranational norm. This once more constitutes evidence of the hypothesised increased significance, and so constitutes

¹⁰¹ Deutscher Bundestag Drucksache 18/12089 18. Wahlperiode 25.04.2017 Antrag der Abgeordneten Andrej Hunko, Azize Tank, Wolfgang Gehrcke, Sabine Zimmermann (Zwickau), Jan van Aken, Matthias W. Birkwald, Christine Buchholz, Sevim Dağdelen, Dr. Diether Dehm, Annette Groth, Heike Hänsel, Inge Höger, Katja Kipping, Katrin Kunert, Stefan Liebich, Niema Movassat, Dr. Alexander S. Neu, Alexander Ulrich, Kathrin Vogler, Harald Weinberg, Birgit Wöllert, Pia Zimmermann und der Fraktion DIE LINKE.

evidence for part 1 of the causal mechanism.

3.1.6 House of Commons Discussion of Water Bill

In the Water Bill debate, MP John Butterfill was one of many MPs to make points arguing against the fluoridation of water supplies. He argued that: Fluoride was a poison under the Poisons Act 1972; that Fluoridation violates the Offences Against the Person Act 1861; and the lack of consent from the populace meant it was in breach of Articles 3 and 8 of the ECHR.

The reference to the Charter is as follows¹⁰²:

Water fluoridation also breaches article 35 of the European charter of fundamental rights, which states that the right to health care includes the right to refuse health care, for whatever reason. It establishes the individual's right to receive particular drugs or treatments—or to prevent them from having such treatment administered against his/her wishes. The Government are in breach of both those treaties, and the offer of indemnity is therefore illegal.

On the face of it this intervention does represent the hypothesised increased significance. The Charter is again adding to list of supranational standards, and it is held up as something with which the UK government would want to comply. However, the picture is somewhat complicated by the almost complete factual inaccuracy of the argument. The text of Article 35 does not contain the statements John Butterfill says it does. So the Charter has not increased the significance of the fundamental rights contained within the article, rather it has merely been used as a tool to make an entirely separate point. Therefore this cannot be considered to constitute evidence of what is expected in the causal mechanism.

3.1.7 Overall Assessment

Looking at the evidence found in section 3.1, it can be said that the evidence supports part 1 of the causal mechanism. At the beginning of this section, the chapter sought smoking gun evidence, with individual occurrences strongly increasing confidence in the causal mechanism, due to being highly unique. There are several pieces of direct evidence, which in and of themselves prove the occurrence of what is expected in this part of the mechanism.

¹⁰² Water Bill, HC Deb 8 September 2003, Volume 410, col. 103.

In five out of the six areas above, the Charter adds to supranational standards and norms that national legislators should follow. For example: citing the Charter as a reason the British government should care about human dignity in the context of human cells including using the precise phrase ‘adding weight’ (P1(i)); the discussions of asylum seekers and health where Die Linke used the Charter to argue for changes in national legislation (P1(iv) and P1(v)); the German parliament highlighting concerns on instrumentalisation and the consequent lack of compliance with the Charter (P1(vi-viii)); elements of the Bundestag seeing the Charter as something that ‘strengthens’ social rights protection (P1(x)).

Not every citation or discussion of the Charter led to the increased significance expected in the causal mechanism. There is also national discussions of the Charter with no increased significance of fundamental rights implied – the Charter being used by the British legislature in a far more general sense than the mechanism predicted (P1(iii)), and using it inaccurately despite attempts at specifics (P(xv)). National legislatures and governments can also be seen reacting to the Charter’s effects at an EU level, without a corresponding increase in national significance, as in the discussion of the interaction between the Charter and the European Social Charter (P1(x-xii)).

Due to the smoking gun nature of the evidence however, the positive evidence in favour of the mechanism has a far greater effect than the negative. Significantly positively increasing confidence in the theory, even after negative evidence somewhat reduces it, means that there is still considerably higher confidence than before considering empirical evidence. Thus it can be stated that the evidence detailed in this section supports the causal mechanism – the Charter causing fundamental rights to be treated with greater significance

3.2 Part 2 - Policy Misfit

At part 2 of the mechanism, policy misfit is expected – some sort of clash between existing national circumstances and the increased significance of fundamental rights caused by the Charter. As discussed in section 2.2.2, any evidence that is found has relatively low uniqueness. Therefore multiple pieces of evidence are required in order to accurately demonstrate the existence of what is predicted by part 2 of the mechanism – multiple pieces of evidence making it through the metaphorical hoop, with each piece of evidence moderately increasing confidence in the prediction, to the effect that the increased significance of the Charter causes policy misfit in health law and policy.

3.2.1 UK Parliament Discussions of Human Fertilisation and Embryology: 2008 Act and Mitochondrial Donation Regulations 2015

There does appear to be some policy misfit present at this point. The UK government is of the opinion that the discussed legislation is in compliance with fundamental rights. The opinion reached by Lord Neill is that various fundamental rights documents point towards non-compliance. The misfit exists between these two views on legislative compliance – two different individual policy positions from different actors clashing sufficiently to constitute misfit. Once again however, similarly to the previous chapter, it is very difficult to state that policy misfit in this section is *caused by* the Charter. It is again only of multiple documents cited in favour of the particular proposition, so it is again reasonable to presume that, without the Charter, any policy misfit would have existed nonetheless.

3.2.2 Bundestag Discussions of Health and Asylum Seekers

Part 2 of the mechanism predicts policy misfit caused by the Charter – to find this the chapter needs to look at the differences between previous circumstances surrounding health and asylum seekers and the policies suggested in arguments referencing the Charter.

There is clearly a misfit between the existing national policy and the policy proposed by Die Linke – were there not a misfit there would be no need to propose a change in policy. The policy proposal itself could also be construed as evidence of policy misfit. This misfit is sufficient for the causal mechanism, as there are two opposing policy positions.

However, the mechanism requires policy misfit *caused by* the Charter. This can be determined by looking at the reasoning offered by Die Linke for the change in policy¹⁰³. It is firstly worth noting that the fundamental rights aspect is only part of the reasoning offered, indicating that at best fundamental rights are only part of the reasoning. Thus, fundamental rights at best were only one element causing misfit. Secondly, even looking at the Charter citation, it is merely one of many fundamental rights under consideration. Whilst the Charter does add to the number of supranational norms under consideration, it is unclear whether this increase in significance caused policy misfit. Other rights documents are cited besides the Charter, and there is no indication given in the text that the Charter played any special significance compared to those other rights documents. Given this fact and the other reasons offered, it can be stated that even without the Charter, Die Linke would likely be

¹⁰³ *Supra* note 45.

proposing changing the law, and thus that policy misfit would likely be present without the Charter.

This is equally true of the second legislative motion discussed in section 3.1.2. A wide range of other Charter rights are cited in the rights-related section, and there are multiple other alternative reasons offered for the law. It can there again be inferred that fundamental rights only forms part of the reasoning behind the legislative proposal, and again that the Charter was not a determining factor. Applying the same logic as to the previous paragraph, the conclusion is that the Charter did not cause policy misfit in this incidence either.

Policy misfit caused by the Charter is therefore not present, and thus this section provides no empirical evidence in favour of the mechanism.

3.2.3 Bundestag Discussions of Clinical Trials Regulations

Looking at the discussions of Clinical Trials Regulations, although the Bundestag invests greater significance in fundamental rights than they otherwise would have done, this takes place in the context of discussing EU-level legislation. Therefore there is no national policy to look to when considering policy misfit – there are no two policies to compare. However, policy misfit as a concept is broader than clashes between individual policy positions – see for example Bulmer describing misfit as a clash between ‘EU requirements’ and ‘domestic circumstances’¹⁰⁴. There is therefore some misfit in these circumstances – the EU-level legislation clashes with the domestic policy positions of Bundestag members representing multiple different parties of generally different ideologies.

Again however, it must be established whether the Charter *caused* the policy misfit. All three citations of the Charter come alongside a citation of the ECHR. Again therefore it is unclear whether the domestic position would clash with the EU position regardless of whether the Charter existed. Given this lack of clarity, it cannot be said that the Charter has *caused* policy misfit. Therefore there is no evidence of what is predicted by part 2 of the mechanism in discussion of the Clinical Trials Regulations.

3.2.4 Bundestag discussion of the EU’s 7th Research Programme

Looking at the discussions of Bundestag discussions of the EU’s 7th research programme, there is a

¹⁰⁴ Bulmer, ‘Theorizing Europeanization’, in Graziano, Vink, *Europeanization: New Research Agendas* (Palgrave MacMillan, 2007), 51. See Chapter 3 for more detail.

similar lack of *Charter-caused* policy misfit. The Bundestag raised various issues with the EU's 7th research programme, with the Charter being referenced in the government's response to the 12th question. There is a misfit between the national position and the EU position, but with the Charter being cited by the government as an EU-level protection *as a response* to the raised misfit, the Charter did not cause the national level misfit. Therefore there is no evidence in favour of the mechanism's predictions from these discussions.

3.2.5 Bundestag Discussion of Social Rights in the EU

In both of the situations where there is increased significance, there is some policy misfit present. In both situations, the left-wing MdBs from Die Linke sought to change policy. The status quo position on social rights clashes with the policies proposed by Die Linke, showing a clear misfit between the two situations. The question again comes as to whether the Charter has *caused* the policy misfit.

In the original document proposing a 'new start' in terms of European social policy, the Charter is explicitly mentioned as part of the justification behind the motion. However, this comes in the context of a lengthy document offering multiple reasons, so it is again reasonable to hypothesise that the document would have been produced even without the Charter's influence. The situation is more complex when assessing the contributions of MdB Weinberg. Whilst the Charter is the only international fundamental rights document raised in Weinberg's speech, the main substantive content is discussion of the negative rights situation in Greece. This analysis stands in contrast to an analysis which focused on explaining why the situation constituted a breach of the Charter specifically. This fact, in combination with the original document's reliance on a large number of other arguments and rights arguments, indicates that even had the Charter not existed, similar arguments would have been made.

On the constitutional amendment proposed by Die Linke, the Charter was one of many international and supranational fundamental rights documents. Beyond this, the Articles studied in the independent variable are only obliquely referenced, which additionally weakens any argument saying the Charter *caused* the policy misfit.

Therefore again these documents provide no evidence for what the mechanism leads us to expect, as they do not demonstrate policy misfit caused specifically by the Charter.

3.2.6 Overall Assessment

None of the previous five sections provide empirical evidence in this area of part 2 of the causal mechanism. In all five of the previous sections there is a policy misfit, but not one that can be clearly attributed to the Charter. Methodologically, the lack of evidence is strongly disconfirmatory - as there was high theoretical confidence in this part of the model, the lack of evidence is particularly significant. Given this strong prior confidence (and the attendant methodology discussed in chapter one), even one or two cases in which the increased significance did not lead to policy misfit would have severely impacted the confidence in the theory.

Given the overall absence of predictions expected by part 2 of the mechanism in the context of health law and policy in national legislation, the overall mechanism is rejected in this context. The significance of this rejection is discussed in the following conclusions.

4. Conclusions

It must be stated from the outset that the main hypothesis of the chapter has been rejected. The hypothesised Europeanisation mechanism broke down at part 2, policy misfit, and there is insufficient evidence that the Charter has caused Europeanisation of the health law and policy. There is the initial step of increased significance, but this is not followed by evidence of policy misfit. Thus in this context, the impact that the Charter has on the national legislative and policy process is practically non-existent. There is no Charter-inspired change to national health law and policy.

The Charter is used in a more general way than was predicted by the hypothesis. Rather than relying on specific articles, in multiple instances the legislators merely cited 'The Charter' as a more general concept. This use is noteworthy compared to the way the Charter was used in previous chapters, in which various judicial bodies relied upon specific articles. When considering fundamental rights protection in the health area, it is useful knowledge for drafters that legislators are likely to rely on a less specific version of whatever document is produced. This finding exemplifies a distinct problem in trying to rely purely on a legalistic approach in protecting fundamental rights – the key venue for legislation is the legislature, a venue for discussion that often cannot apply a legal document to its full potential. In order to fully protect fundamental rights, they need to be put into a form the legislature and public can understand and implement.

That being said, the way that the Charter is used is in and of itself noteworthy. Firstly, the hypothesised increased significance found by the chapter reflects the Charter working as expected. Looking back to chapter 3, many actors see the Charter as a way to raise the significance of fundamental rights within Member States. This is reflected by the increased significance found and summarised in section 3.1.6, seen in the German discussions on health and asylum seekers and on the Clinical Trials Regulation. But even outside of the particular increased significance predicted by the part 1 of the mechanism, the Charter has affected the position of fundamental rights within national legislatures in a way that fundamental rights' advocates would approve of. In other examples, there is instead greater discussion of fundamental rights generally: British parliamentarians rely on the Charter when making a point; the German government highlights the Charter's influence in the area of social rights; and the Charter is used as a response to national-level concerns around cell donation. Even outside of the model, the discussion itself could be seen as beneficial by those who advocate a fundamental rights approach – as proposed, it aids and improves discussion of fundamental right within a Member State.

The Charter is also added to the list of international and supranational fundamental rights documents to which legislatures pay attention. Both regulatory and normative elements of institutionalism influence proceedings – the Charter is sometimes seen as binding, but sometimes used as a normative standard. Thus two different elements of institutionalism offer different ways for a supranational legal norm to influence legislatures. The overall conclusions of the thesis will assess the significance of the Charter's variable impact between phenomena studied in the different chapters of the thesis.

However, the impact of this acceptance is very minimal, as evidenced by section 3.2, in which no policy misfit can be directly attributed to the Charter alone. It is also worth considering whether the Charter is only likely to be cited alongside other fundamental rights documents, a phenomenon seen on multiple occasions throughout this chapter, and was also seen in previous chapters. The effects the Charter has and could have as a supplementary fundamental rights document is discussed in the overall conclusions to the thesis (chapter 8).

5. Appendix 7.1 - Evidence Appendix

Causal Relationship

Causal mechanism by which the CFREU causes Europeanisation through ECJ judgments

Moderate Prior confidence

Contested initial step but well theorised responses thereafter

Proposition 1

Creation of Charter of Fundamental Rights causes national court to treat rights with greater significance

Expected Evidence

Direct citations of the Charter in a way that makes increased influence clear.

Alternatively, legal or institutionalist analysis that demonstrates the Charter's influence on the judgment (common doctrinal evidence)

Evidence for and against P1 from the debate on the Human Fertilisation and Embryology Act 2008, and the Human Fertilisation and Embryology Act (Mitochondrial Donation) Regulations 2015

Evidence for P1(i)

Lord Neill described the Charter as 'adding weight' to arguments based on fundamental rights, citing Article 1 on human dignity and Article 3 on bodily integrity. Increased significance demonstrated through the Charter providing additional evidence that something is a supranational norm.

Hu, Ha – The evidence is fairly unique, as there are few reasons Lord Neill would cite the Charter as part of supranational standards unless they felt it was evidence it was a supranational norm that should be followed. High accuracy as direct parliamentary reports.

Evidence against P1 (ii)

Jacob Rees-Mogg sought to use the Charter to increase significance of specific rights, but no specific response from: the relevant under-secretary in that specific debate; no response from the health minister in the full debate; or any reference to the Charter in the full debate.

Mu, Ha – There are some conceivable scenarios in which the Charter increased significance but was not discussed at all, but these are relatively unlikely given openness of debate. High accuracy as direct parliamentary reports.

Evidence against P1 (iii)

The Charter was cited in the Lords' debate on the Regulations, but without any specific provisions mentioned, and was only discussed fairly swiftly.

Mu, Ha – There are some conceivable scenarios in which the Charter increased significance but was not discussed at all, but these are relatively unlikely given openness of debate. High accuracy as direct parliamentary reports.

*Evidence for P1 from the German debates on asylum laws and health**Evidence for P1(iv)*

Die Linke fraction proposed amendments to asylum laws, with specific Charter articles being cited as part of a list of supranational standards. Increased significance demonstrated through the Charter providing additional evidence that something is a supranational norm

Hu, Ha – The evidence is fairly unique, as there are few reasons Die Linke would cite the Charter as part of supranational standards unless they felt it was evidence it was a supranational norm that should be followed. High accuracy as direct parliamentary reports.

Evidence for P1(v)

Die Linke sought to condemn and amend the Asylbewerbergesetz. Increased significance demonstrated through the Charter providing additional evidence that something is a supranational norm.

Hu, Ha – The evidence is fairly unique, as there are few reasons Die Linke would cite the Charter as

part of supranational standards unless they felt it was evidence it was a supranational norm that should be followed. High accuracy as direct parliamentary reports.

Evidence of P1 from German discussions of Clinical Trials Regulations

Evidence for P1(vi)

CDU-member Rudolf Henke stated that the Regulations were incompatible with the Charter of fundamental rights due to the instrumentalisation of patients, with the Charter being used alongside the ECHR as more evidence of a supranational standard.

Hu, Ha – The evidence is fairly unique, as there are few reasons Henke would cite the Charter as part of supranational standards unless they felt it was evidence it was a supranational normal that should be followed. High accuracy as direct parliamentary reports.

Evidence for P1 (vii)

SPD-Member Marlies Volker argued that suggested changes were incompatible with the Charter of fundamental rights due to the instrumentalisation of patients, with the Charter being used alongside the ECHR as more evidence of a supranational standard.

Hu, Ha – The evidence is fairly unique, as there are few reasons Volker would cite the Charter as part of supranational standards unless they felt it was evidence it was a supranational normal that should be followed. High accuracy as direct parliamentary reports.

Evidence of P1 (viii)

Green-Member Bender states that without changes, the suggested Regulations were incompatible with the Charter of fundamental rights due to the instrumentalisation of patients, with the Charter being used alongside the ECHR as more evidence of a supranational standard.

Hu, Ha – The evidence is fairly unique, as there are few reasons Bender would cite the Charter as part of supranational standards unless they felt it was evidence it was a supranational normal that should be followed. High accuracy as direct parliamentary reports.

Evidence against P1 from the Bundestag discussion of the EU's 7th research programme

Evidence against P1(ix)

The only citation of the Charter in this discussion is from the government in response to Bundestag-raised concerns around cell donation. Given the government merely highlights the Charter's protection at an EU level, it does not represent increasing significance at a national level so is no evidence in favour of the model.

Hu, Ha – The evidence is fairly unique, as there are few reasons the government would cite the Charter as part of EU-standards unless they felt it was evidence it was a supranational normal that should be followed. High accuracy as direct parliamentary reports.

Evidence for and against P1 from the Bundestag discussions of social rights

Evidence for P1(x)

In a document on the 50th anniversary of the European Social Charter, Die Linke Fraction argued that the rights in the European Social Charter were 'strengthened' by the Charter.

Hu, Ha – The evidence is fairly unique, as there are few reasons the fraction would cite the Charter as part of EU-standards unless they felt the Charter had that effect. High accuracy as direct parliamentary reports.

Evidence against P1 (xi)

The government's response to a question about *Laval* and *Rüffert* stated that the Charter enhanced the protection of fundamental social rights. However, this reference refers to social rights at an EU level, so it not evidence in favour of the model.

Mu, Ha – The evidence is only of medium uniqueness. It is my own inference that the government's response refers only to an EU level, and there is a moderate possibility it could refer to wider law. High accuracy as direct parliamentary reports.

Evidence against P1 (xii)

Further government response to questions about social rights references binding nature of the Charter reinforcing the protection of social rights. However, this reference refers to social rights at an EU level, so it not evidence in favour of the model.

Mu, Ha – The evidence is only of medium uniqueness. It is my own inference that the government's response refers only to an EU level, and there is a moderate possibility it could refer to wider law. High accuracy as direct parliamentary reports.

Evidence for P1 (xiii)

Motion on a 'new start' in social policy refers to the Charter as part of international and supranational fundamental rights standards. Charter adds to evidence that given norm is a supranational standard, thus increasing significance.

Hu, Ha – The evidence is fairly unique, as there are few reasons the fraction would cite the Charter as part of EU-standards unless they felt the Charter had that effect. High accuracy as direct parliamentary reports.

Evidence for P1 (xiv)

MdB Harald Weinberg uses Article 35 of the Charter to highlight that the European Institutions are bound to promote access to healthcare and social rights. Represents increased significance, in that the direct text of Article 35 is used as the basis of fundamental rights argument.

Hu, Ha – The evidence is fairly unique, as there are few reasons text of Charter would be used as unless they felt the Charter had that effect. High accuracy as direct parliamentary reports.

Evidence for P1 (xv)

In document proposing constitutional amendment, Die Linke mention the 4th chapter of the Charter, including Article 35. Increased significance demonstrated through the Charter providing additional evidence that something is a supranational norm.

Hu, Ha – The evidence is fairly unique, as there are few reasons Die Linke would cite the Charter as part of supranational standards unless they felt it was evidence it was a supranational norm that should be followed. High accuracy as direct parliamentary reports.

Evidence for P1 (xvi)

In document proposing the German parliament make a 'new start' on protecting social rights, Charter is cited as document binding German government on social rights. Increased significance demonstrated through the Charter providing additional evidence that something is a supranational norm.

Hu, Ha – The evidence is fairly unique, as there are few reasons Die Linke would cite the Charter as

part of supranational standards unless they felt it was evidence it was a supranational norm that should be followed. High accuracy as direct parliamentary reports.

Evidence against P1 from the Water Bill

Evidence against P1(xvii)

MP John Butterfill used Charter as part of an argument on international and supranational norms. However, the inaccuracy means that the Charter has not increased the significance of the rights contained within, so does not constitute evidence of P1.

Mu, Ha – Charter could be said to have increased significance of fundamental rights more generally as opposed to specific content – alternative explanation leads to medium uniqueness. High accuracy as direct parliamentary reports.

Proposition 2

Greater significance leads to policy misfit

Expected Evidence

The evidence of policy misfit will be a difference between the policy as a result of the judgment and pre-existing national level policy – either legislative change or changes in the actions of relevant bodies.

Evidence against P2 from Bundestag discussions on asylum seekers and health

Evidence against P2(i)

Policy misfit present in that Die Linke were proposing an alternative policy, but it cannot be held that the policy misfit was *caused* by the Charter due to the Charter only being one of multiple rights documents cited, and only one of many reasons offered.

Hu, Ha – There are few reasons Die Linke would not propose a new policy if they did not wish to change national policy. High accuracy as direct parliamentary reports.

Evidence against P2 from Bundestag discussions on clinical trials regulations

Evidence against P2(ii)

Misfit present due to difference between national position and proposed-EU legislation. However, given repeated citations of the ECHR alongside the Charter, it cannot be stated that the Charter *caused* the misfit.

Hu, Ha – Few other reasons to suggest the ECHR and the Charter as sources were they not the actual sources. High accuracy as direct parliamentary reports.

Evidence against P2 from the discussion of the EU's 7th Research programme

Evidence against P2(iii)

Misfit present due to difference between national position and provisions of research programmes. However, given repeated citations of the ECHR alongside the Charter, it cannot be stated that the Charter *caused* the misfit.

Hu, Ha – Few other reasons to suggest the ECHR and the Charter as sources were they not the actual sources. High accuracy as direct parliamentary reports.

Evidence against P2 from the Bundestag discussion of Social Rights

Evidence against P2(iv)

Misfit present due to difference between proposals put forward by Die Linke on social rights and the existing status quo. However, given extensive use of other arguments and international fundamental rights documents, cannot be stated that the Charter *caused* the misfit.

Hu, Ha – There are few reasons Die Linke would not propose a new policy if they did not wish to change national policy. High accuracy as direct parliamentary reports.

Evidence against P2 (v)

MdB Harald Weinberg, during the floor debate on the above motion, referenced the Charter. There was again misfit. However, given Weinberg's analysis did not focus on fundamental rights compliance, it likely that in the absence of the Charter, the misfit would have taken place anyway.

Mu, Ha – Given focus on Charter, it is less clear that the individual misfit would have taken place if it wasn't present, thus medium uniqueness. High accuracy as direct parliamentary reports.

Evidence against P2 (vi)

Misfit present, as demonstrated by the clash between the status quo and the constitutional amendment proposed by Die Linke. However, the Charter is merely one of many international and supranational fundamental rights documents cited in the reasoning, therefore there is again little evidence that the Charter *caused* the policy misfit in question.

Hu, Ha – Few other reasons to suggest international fundamental rights documents and the Charter as sources were they not the actual sources. High accuracy as direct parliamentary reports.

Chapter 8 - Conclusions

'People will be able to bring it up in the European Court of Justice just as if it was the Beano'

Keith Vaz, (British MP, then Minister for Europe, 2000)

Keith Vaz certainly went too far in claiming the Charter had the legal authority of a children's comic. But the main finding of this thesis is that, in the studied area, the above quotation is probably closer to the truth than the Michael Gove quotation on page 1, claiming the Charter could erode national independence. The fears of the Charter strongly influencing the health law and policy of the UK and Germany, in a way unforeseen and unlegislated by national parliaments, are mostly unfounded.

The research question investigated here - *to what extent has the EU Charter of Fundamental Rights caused top-down Europeanisation of the health law and policy of the UK and Germany?* - was designed to test some of the views discussed in the previous paragraph. Commissioners¹ and those involved in the Chartering process², academics working in fundamental rights in European law³, all who thought the Charter would lead to a dramatic increase in fundamental rights protection. Additionally, the thesis was designed to ascertain, in one specific policy area, if there was any truth behind the fears of Eurosceptics (that the Charter would be a grand intrusion into national sovereignty)⁴. Thus top-down Europeanisation was selected as a research model, as it as it focuses specifically on loss of control of national policy areas.

¹ http://ec.europa.eu/justice/events/assises-justice-2013/files/factsheets/fundamental_rights_en.pdf, first accessed 04/15/2016; Commission Communication on the Charter of Fundamental Rights of the European Union, 13 September 2000, Com (2000) 559 final.

² CHARTE 4105/00, Record of the first meeting of the Body to draw up a draft Charter of Fundamental Rights of the European Union (held in Brussels, 17 December 1999), 4.

³ Eg. Iglesias Sánchez, 'The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights' *CMLRev* 49 (2012), 1565; Rosas, Kaila, 'L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice : Un premier bilan' 16 *Il Diritto dell'Unione Europea* (2011), 28; O'Neill, 'The EU and Fundamental Rights – Part 2' 16 *Judicial Review* 4 (2015), 374; Denman, 'The Charter of Fundamental Rights', 4 *European Human Rights Law Review* (2010), 349; Menéndez, 'Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union' 40 *JCMS* 3 (2002), 471; Muir, 'Fundamental Rights: An Unsettling EU Competence' 15 *Human Rights Review* 1 (2014), 25.

⁴ Discussed in Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights' 8 *EUConst* 3 (2012) 375; and O'Neill, *ibid.*

The thesis focuses on specific areas of health law and policy and specific articles of the Charter. Articles 1, 3, 20, 21, and 35 of the Charter were selected due to their potential for overlap with health. For the purposes of this thesis, health law and policy are defined as: financing of healthcare systems; public health; regulation of healthcare; and social care.

It is also important to remember the fixed time period the thesis studies – from when the Charter was solemnly proclaimed in 2000 to the end of August 2017. This is particularly important in the context of UK-EU relations, which began a dramatic change as of the Brexit referendum on June 26 2016. Whilst the referendum and the following process will have many consequences and be the subject of many theses to come, this thesis is not one of them. The empirical findings are focused before the 2016 referendum, and concern impacts and changes that also took place before the referendum. Where it is relevant however, the chapter takes into account the Brexit process in assessing the likely impacts of the research, and any future potential work.

The process-tracing methodology used in this thesis involves tracing a theorised causal mechanism across multiple parts, empirically testing the existence of each part. One of the benefits of this methodology is that it offers a more detailed analysis on a specific area – the empirical chapters establish precisely which mechanisms of Europeanisation are present, and this information shapes the conclusions drawn in this chapter and throughout the thesis. It is therefore clear at the outset of this chapter which parts of the mechanisms are supported by the empirical evidence. To reiterate, the causal mechanism used in the thesis is as follows:

Part 1. The Charter increasing the significance of fundamental rights.

Part 2. The increased significance leading to policy misfit..

Part 3. Reactions to policy misfit.

Part 4. Reaction to policy misfit leading to policy change.

There are multiple findings worthy of note discussed in the chapter – albeit bounded conclusions, limited to the areas outlined. The main finding of the thesis is that, in the context studied, there is rarely policy misfit (part 2) or change (part 4) attributable to the Charter, and only limited top-down Europeanisation. Thus, the thesis' main hypotheses are rejected. Section 1 is dedicated to this aspect of the thesis' findings, returning to the issues posed in chapter 1: evidence against prevailing academic wisdom; the Charter not being a significant policy consideration in health law and policy; and the effects of the UK's opt-out being fairly limited in that context.

Section 2 considers what effects the Charter does have. Increased significance (part 1) was seen across all three of the studied areas: ECJ judgments; national judgments; and national legislatures. The form of increased significance confirms the three-part formulation in chapter 3. But as seen in chapter 4, a different form of increased significance was also noticed, one which goes against the top-down model of the thesis. Section 3 analyses the future impact of the thesis' findings in terms of: their practical impact on actors' litigation strategies; their potential for future academic work and developments at an EU level; and comparing the thesis' findings with recent academic developments. Finally, Section 4 analyses how, and the extent to which, the thesis' findings can be extrapolated further, specifically to other EU Member States; generalising the findings to other Charter rights; and generalising to other policy areas with potential for Europeanisation.

1. What the Charter Does Not Do

Bearing in mind that these findings are predominantly limited to the UK and Germany, the thesis now moves onto to summarising and analysing the findings made in the previous four chapters.

Given the rejection of the main hypothesis of the thesis, and given the value in giving some evidence against the fears and predictions of many, analysing the findings of thesis must start with what the Charter does not do.

1.1 Academic Wisdom on Human Rights

One of the main predictions the thesis is designed to test is that use of fundamental rights languages and constructions leads to rights being treated with greater significance, and that this greater significance leads to policy change. There generally was increased significance, but this did not lead to the hypothesised and expected policy change, even with the greater binding nature of the EU compared to international law. Looking at the more detailed elaboration in chapter 3, there a number of actors who expected policy change as a result of the Charter.

Various actors within the drafting convention had clear expectations that the Charter would be incorporated in a way that was legally-binding⁵. The European Commission repeatedly expressed the idea of the Charter strengthening fundamental rights protection, and the idea of strengthening

⁵ For the comments during the original convention, see CHARTE 4105/00, *supra* note 2.

protection of fundamental rights features in the preamble of the Charter.⁶ Various academics gave additional support to these ideas,⁷ as did various members of the EU judiciary.⁸

The implications of this assumption being incorrect thus need to be considered (that the Charter strengthens fundamental rights protection). There is now relatively substantial evidence that, at least in the policy areas studied by the thesis, the Charter does not make a substantial difference to the protection of fundamental rights. It does not influence policy in a notable way. At best, it has influence on the treatment of fundamental rights in ECJ judgments. To the extent that fundamental rights could be affected by these judgments, the Charter has impacted protection.

But this protection is not replicated at a national level – adding to the fundamental rights documents at a supranational level did not lead to greater national protection. This finding would be of some note to academics who thought otherwise, but also of concern to those who sought to use the Charter as a means of improving Member-State level fundamental rights. Other strategies, both through litigation and legislation, will have to be found should these actors seek to influence national-level fundamental rights protection from a European level.

The thesis can therefore draw some conclusions on the effects of the Charter for those seeking to use it to improve fundamental rights protections – what ‘deficiencies’ would they consider it has and what might be improved in the future. One clear example is that mechanisms of change based on expectations and norms are ineffectual, particularly when compared to mechanisms based on sanctions and compliance. As will be further discussed in section 2.2, mere changed expectations was insufficient to generate policy misfit sufficiently significant to generate change. A second point, as again will be further analysed in section 2.2, is that too often the Charter replicates pre-existing other common fundamental rights standards, without adding any sufficient additional pressure.

So when considering how these ‘deficiencies’ could be rectified, two conclusions are apparent. The first is that those seeking to use the Charter to protect fundamental rights should concentrate on sanctions and compliance, for example enforcement actions brought by the Commission against Member States. Alternatively, using secondary legislation with stronger enforcement mechanisms for

⁶ *Supra* note 2.

⁷ Eg. *supra* note 3.

⁸ Eg. Opinion of AG Bot in Case C-108/10, *Scattolon*, ECLI:EU:C:2011:211, para. 108; Opinion of AG Cruz Villalón in Case C-70/10, *Scarlet Extended SA*, ECLI:EU:C:2011:255, para. 30.

the promotion of fundamental rights. The second is that enforcement should focus on emphasising the ways in that the Charter is a separate standard from other international and supranational rights. For example, seeking to differentiate the content in the rights in the Charter from the content of other international fundamental rights documents, or emphasising areas where the Charter designates new rights to be fundamental.

These findings are additionally interesting when compared to studies of compliance. Studies of compliance focus on the processes by which actors alter their policies and legislation in order to comply with judgments. Whilst resembling Europeanisation in many ways, it focuses more specifically on responses to judgments, as opposed to Europeanisation which potentially studies far broader interactions⁹. However the literature remains relevant here, as many of the more noteworthy findings concern responses to ECJ judgments.

Much literature has been written on compliance with international human rights judgments. Similarly to Europeanisation it offers multiple theoretical perspectives, including both normative and coercion-based mechanisms¹⁰. Where normative theories apply to various international and regional human rights courts, compliance can be due to reputational concerns and social conformity¹¹, or normative commitments to international obligations¹². Sanctions-based compliance relies upon facilitating the involvement of civil society to create checks on the actions of governments¹³.

Here we can distinguish the Charter from what we know about compliance with EU law as well as the relationship between national governments and various international human rights treaties. Whilst a normative commitment to international human rights and the rule of law can be sufficient for

⁹ For more detailed analysis on the two see Graziano, Vink, 'Europeanization: Concept, Theory, and Methods' in Bulmer, Lequesne, *The Member States of the European Union*, (OUP, 2nd Edition, (2013), 31.

¹⁰ See for example Beach, 'Why Governments Comply: An Integrative Compliance Model that Bridges the Gap between Instrumental and Normative Models of Compliance', 12 *Journal of European Public Policy* 1 (2005), 113; Vachudova, *Europe Undivided: Democracy, Leverage and Integration after Communism* (OUP, 2005); Tallberg, 'Paths to Compliance: Enforcement, Management and the European Union', 56 *International Organization* 3 (2002), 609.

¹¹ Simmons, *Mobilizing for Human Rights International Law in Domestic Politics*, (CUP, 2009).

¹² Chayes, Chayes, 'On Compliance', 47 *International Organization* 2 (1993), 175.

¹³ Anagostou, Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter' 25 *European Journal of International Law* 1 (2014), 205; Hillebrecht, 'Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights' 13 *Human Rights Review* (2012), 279, 293.

compliance with the ECHR, and consequently change policy, this thesis provides empirical evidence that this statement is not true of the Charter. Having established this, we have more evidence against conventional academic wisdom on human rights, the consequences of which merit further investigation.

1.2 Not a Significant Policy Consideration

Again, those (often in the UK) who predicted large-scale policy impacts of the Charter will also be disappointed. There was no policy change as a result of the Charter through either national judgments or national legislation.

In of itself, this is a relative significant finding, but as a finding of a lack of effect, it is difficult to construct positive conclusions as to its significance.

As detailed in chapters 1 and 3, the existing theoretical and political assumptions would lead an observer to believe that the Charter would have significant implications for health law and policy. The thesis, as was intended, tested this assumption against empirical reality. Fortunately, for your average national health service manager, the Charter is not something to worry about. Therefore policy-making can realistically proceed without concern to the Charter. In fact, as discussed in section 2 (building on the findings of chapter 4), the Charter has given Member States increased freedom to operate in the public health sphere, without fear of internal market law.

However, there are limited circumstances in which the Charter would have notable effects on the health service, focused around an ECJ judgment. So policy-makers would be best advised to keep an eye on events in Luxembourg. Realistically however, this would likely not require any further attention than that which is already paid as part of compliance with EU law.

1.3 UK Opt-out has Limited Effects

The thesis also tests the effects of the so-called UK 'opt-out' of the Charter. Theoretically, if the opt-out has substantial effects, then the Charter should have had differential effects on Germany (which has not opted-out) and the UK.

The UK was far less receptive to the Charter in the area of national legislation. When you compare the

national political response, the German legislature was far more receptive to the Charter than the UK national legislature. The Charter was cited far more freely, both in health discussions and other discussions. Regardless of the outcome in the Europeanisation process, the Charter plays a larger discursive role in the German parliament than in the UK. Specific fractions within parliament (Die Linke) explicitly cited Charter provisions in their reasoning as to why the government should adopt a specific position. Beyond individual citations, the Left fraction consistently pursued this position using the Charter, showing commitment over time. Additionally, the Bundestag used the Charter to analyse EU health legislation, as part of the broader process of scrutinising the actions of the EU. This latter citation is particularly noteworthy as it raises the Charter with the implicit assumption that it will be followed.

Compare this to the UK. Here the Charter discussion is almost entirely constitutional. Even when the Charter was raised as an issue in a health context, the government response was less to analyse why the legislation complied with the Charter, rather to argue that the Charter itself did not constitutionally apply to this legislation. This is notably different analysis compared to Germany, in which the Charter was used in a way with more substantive effects. Analysing the effects the Charter has on national legislation is a far better reflection of the current position of the Charter, which is something that despite the British opt-out, does have some admittedly limited effects.

The purpose of the thesis is to test assumptions on the influence of the Charter. It is therefore worth noting that the Charter appears to have a lesser effect on the UK. Not only has the Charter not had the expected wide policy effects, it has seemingly influenced the UK legislature even less than in Germany. This is a particularly interesting finding, given that the vast majority of fears over the scope and effects of the Charter have come from the UK. These fears are shown up to be even less true in the UK. Beyond even the only limited policy change, the UK is subject to even less influence than Germany.

Looking at that specific interaction, it is arguable that the attitudes to the Charter influenced the degree to which it affected national legislation. The mechanism at that stage frequently relies upon national actors. Under sociological institutionalism, it relies on national actors fearing a reputational loss for not following the Charter. Under rational-choice institutionalism, it relies on national authorities fearing the negative consequences of non-compliance, and these fears altering cost-benefit analyses.

The attitude national authorities have towards the Charter has thus affected its application. For example, if national legislatures think the Charter does not constitutionally apply, they do not fear consequences for not following it. Similarly, if national legislatures spend significant amounts of time discussing the constitutional implications of the Charter rather than its substantive content, they are unlikely to use it to place pressure on the executive to change, highlighting the changed expectations. Additionally, if the general perception is that the government is not bound by the Charter, they are unlikely to feel a reputational loss for not following it. So this dynamic can be seen when comparing the findings of chapter 7 for the UK and Germany. There is less substantive discussion of the Charter because it is believed that the Charter has less influence. This opinion then becomes self-fulfilling. The Charter has less influence purely because it is discussed differently. If the Charter was discussed in the UK in the way it is discussed in Germany, that specific causal mechanism would be present and they would be one step closer to Europeanisation.

It is also therefore worth noting that in spite of the UK opt-out being subject to frequent derision, with many academics and commentators pointing out that the Charter did still have substantive effects in the UK, it has indirectly led to lesser effects in the national legislature in the UK. There it was assumed the Charter was not something that caused substantive effects, and therefore it did not cause substantive effects. So the opt-out itself surprisingly indirectly performed the function many were promised it would.

However, a significant caveat needs to be placed on this argument. In both chapters 5 and 6, there was little if no difference in the way the Charter interacted through either mechanism. So in these circumstances, the opt-out does seem to have had little significant impact. However, this finding itself needs to be read in the context of section 1 of this chapter. Even if the opt-out from the Charter does not have much effect, if the Charter itself is of minimum policy relevance then this fact is of little consequence.

2. What the Charter Does Do

Beyond the above analysis of the three sets of problems the thesis set out to study, and the overall rejection of the hypothesis, the thesis has at various points noted substantive effects of the Charter, and it is worth assessing the Charter's impacts to understand its relationship to national law and policy.

The effects of Brexit on the findings must at this point be considered. At time of writing, the vast

majority of details of the final relationship between the UK and the EU remain undecided, so any attempt to analyse their effects on the thesis would be highly speculative. However, the Charter has been substantively discussed in the UK at the time of writing in 2018, particularly in the context of the Withdrawal Bill.¹⁴ Some of these discussions form part of the evidence base of the thesis, but as seen in chapter 6, they do not constitute relevant substantive evidence. This exclusion is due to health not playing a particularly prominent role as part of these discussions. Health and the health system in general is frequently discussed as part of Brexit, but not frequently in the context of the Charter. The current state of the Withdrawal Bill *can* be used as a guide on how the Charter will continue to apply in the UK, if at all. Several provisions of the Bill affect the Charter's application in the UK post-Brexit, and are thus discussed in the following sections.

2.1 Part 1 - Increased Significance

The thesis built upon existing literature to create a specific conceptualisation of 'increased significance' – a detailed explanation of what some existing predictions mean in practice. This work is important to the thesis, but it could have a further impact. If the thesis found that the predicted increased significance is empirically present, then this formulation could be relied upon in future studies of the Charter's effects.

Process-tracing can separately establish which of the parts of the Europeanisation mechanism are empirically present by creating a detailed causal mechanism and then specifically analysing the empirical evidence for each part. Thus the thesis produces a detailed breakdown of the Charter's effects.

The first part of the mechanism, as mentioned in the introduction to this chapter, was 'increased significance'. Chapter 3 predicted three potential manifestations of increased significance: actors being more likely to use arguments based on fundamental rights than before; arguments based on fundamental rights being more likely to be generally accepted; and in trade-offs between competing claims, actors being more likely to favour fundamental rights.

The four substantive chapters established that increased significance was present in all of the studied areas: ECJ judgments; national judgments; and national legislative action. The evidence is summated

¹⁴ European Union (Withdrawal) Bill 2017.

and discussed below.¹⁵.

In the chapter on ECJ judgments the Charter gave the Court the ‘increased resolution’ to develop a centralised conception of dignity which was then imposed on the Member States through the implicit threat of sanctions and policy change. The Charter was also used as a fundamental rights standard as opposed to existing case-law on non-discrimination. In the chapter on national judgments, the Charter interacted with national fundamental rights, adding weight and evidence to the value of dignity that would not have been otherwise present. In chapter 6, the Charter added to supranational standards and norms that national legislators feel they should follow. Whilst the evidence in the chapter is not solely positive in terms of being evidence towards the hypothesis, the overall weight of evidence demonstrates increased significance has taken place.

The thesis thus empirically confirms this idea of increased significance. Looking more closely, the empirical evidence supports chapter 3’s specific analysis on what ‘increased significance’ means. For example, the ECJ used arguments based on fundamental rights, where previously they had relied on general principles of non-discrimination.¹⁶ Discussion of fundamental rights amongst national legislators were aided and improved by the existence of the Charter, in that specific rights were taken more seriously by the German legislature. National judges accorded greater significance to dignity in a trade-offs involving autonomy and social care.¹⁷

These findings are worthy of note, particularly increased significance in the legislature. At the time of writing, with the Brexit process taking place, it would seem implausible that the UK legislature would consider the Charter as a relevant factor for the executive. Yet chapter 6 discusses the actions of the very Eurosceptic Jacob Rees-Mogg, and his attempts to highlight the executive’s non-compliance with the Charter. That in itself seems at least somewhat noteworthy, in that it demonstrates the Charter’s influence in an unexpected arena.

The Charter’s effects can be considered more specifically and vary in a way not foreseen by the initial chapter 3 prediction. There are multiple areas in which rights in the Charter, including the articles studied in the thesis, substantively replicate other fundamental rights. In both chapter 5 and chapter 6, the Charter is added to a list of international and supranational norms that are accepted by the

¹⁵ See the individual chapters for further analysis.

¹⁶ Case C-236/09, *Test-Achats*, ECLI:EU:C:2011:100.

¹⁷ *London Borough of Tower Hamlets v TB and Others* [2014] EWCOP 53.

judiciary and legislature respectively. This effect is a specific example of the second strand of predicted effects - arguments made relying on these international standards are (in some circumstances) more likely to be accepted due to the Charter's added weight. But it can also be seen as a factor limiting the Charter's effects, as the Charter needs to be duplicating other areas of fundamental rights law in order to cause increased significance. But, as detailed through several empirical chapters, it is difficult to actively attribute change to the Charter – it is unclear whether these changes would have likely occurred anyway based on the pre-existing supranational standards.

However, the effects were slightly more impactful in areas where the Charter was used as a standard separate from other areas of law. The evidence for policy misfit (the second part of the mechanism) comes from areas where the Charter was used a more distinct standard: in *Brüstle* the Court developed its own centralised standard of dignity; in *Test-Achats* the court used the Charter rather than relying on pre-existing principles of non-discrimination; the Court similarly again choosing to use the Charter in *Léger*.

Increased significance has thus come from two somewhat separate directions – the Charter being used to bolster existing international and supranational fundamental rights documents, or the Charter being used as a standard in of itself. When comparing the two, the evidence shows that policy misfit follows the examples in the previous paragraph – the Charter as a standard in of itself as opposed to increased significance of a pre-existing principle. Where the Charter re-emphasised existing standards, policy misfit did not follow.

Both of these forms of increased significance are notable, and have their own impacts, but the above is a noteworthy distinction, the consequences of which will be discussed in section 3.

In terms of Brexit, there are several clarifications which can be made when discussing the effects of the above findings on the UK. Section 5(4) of the Withdrawal Bill, as it is currently written, states 'The Charter of Fundamental Rights is not part of domestic law on or after exit day'¹⁸. This however is subject to several caveats. Section 5(5) states that the previous subsection does not affect the retention of any fundamental rights principles that exist irrespective of the Charter, and that references to the Charter in any case law are to be read as if they were references to the corresponding fundamental rights.

¹⁸ European Union (Withdrawal) Bill 2017, Section 5(4).

Firstly, it can be argued that any increased significance the Charter has already caused through judicial cases is likely to continue. To the extent it re-emphasises existing fundamental rights, the case is already set in precedent, any references to the Charter are to be read as if it referred to another fundamental right. So these cases are likely to remain good law and thus have relevance. However, with the references to the Charter being read as references to other pre-existing rights, the Charter itself would not be used as a justification, rather the trade-off applied more generally.

Additionally, looking at the circumstances in which the Charter is used, it could still increase significance in spite of this provision. It is generally used as an example of supranational rights, including various other documents that, whilst not formally binding in the UK, are used to emphasise the content of international fundamental rights. So given judicial discretion will still exist, the option will still exist to use the Charter as contributory jurisprudence, and thus it could still increase the significance of fundamental rights in the way seen in the thesis.

2.2 Limited Top-down Europeanisation

Beyond the increased significance discussed in the previous section, the thesis found the theorised top-down Europeanisation in chapter 5 on ECJ judgments. It is worth at this point comparing this finding with the findings in other chapters. The process-tracing methodology allows step-by-step comparison of the different actors' responses, and very specific analysis of Europeanisation where it was found.

Starting with the first part, 'increased significance', some consequences do differ between the chapters. The increased significance displayed in chapters 4 and 5 is somewhat different. In those circumstances, the ECJ used the Charter to develop its own substantive conception of human dignity. In the other chapters, the use of the Charter was more constrained: in national courts the use of the Charter ran into doctrinal limitations, and was generally less impactful; in the national legislatures the Charter was often used in a general manner, without relying on specific articles.

In chapter 5 there was Europeanisation but in chapters 6 and 7 there was not, despite a relatively high level of initial confidence in the theory. The process broke down at the second part – the Charter causing policy misfit. In both national judgments and in the national legislatures, the Charter's use alongside multiple other documents meant that it was difficult to attribute policy misfit to the Charter - policy misfit likely would have occurred anyway. The nature of the most-frequent manifestation of

increased significance (the Charter adding weight to existing fundamental rights arguments) caused the lack demonstrable evidence for the second part.

The role of the ECJ is important in determining whether policy misfit occurs. Without the additional binding weight of an ECJ judgment, the Charter in of itself is not sufficient to cause policy misfit at a national level. Thus it is only through an ECJ judgment where policy misfit can be expected.

The size of the policy misfit bears additional importance to the process, in a way not predicted by the original mechanism. Even where policy misfit is found, it is not always followed by full Europeanisation. Looking at the causal mechanisms in the *Léger* case, the mechanism breaks down at the fourth part (policy change). There is a Charter-inspired ECJ judgment, where a right was treated with greater significance than previous non-discrimination principles. There were then attempts by national actors to use the Charter, both in terms of seeking to highlight the risk of non-compliance as well as seeking to use the judgment and the Charter to highlight changed expectations, leading to policy change. However, the overall policy change was lacking.

Comparing these facts with the outcomes elsewhere in chapter 5, the difference is the level of misfit involved. Rational-choice institutionalism explains Europeanisation through analysing cost-benefit analyses. The greater the misfit, the larger the risk of sanctions for non-compliance, and the increased severity of the sanctions themselves.¹⁹ Theories of sociological institutionalism also offer an explanation for this – whilst high adaptational pressure can result in inertia, medium levels of adaptational pressure create greater change than low levels, as some increased effort is required to change expectations.²⁰

There is however a reaction to policy misfit and policy change, and further insight can be gained by considering how the two models of Europeanisation interact - comparing how rational choice and sociological institutionalism function. In chapter 4, the change was best explained by rational choice institutionalism. In chapters 6 and 7, the initial steps of an interaction are best explained by sociological institutionalism. So there is a clear split between rational choice and sociological institutionalism – where national actors feel the need to act based on sanctions, as opposed to

¹⁹ Börzel, Dudziak, Hofmann, Panke, Sprungk, 'Why Member States do (not) comply with European law' *CES Working Paper* 148 (Harvard, 2007).

²⁰ Börzel, Risse, 'Conceptualizing the Domestic Impact of Europe' in Featherstone, Radaelli, *Politics of Europeanization* (OUP, 2003), 71.

expectations, only then will the Charter cause policy misfit and consequently Europeanisation. From that, some conclusions can be drawn about the functioning of supranational human rights and the Charter.

Based on this comparison, sanctions and compliance are more likely to increase significance to the point of policy misfit. The implication of this finding is that this route is more likely to lead to change, something worthy of consideration when discussing the future of fundamental rights policy in the EU, as discussions of fundamental rights enforcement should focus on strategies more likely to succeed. These thoughts will be further discussed in section 3, as will the failure of the expectations approach.

Finally, it is worth recapping that chapter 4 did find some of the predicted Europeanisation. This is noteworthy, despite only occurring on a small scale. There are some occasions of the Charter leading to top-down Europeanisation, with the Charter leading to policy change in a few limited circumstances. Whilst there are implications for the relationship between judiciary and legislature, and Member States' overall control of policy, the discussion must take place in the context of the expectations the thesis was designed to test – when looking at the overall picture it is more accurate to say that the Charter generally does not cause Europeanisation.

However, Brexit is likely to affect the degree to which these findings apply to the UK. Whilst section 6 of the Withdrawal Bill is clear that British courts are not bound by the ECJ, they may have regard to the ECJ if they consider it appropriate to do so. This again opens a route through which the findings of the thesis could still impact the UK, as British courts use ECJ judgments to clarify the UK's future relationship with the EU. To the extent to which the Charter increases significance of fundamental rights in an ECJ judgment, the option remains for national courts to refer to that judgment. The Charter would thus impact the UK in so far as national courts felt influenced by ECJ judgments influenced by the Charter. This influence could present as a weakened version of the mechanisms seen in chapter 4. ECJ judgments will still shape national judgments, which will influence government policy.

However, it is worth noting that both of these options would be fraught with political significance. Any resort to the Charter or the ECJ would likely cause ire amongst those who sought to leave the EU. So further work would have to be done to establish the political climate and judicial responses to Brexit, in order to fully understand the post-Brexit impact of the thesis.

2.3 Increasing Freedom of Member States to Act Within Internal Market Law

Chapter 4 shows that, including both the evidence on increased significance and the conclusions of that chapter, the Charter has several noteworthy, unexpected effects. By increasing the significance of fundamental rights, the Charter was actually able to increase the ability of Member States to operate on an assumption of no policy misfit. By allowing them to rely on the Charter when justifying national restrictions on free movement principles, Member States can operate more freely – knowing that the Charter has somewhat moved the focus of the ECJ away from centralised regulation of the internal market. Future research needs to be done on the extent to which this research can be generalised, as discussed in section 4, in order to fully understand the extent of the phenomenon. However these findings stand in noted contrast to contemporary research on ‘non-decisions’, i.e. Member States avoiding certain policy choices due to concerns of compatibility with ECJ jurisprudence²¹.

These findings also exist separately from a general analytical trend towards seeing the ECJ as responding to Member State interests²². The ECJ has elsewhere interpreted provisions narrowly, based on Member State interests and the fear of legislative override, but this would manifest differently to the judgments studied in this thesis. Specifically tracing the use of fundamental rights language allows us to show increased significance as a phenomenon specifically, and its attendant significance, separate from more general trends towards Member State flexibility.

3. Future Impact of the Research

With the above sections having established what the Charter does or doesn’t do, the chapter moves onto discussing the impact of these findings on future events, as well their impact on wider areas of research. This analysis draws on several specific overviews of ECJ-related research by Blauburger and Schmidt²³, with increased significance and ECJ decisions forming the main focus due to the

²¹ Blauburger, Schmidt, ‘The European Court of Justice and its Political Impact’ 40 *West European Politics* 4 (2017), 907, 914; Töller, ‘Measuring and Comparing the Europeanization of National Legislation: A Research Note’ 48 *JCMS* 2 (2010), 417

²² Larsson, Naurin, ‘Judicial Independence and Political Uncertainty: How the Risk of Override Impacts on the Court of Justice of the EU’ 70 *International Organization* 1 (2016), 377; Carubba, Grabel, *International Courts and the Performance of International Agreements. A General Theory with Evidence from the European Union*, (CUP, 2015)

²³ Blauburger, Schmidt, *supra* note 21; Blauburger, ‘National Responses to European Court Jurisprudence’ 37 *West European Politics* 3 (2014), 457

predominant lack of Member-State-level policy change found by the thesis.

One of the main ways the findings could impact the future is through affecting the litigation strategies of various national actors. Understanding how the Charter affects court judgments at various levels can give actors an understanding of how to use the Charter to achieve specific policy positions, in several ways.

Firstly, an ECJ judgment appears to act as a catalyst – without the Charter being used in a binding judgment from the ECJ at an EU level, it carries very little decisive weight. Whilst trying to change expectations can be successful in some circumstances, it does not appear to be a successful tactic regarding the Charter in the area of health law and policy.

Advocates seeking to use the Charter to implement policy change would be better advised to pursue litigation at the supranational level where possible (including through the preliminary reference procedure), rather than either national-level litigation or legislation. Greenpeace and Test-Achats both achieved notable victories in the cases discussed in chapters 4 and 5, whereas barely any change came about as a result of the national cases discussed in chapter 6.

Transformative change can also evolve incrementally²⁴, creating the need to study whole lines of jurisprudence in order to gain full understanding of events²⁵. Recently authors have emphasised the extent to which the Court will ‘lock in’ or ‘over-constitutionalise’ certain policies, affecting Member States’ actions even further²⁶. These phenomena and Member States’ subsequent compliance could also occur with regards to the Charter. It remains to be seen how the Charter will interact with these trends, but the increased significance shown by this thesis opens up many potential consequences. For example, some of the aforementioned advocacy groups could seek multiple judgments originating from multiple states, trying to build a line of jurisprudence which locks in the change they seek. This also builds on the idea of Charter-caused precedent discussed in section 2.1.

Chapters 4 and 5 of this thesis join ‘relatively few’²⁷ studies focusing on the domestic impact of ECJ jurisprudence, but those studies that do cover this material offer a few further potential effects

²⁴ Streeck, Thelen, ‘Introduction: Institutional Change in Advanced Political Economies in Streeck, Thelen, *Beyond Continuity: Institutional Change in Advanced Political Economies*, (OUP, 2005), 1-39

²⁵ Blauburger, Schmidt, *supra* note 21, 910.

²⁶ *Ibid*; Grimm, *Europa Ja – Aber Welches? Zur Verfassung der europäischen Demokratie*, (Beck, 2016).

²⁷ Blauburger, (2014), *supra* note 23, 458.

created by the above-discussed risk of a Charter-driven judgment. Where legal ambiguity is present as to a potential ECJ Judgment (as say with the Charter, increased significance, and national policies), states can respond in two ways. Either: ‘anticipatory obedience’, where states pre-emptively act to reduce the chances of a problematic decision that might affect domestic planning²⁸; or ‘contained compliance’, where states respond to individual cases narrowly in order to avoid unwanted far-reaching implications²⁹. These choices are influenced by factors such as time constraints, the number of similar cases (for example the series of cases studied in chapter 4 on the Charter and internal market law) and how negative the worst-case scenario of a judgment would be³⁰.

This thesis establishes that the Charter constitutes a risk of Europeanisation and policy change, albeit a small one. Where this risk is subject to some legal ambiguity states could, for example, respond proactively by altering national legislation to comply with any potential Charter-driven ECJ judgment involving increased significance. Alternatively, a state’s response could resemble more narrow compliance with a specific judgment. Thus, future research could investigate the extent to which these models predict responses to the Charter specifically (beyond the work already done by this thesis), as well as provide further information for advocates seeking to change public policy.

The Charter’s increased significance in ECJ judgments also invites a potential response at the EU level. Legislative responses to ECJ cases are categorised differently by recent theorists³¹, but can roughly be described as follows: codification, where case-law is fixed in legislation; modification, where ECJ jurisprudence is accepted with moderate change; override, in which the EU legislature seeks to overturn a judgment; and pre-emptive legislation, where the legislature seeks to change the law to avoid a potential ECJ judgment (similar to the ‘anticipatory obedience’ discussed above). Given the fundamental rights nature of the ECJ judgments in this thesis, it is easy to foresee modification or override resulting in a new judgment, with the ECJ continuing to uphold the Charter. However, codification or pre-emptive legislation could follow some of the cases discussed in the thesis, locking

²⁸ Schmidt, ‘Research Note: Beyond Compliance. The Europeanization of Member States through Negative Integration or Legal Uncertainty’ 10 *Journal of Comparative Policy Analysis* 3 (2008), 299, 304.

²⁹ Conant, *Justice Contained: Law and Politics in the European Union*, (Cornell, 2002), 70.

³⁰ Blauburger, (2014) *supra* note 23, 460-461

³¹ See for example Martinsen, *An Ever More Powerful Court? The political constraints of Legal Integration in the European Union*, (OUP, 2015); Martinsen, ‘Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union’, 48 *Comparative Policy Studies* 12 (2015) 1622; Schmidt, ‘Only an Agenda Setter? The European Commission’s Power over the Council of Ministers’ 1 *European Union Politics* 1 (2000), 37; Davies, ‘The European Union Legislature as an Agent of the European Court of Justice’ 54 *JCMS* 4 (2016), 846.

the increased significance of fundamental rights into internal market legislation. Pre-emptive legislation would provide legal certainty, and advocacy groups could put useful pressure on the EU legislature to implement such change.

Beyond this practical information, the findings can potentially lead to more focused research in the future. Knowing in advance that national judiciaries and national legislatures are, at least somewhat, influenced by expectations and the Charter can improve theoretical models built by future researchers, and direct more focused research.

The distinction made in section 1 must again be considered, that between the Charter being used as a standard in of itself and the Charter re-emphasising other existing fundamental rights documents (national or international). The former led to clearly attributable policy-misfit and subsequent policy change, whereas the latter did not. So when seeking to implement change through the judicial system, it is worth constructing arguments that emphasise the Charter as a standard in and of itself.

Whilst the thesis did find increased significance where the Charter was used to re-emphasise existing fundamental rights, this did not lead to change. It is worth noting however, that it did impact the discussions of fundamental rights within the national legislature. So, should advocates and activists seek to improve the general significance of fundamental rights within national legislatures (and to an extent the national judiciary), they should seek to use the Charter to re-emphasise otherwise existing national rights. But, it is worth being wary. The policy effects of this are limited, at least in the context of Europeanisation. It is possible that this increased significance might translate into other forms of change, but they are beyond the scope of the thesis.

Looking at the above findings, and studying the patterns seen across this thesis, the following advice could be offered, to the extent the findings of this thesis can be generalised:

- where possible, try and gain an ECJ judgment in your favour
- should you wish to bring about policy change at a national level otherwise, it is better to try and argue the Charter forms its own standards
- should this not be possible, the Charter can be used to add weight to arguments based on other fundamental rights

However, Brexit will affect the way the findings apply to the UK. As previously discussed, there is still

potential for national courts to take ECJ judgments into account in the future, as the Withdrawal Bill stipulates. So there is still some potential that influencing supranational litigation could influence national policy, were there potential for a case to emerge in that area.

4. Generalising the Results

The first chapter in the thesis openly acknowledged that the main benefits and findings of the thesis predominantly concerned the UK and Germany, and the conclusions offered in the above sections are bounded conclusions, making limited claims in a series of limited areas. But the process-tracing methodology allows some generalisation in the right circumstances and with detailed analysis.

Chapter 5 found Europeanisation, and thus by generalising it is possible to understand other areas this Europeanisation could be expected. However, it is very important to remember that the main findings of the thesis are a *lack* of Europeanisation - the Charter did not have the expected policy effects. This lack of Europeanisation better represents what is being generalised. The preceding steps found that did *not* lead to Europeanisation can also be generalised, as they themselves carry some significance as findings. Overall therefore, two separate but interrelated sets of findings are being generalised: Europeanisation in some circumstances following an ECJ judgment; or noteworthy parts of the causal mechanism but *not* Europeanisation.

4.1 The Limitations on Generalisation in Case-study Methodologies

Generally speaking, the process-tracing methodology is designed to give specific results in specific cases. More exactly, process-tracing produces within-case evidence of the existence or non-existence of a causal mechanism - 'Inferring beyond the single case to the rest of the population requires that it is causally similar to the studied case'³². The national health law and policy studied is the 'single case', and further cases being generalised to are: other Member States; other articles of the Charter; other national policies that are areas of potential Europeanisation.

But before engaging in any such generalisation, it is necessary to highlight its limited extent. Case studies, of which process-tracing is an example, provide a set of findings that is limited to small,

³² Beach, Pedersen, *Causal Case Study Methods: Foundations and Guidelines for Comparing, Matching, and Tracing* (UMich, 2016), 48.

bounded populations³³. Thus these are ‘middle-range theories’, with findings limited in time and space, as opposed to grander societal theories³⁴. Some authors do not consider generalisation to be a goal, rather that theories are merely used as a heuristic to understand the events in a particular case³⁵.

To the extent that it is possible, specific work is required to successfully and accurately generalise from process-tracing. Other cases need to be found that replicate the specific mechanistic relationship that was found in the thesis. This often requires specific research demonstrating that these causal relationships do exist, with previous work (for example this thesis) providing an illustrative guide of where to start. There is also significant potential for flawed generalisation, leading to misleading and inaccurate results³⁶.

Therefore, this thesis can only draw limited conclusions beyond the two studied cases of the UK and Germany. It is possible to offer *some* suggestions as to how the thesis’ findings could be replicated, based on the findings and relevant factors, but without the proper research supporting it, it is important to treat these generalisations with a pinch of salt.

4.2 The Need for Causal Homogeneity

In order to successfully generalise results to any extent, ‘causal homogeneity’ must be ensured. A causally homogenous population is one ‘in which a given cause can be expected to have the *same* causal relationship with the outcome across cases in the population³⁷, i.e. where the same cause results in the same outcome due to the same relationship existing. Here, the outcomes in a causally homogenous case would be that the Charter did *not* cause Europeanisation of health law and policy of a Member State, but did have some increased significance.

Therefore, other cases need to be found that are similar on a range of causally relevant factors. There will however, always be a trade-off between the homogeneity of cases and the desire to generalise

³³ Ibid, 51.

³⁴ Merton, *On Theoretical Sociology* (New York Press, 1967).

³⁵ Beach, Pedersen, *supra* note 32, 54; this view is more prevalent amongst historians, see for example Jackson, *The Conduct of an Inquiry in International Relations* (Routledge, 2011).

³⁶ Beach, Pedersen, *supra* note 32, 56.

³⁷ Ibid, 50.

more widely to get more results.³⁸ Homogeneity ensures accuracy, but limits the amount of information provided. A wider generalisation provides more information on a larger number of cases (and thus countries), but the risk of inaccuracy increases with the likely greater heterogeneity of more cases.

Therefore, when seeking to generalise, the causally relevant factors must be considered, based on the results of this piece of research, before considering which cases (i.e. which Member States) possess those causally relevant factors.

Methodologically, causally relevant factors must be a difference of kind, as opposed to a difference in degree.³⁹ A difference in kind is something that changes the *character* of a particular causal relationship. Conversely, a difference in degree is ‘*variations* in scores of causal concepts *within* these kind-differences’.⁴⁰ Essentially, a difference in kind is something that can be more clearly divided into crisp-sets with clear boundaries. The favoured blunt metaphor is that of pregnancy. A difference in kind is either pregnant or not pregnant. A difference in degree is that of 3 months pregnant or 8 months pregnant.

In mechanism-based research, the relationship between a given cause and outcome is studied. Both of these need to be fixed. At the point at which the causally relevant factors vary by differences in degree, as opposed to in kind, it is no longer sure that the causal relationship is the same. So if the causally relevant factor differs in degree, one cannot safely generalise to another case.⁴¹ Whilst the accuracy of this distinction has been questioned,⁴² it is reasonably well-established as relevant to causal case-study methods.

4.3 Causally Relevant Factors for the Thesis’ Findings

Based on the previous section, in order to safely generalise, the thesis must be analysed in order to find causally relevant factors – factors that determine the causal relationship between Charter rights and a national area of law and policy. Causally relevant factors must be identified for each of the areas

³⁸ Ibid, 54.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Munck, ‘Drawing Boundaries: How to craft Intermediate regime boundaries’ *Committee on Concepts and Methods Working Paper Series No. 4* (2005); Coppedge, *Democratization and Research Methods* (CUP, 2012).

of potential generalisation: generalising the findings on these Charter rights in this policy area to other EU Member States; generalising the findings to other Charter rights; and generalising to other policy areas with potential for Europeanisation.

4.3.1 Generalising to Other EU Member States

It is important to note from the outset that many of the factors which are causally relevant to the findings of the thesis are not factors that would vary between Member States. Therefore they would not be relevant when considering which states were causally homogenous.

Firstly, an important factor in whether Europeanisation took place in this context, as opposed to merely increased significance, is the presence of a relevant ECJ judgment – something which could occur with regards to any Member State. Similarly, the circumstances of the bottom-up Europeanisation discussed in chapter 4 are available to all Member States, in that all could be party to a case before the ECJ on public health in the internal market. Secondly, the Charter's effects were determined by whether the Charter was used as its own standard or duplicated national standard, but these are again circumstances that could be replicated across EU Member States. Thirdly, the reasons behind the increased significance the thesis did find are based on various theories that apply across Member States, meaning that that the part of the causal mechanism studied could reoccur across any Member State. Therefore, with an ECJ judgment, Europeanisation could be expected in any Member State.

Additionally, there is no evidence that some of the factors that were used to select the two Member States studied (and so were thought to provide variance) are causally relevant factors. For example, there is no evidence that the type of health system present in a country is a causally relevant factor. There are several reasons for its non-relevance. Firstly, the majority of change that has been observed has taken place through factors common to both systems, national judiciary and national legislative authorities. These factors exist regardless of the healthcare system in question, so help separate the nature of the system from being causally relevant. Secondly, when you look at the parts of health law and policy where change has been observed, they are frequently not directly connected to the structure of the health system. For example, whilst scientific research and permissible treatments often affect healthcare financing and so are part of the dependent variable, it is again something that does not factor into the classification of healthcare systems discussed in chapter 1. Thirdly, where the dependent variable was connected to the healthcare system, it was not in a particularly detailed way.

For example, merely considering questions of 'access' in an abstract binary fashion, as opposed to more specific details on how the healthcare system is accessed or financed – the sort of thing that varies between health systems in Europe.

One potentially causally relevant factor for increased significance but not Europeanisation, looking at the above conclusions, is the attitude to the Charter. If national authorities treat the Charter as if it has less significance, then its effects are less likely to be felt. So when considering which countries are causally homogenous and thus likely to show increased significance caused by the Charter, it must be considered which countries share a similar attitude to the Charter, and whose national authorities and institutions might respond similarly to those in the UK or Germany. Those causally homogenous with Germany could expect results more similar to Germany, and vice versa.

Beyond the specific attitudes to the Charter exhibited by the UK national authorities, attitudes towards the Charter could theoretically influence the causal mechanisms and processes in and around compliance with the ECJ and the Charter – if national authorities are more hostile to the Charter, they are likely to be more resistant to Charter-inspired judgments, meaning Europeanisation is less likely. So attitudes towards the Charter, or even the opt-out specifically, are another factor that might make a separate case causally homogenous to the cases selected in this thesis.

Attitudes towards the Charter vary in kind as opposed to degree. Similar to differences in misfit, it is something that cannot easily be quantified numerically. It can in several ways be quantified as set to which a case would or would not belong. Firstly, as above using the opt-out. A country either is or is not covered by the opt-out protocol. Countries could also be divided based on the attitudes of their political actors' towards the Charter, in a way that resembles the classification of outcomes in the Europeanisation process: hostile to the Charter; relatively neutral on the Charter; accepting of the Charter; and actively accepting of the Charter. Whilst not the most clearly defined sets, much like the Europeanisation outcomes used in the thesis, it is considerably closer to a difference in kind than a difference in degree, and therefore suitable here. Poland for example, could be classified as hostile to the Charter – it is covered by the opt-out protocol in the same way that the UK is, and based on developments in the past few years could be seen as having a negative reaction to EU law. Belgium or Luxembourg could be examples of a country that actively accepts the Charter – they are not covered by the opt-out protocol, their governments were in favour of a binding Charter even at the time of the Nice Treaty⁴³, and their populations have relatively consistent pro-EU views.

⁴³ <https://euobserver.com/news/1050>, first accessed 21/01/2018.

4.3.2 Generalising to Other Charter rights

When considering the factors causally relevant to the Charter rights causing change, the institutionalist theories and predictions of chapter 3 are again relevant. There are multiple theoretical reasons why designating something as a fundamental right could cause it to be treated with greater significance. A right being treated with greater significance is a finding in of itself, as well as the first steps of the Europeanisation process, both in terms of the top-down Europeanisation noted in chapter 5 and the separate, (similar to) bottom-up Europeanisation process discussed in chapter 4.

Chapter 3 offered multiple theories as to why the Charter would have the effect of increased significance. Whichever logic is behind human rights as a concept, including a claim within that conception grants it greater significance. For example: calling something a human right is to imply its substantive content is greater and more significant than other rights⁴⁴; calling something a human right implies it is necessary for human dignity⁴⁵; or calling something a human right implies it is part of the minimum standards required for life⁴⁶.

Beyond this, the way law and the Charter work as an institution mean it is likely to increase significance. Broadly speaking, the conversion of existing rights, principles, and claims into a more visible binding fundamental rights Charter increases their influence within institutionalist frameworks. In particular, the Charter increases the normative institutionalist element (a normative consensus around fundamental rights), thus increasing the social obligations of compliance and thus increasing the significance of rights. This logic applies across all the rights in the Charter.

As elucidated in section 2.1, the Charter had somewhat different effects where it was used as a standard more separate from other areas of law. Thus, a causally relevant factor is the extent to which the Charter is used as a standard in of itself, as opposed to replicating other rights or other legal principles.

Some conclusions can therefore be drawn as to the extent to which other rights could potentially have similar effects to those rights studied in this thesis. Generally speaking, the causal reasons behind the

⁴⁴ Eg. Griffin, *On Human Rights* (OUP, 2008); Beitz, *The Idea of Human Rights* (OUP, 2009).

⁴⁵ Eg. Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011), 335.

⁴⁶ Eg. Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, 2003), 56; Williams, *In the Beginning was the Deed* (Princeton, 2006), 19.

Charter's effects remain consistent across all the rights – they are all rights designated human rights, and the same institutionalist logic applies across the Charter. Generalisation also needs to consider which rights in the Charter might likely be used in a manner which replicated existing rights, and which were not. For example, the right to privacy (Article 7) is a common right in international or national fundamental rights law, whereas few fundamental rights documents contain a specific right to consumer protection (Article 38).

Both of these causally relevant factors are differences in kind rather than degree. The way the Charter is used is easily split into two distinct categories and is not quantified numerically. The same is also true of various pieces of theoretical logic applied to the Charter – the Charter does as opposed to does not fulfil these criteria.

4.3.3 Potential Generalisation to Other Areas of Law

In addition to generalisation to other Charter articles, the findings of increased significance (without leading to top-down Europeanisation) could be generalised to other areas of law. As mentioned in the previous section, the theoretical logic behind the increased significance applies across multiple areas of law. Similar increased significance could thus be expected elsewhere.

It is also worth analysing the extent to which these findings could be generalised to other areas of law and policy besides health. The thesis has not found evidence of large-scale policy change, with any policy impact limited to a few specific instances of Europeanisation. However, whilst not being a significant consideration, it is worth highlighting that there is nothing about the mechanics of Europeanisation that preclude its application to another area of law and policy. All that is required to create this potential is an area of law and policy where the substantive content has some overlap with the substantive content of one of more articles in the Charter.

But beyond the very limited top-down Europeanisation, as discussed in chapter 5 and section 2.3 of this chapter, there is some bottom-up Europeanisation – changes that actually increase the ability of Member States to operate on the assumption of no policy misfit. The thesis thus needs to establish the causally relevant factors in this change, and the extent to which this could be expected elsewhere.

Firstly, the changes found are located in the area of internal market law, so when extrapolating these changes to other areas of law, it is worth primarily focusing on areas where national law overlaps with

internal market law. Secondly, the important change found (as seen in chapter 4) is a shift between a centrally-regulated area of law, in which the EU has control, to an area of decentralised control with multiple legitimate interpretations. So when considering other areas in which the Charter might have a similar effect, it would need to be an area of EU law that is centralised in such a manner. This area would also need to be one where Member State preferences could be expressed as one of the Charter fundamental rights.

The overlap between internal market law and fundamental rights has been much studied. For example, Kosta⁴⁷ studied the fundamental rights implications of various areas of the internal market, and in doing so studied multiple different rights covering both civil and political rights and social and economic rights. These were mere examples of frequent interactions, and included interactions between: the right to data protection (Article 8 CFREU), the e-Privacy Directive⁴⁸, and the Data Retention Directive⁴⁹; freedom of expression (Article 11 CFREU) and the Audiovisual Media Services Directive⁵⁰; the right to take collective action (Article 28 CFREU) and the Posted Workers Directive⁵¹; and the right to health and legislation including the Tobacco Control Regulation⁵², the Orphan Medicinal Products Regulation⁵³, and the Patient Mobility Directive⁵⁴.

All of these are examples of areas with potential for the bottom-up Europeanisation found in chapter

⁴⁷ Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart, 2015).

⁴⁸ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 203.

⁴⁹ Directive 2006/24/EC of the European parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105.

⁵⁰ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Text with EEA relevance), OJ L 95.

⁵¹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18/1.

⁵² Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (Text with EEA relevance), OJ L 152.

⁵³ Regulation (EC) No 141/2000 of the European Parliament and of the Council of 16 December 1999 on orphan medicinal products, OJ L 18/1.

⁵⁴ Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, OJ L 88/45.

5 (with the slight exception of the Data Retention Directive no longer being in force). They are centralised areas of EU law, where Member States could want to express a policy preference using a fundamental right. Thus, a shift in logic from the ECJ could be seen, from a centralised interpretation to deference to Member States on the substance of fundamental rights protection. Most importantly however, in Kosta's work they merely represent examples of the general interaction between internal market law and fundamental rights⁵⁵, which implies the potential for the interactions found in this thesis to be replicated across internal market law more generally.

Again, the various pieces of Europeanisation logic that apply to the thesis, both bottom-up and top-down, are the differences in degree rather than in kind required for accurate generalisation of the causal mechanism.

5. Conclusions

Over the course of several years, I set out to study what could have been a classic case of the EU's competence creep. Many thought that the consequences of the Charter would be to limit Member State control, and have notable effects on important areas of national policy. The goal of the thesis was to test these predictions (or fears), whilst at the same time establishing the impact the Charter could have on national finances and control of health law and policy. The thesis established a model of the Charter causing 'increased significance', supported by institutionalist theories of EU law and wider human rights literature, and sought to test it in a specific policy area.

There is no doubt that Keith Vaz overstated the Charter's lack of influence and effects. But when considering the overall impact of the Charter, he is certainly closer than many of the academics and politicians whose opinions were discussed in the first three chapters. Realistically in the area of health law and policy, the practical impact of the Charter never materialised beyond a few specific ECJ cases. So with the catalyst of an ECJ judgment, the binding nature of EU law can pressure actors into change. As discussed earlier in the chapter, trying to influence these judgments could be a wise strategy for those seeking to enforce specific fundamental rights positions. But this is not a very dramatic finding, as realistically it merely affects the existing dynamic between the ECJ and Member States. The thesis has failed to find any data showing large-scale influence of the Charter on national fundamental rights protection in the area this thesis studies (health law and policy).

⁵⁵ Kosta, *supra* note 31, 7.

So where to go from here? Considering future research, the impact of the thesis is clear. Only one or two elements of this chapter prompt questions as to the future. The first is undoubtedly Brexit. The thesis elucidated some, albeit limited, impacts to judicial decision-making, as well as increasing significance in the legislature. Even if these did not lead directly to policy misfit, it is a significant change in thinking and analysis. So, in terms of future research into the Charter, future research needs to establish whether the UK-related findings are likely to continue post-Brexit, as well as any new relationship between UK law and the Charter that emerges from negotiations and withdrawal legislation. No doubt many pieces of academic research will be written on the effects of Brexit on health, fundamental rights, and countless other areas, but at some point in the future the findings of this thesis could be further explored. Any future work on Europeanisation and the UK will join various works on Europeanisation of non-Member-States⁵⁶.

It is also worth noting that, contrary to raising questions as to the Charter's national influence and limitations on Member State control, the thesis has raised questions as to how the Charter has increased Member State control. The thesis found that Member States were able to exert more control over their national health policies as opposed to ECJ-based control. It is worth exploring this dynamic further. Are there other areas of national policy where the Charter boosts the position of Member States compared to aspects of internal market law, as seen in the bottom-up Europeanisation discussed earlier in the chapter? As postulated in section 1, are there other areas in which the Charter could decrease EU-level decision-making and control and move power back towards national institutions, be they courts, legislatures, or other entities?

Other areas of the thesis point to ECJ judgments as a potential area for future research. With the increased significance only resulting in Europeanisation when combined with an ECJ judgment, those seeking to study the influence of the Charter should focus on its impacts on this decision-making process.

In terms of health policy and the EU, the Charter is not a source of particular friction. Any future impact of the EU on national health law and policy does not seem to come from the Charter as a source. There is minimal impact in terms of control of national policy, and minimal impact in terms of substantive change through the ECJ, national judgments, or national legislatures. So I would say that those seeking to study and understand the influence of international fundamental rights on health law and policy

⁵⁶ For an overview, see Schimmelfennig, 'Europeanization beyond Europe' 10 *Living Reviews in European Governance* 1 (2015), 1.

should look elsewhere.

Overall, whilst the findings of this thesis are limited by the rejection of the main hypotheses, this is the end of a piece of work that has heavily investigated the effects of the Charter. This work could either close or open a new path for fundamental rights protection in the EU. By demonstrating the limited yet specific effects of the Charter, the thesis has provided valuable evidence of the practical functioning of fundamental rights protection in the EU. Whatever happens, it should no longer be assumed that the Charter has important effects in every area of law and policy – this thesis has demonstrated there is at least one area in which it does not, and this chapter has discussed the potential for other findings in other areas. Either the EU can continue to rely on a Charter with limited effects or a national level, or it could try to move on into a post-Brexit world with newer instruments or different methods for protecting the basic rights of citizens.

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Evidence Base Appendices

1. Evidence Base Appendix for Chapters 4 and 5

Article 1

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Article 3

C-148/13 – A ECLI:EU:C:2014:2406
C-562/13 – Abdida ECLI:EU:C:2014:2453
C-483/11 - Boncea and Others
C-293/12 - Digital Rights Ireland and Seitlinger and Others ECLI:EU:C:2014:238
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Article 20

C-562/13 – Abdida ECLI:EU:C:2014:2453
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C-682/13 P - Andechser Molkerei Scheitz v Commission ECLI:EU:C:2015:356
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C-1/14 - Base Company and Mobistar ECLI:EU:C:2015:378
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C-356/12 - Glatzel ECLI:EU:C:2014:350
C-580/12 P - Guardian Industries and Guardian Europe v Commission ECLI:EU:C:2014:2363
C-45/12 - Hadj Ahmed ECLI:EU:C:2013:390
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C-234/12 - Sky Italia ECLI:EU:C:2013:496
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C-135/13 - Szatmári Malom ECLI:EU:C:2014:327
C-69/14 - Târșia ECLI:EU:C:2015:662
C-444/11 P - Team Relocations and Others v Commission ECLI:EU:C:2013:464
T-456/10 - Timab Industries and CFPR v Commission ECLI:EU:T:2015:296
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C-665/13 - Sindicato Nacional dos Profissionais de Seguros e Afins ECLI:EU:C:2014:2327
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T-392/07 - Strack v Commission ECLI:EU:T:2013:8
C-69/14 - Târșia ECLI:EU:C:2015:662
C-444/11 P - Team Relocations and Others v Commission ECLI:EU:C:2013:464
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C-161/11 - Vino ECLI:EU:C:2011:420
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Article 21

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Deutscher Bundestag 14. Wahlperiode Drucksache 14/5280 09. 02. 2001 Schriftliche Fragen mit den in der Woche vom 5. Februar 2001 eingegangenen Antworten der Bundesregierung

Deutscher Bundestag 14. Wahlperiode Drucksache 14/5280 09. 02. 2001 Schriftliche Fragen mit den in der Woche vom 5. Februar 2001 eingegangenen Antworten der Bundesregierung

Plenarprotokoll 14/168 Deutscher Bundestag Stenographischer Bericht 168. Sitzung Berlin, Freitag, den 11. Mai 2001

Plenarprotokoll 14/179 Deutscher Bundestag Stenographischer Bericht 179. Sitzung Berlin, Donnerstag, den 28. Juni 2001

Deutscher Bundestag Drucksache 14/4654 14. Wahlperiode 17. 11. 2000 Antrag der Abgeordneten Dr. Klaus Grehn, Uwe Hirsch, Dr. Gregor Gysi, Manfred Müller (Berlin), Dr. Dietmar Bartsch, Roland Claus und der Fraktion der PDS

Deutscher Bundestag Drucksache 14/6443 14. Wahlperiode 27. 06. 2001 Antrag der Abgeordneten Uwe Hirsch, Dr. Klaus Grehn, Roland Claus und der Fraktion der PDS

Deutscher Bundestag Drucksache 14/7483 14. Wahlperiode 14. 11. 2001 Antrag der Fraktionen SPD und BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 14/7791 14. Wahlperiode 12. 12. 2001 Entschließungsantrag der Abgeordneten Dr. Klaus Grehn, Uwe Hirsch, Dr. Dietmar Bartsch, Wolfgang Gehrcke und der Fraktion der PDS

Plenarprotokoll 14/219 Deutscher Bundestag Stenographischer Bericht 219. Sitzung Berlin, Freitag, den 22. Februar 2002

Deutscher Bundestag Drucksache 15/548 15. Wahlperiode 12. 03. 2003 Antrag der Fraktionen SPD und BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 15/577 15. Wahlperiode 12. 03. 2003 Antrag der Abgeordneten Sabine Leutheusser-Schnarrenberger, Dr. Claudia Winterstein, Jürgen Türk, Ulrich Heinrich, Ernst Burgbacher, Gudrun Kopp, Dr. Werner Hoyer, Daniel Bahr (Münster), Rainer Brüderle, Helga Daub, Jörg van Essen, Ulrike Flach, Otto Fricke, Horst Friedrich (Bayreuth), Rainer Funke, Dr. Christel Happach-Kasan, Klaus Haupt, Birgit Homburger, Dr. Heinrich L. Kolb, Jürgen Koppelin, Sibylle Laurischk, Ina Lenke, Markus Löning, Dirk Niebel, Günther Friedrich Nolting, Detlef Parr, Cornelia Pieper, Gisela Piltz, Dr. Andreas Pinkwart, Dr. Max Stadler, Dr. Rainer Stinner, Carl-Ludwig Thiele, Dr. Wolfgang Gerhardt und der Fraktion der FDP

Plenarprotokoll 15/31 Deutscher Bundestag Stenografischer Bericht 31. Sitzung Berlin, Donnerstag, den 13. März 2003

Plenarprotokoll 15/43 Deutscher Bundestag Stenografischer Bericht 43. Sitzung Berlin, Donnerstag, den 8. Mai 2003

Deutscher Bundestag Drucksache 14/3522 14. Wahlperiode 07. 06. 2000 Antrag der Abgeordneten Dr. Helmut Haussmann, Hildebrecht Braun (Augsburg), Rainer Brüderle, Ernst Burgbacher, Jörg van Essen, Ulrike Flach, Joachim Günther (Plauen), Dr. Karlheinz Gutmacher, Klaus Haupt, Ulrich Heinrich, Walter Hirche, Birgit Homburger, Dr. Werner Hoyer, Jürgen Koppelin, Dirk Niebel, Hans-Joachim Otto (Frankfurt), Detlef Parr, Cornelia Pieper, Dr. Edzard SchmidtJortzig, Dr. Herrmann Otto Solms, Dr. Dieter Thomae, Dr. Wolfgang Gerhardt und der Fraktion der F.D.P.

Plenarprotokoll 15/53 Deutscher Bundestag Stenografischer Bericht 53. Sitzung Berlin, Donnerstag, den 26. Juni 2003

Plenarprotokoll 15/56 Deutscher Bundestag Stenografischer Bericht 56. Sitzung Berlin, Donnerstag, den 3. Juli 2003

Plenarprotokoll 15/82 Deutscher Bundestag Stenografischer Bericht 82. Sitzung Berlin, Donnerstag, den 11. Dezember 2003

Plenarprotokoll 15/119 Deutscher Bundestag Stenografischer Bericht 119. Sitzung Berlin, Freitag, den 2. Juli 2004

Deutscher Bundestag Drucksache 15/4900 15. Wahlperiode 18. 02. 2005 Gesetz der Bundesregierung

Plenarprotokoll 15/160 Deutscher Bundestag Stenografischer Bericht 160. Sitzung Berlin, Donnerstag, den 24. Februar 2005

Plenarprotokoll 15/175 Deutscher Bundestag Stenografischer Bericht 175. Sitzung Berlin, Donnerstag, den 12. Mai 2005

Deutscher Bundestag Drucksache 16/1041 16. Wahlperiode 23. 03. 2006 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums für Wirtschaft und Technologie vom 21. März 2006 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Lötzer, Dr. Diether Dehm, Cornelia Hirsch, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 16/863 –

Deutscher Bundestag Drucksache 16/863 16. Wahlperiode 08. 03. 2006 Kleine Anfrage der Abgeordneten Ulla Lötzer, Dr. Diether Dehm, Cornelia Hirsch, Dr. Barbara Höll, Kornelia Möller, Alexander Ulrich, Sabine Zimmermann und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 16/1243 16. Wahlperiode 13. 04. 2006 Die Antwort wurde namens der Bundesregierung mit Schreiben des Auswärtigen Amts vom 12. April 2006 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Rainer Steenblock, Volker Beck (Köln), Marieluise Beck (Bremen), weiterer Abgeordneter und der Fraktion BÜNDNIS 90/ DIE GRÜNEN – Drucksache 16/1096 –

Deutscher Bundestag Drucksache 16/1806 16. Wahlperiode 13. 06. 2006 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums für Bildung und Forschung vom 9. Juni 2006 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Priska Hinz (Herborn), Krista Sager, Volker Beck (Köln), weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 16/1607 –

Plenarprotokoll 16/46 Deutscher Bundestag Stenografischer Bericht 46. Sitzung Berlin, Mittwoch, den 6. September 2006

Plenarprotokoll 16/57 Deutscher Bundestag Stenografischer Bericht 57. Sitzung Berlin, Donnerstag, den 19. Oktober 2006

Deutscher Bundestag Drucksache 16/3042 16. Wahlperiode 19. 10. 2006 Kleine Anfrage der Abgeordneten Jürgen Trittin, Volker Beck (Köln), Alexander Bonde, Dr. Uschi Eid, Thilo Hoppe, Winfried Nachtwei, Omid Nouripour, Claudia Roth (Augsburg), Rainer Steenblock und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 16/3206 16. Wahlperiode 27. 10. 2006 Kleine Anfrage der Abgeordneten Dr. Uschi Eid, Marieluise Beck (Bremen), Volker Beck (Köln), Grietje Bettin, Ekin Deligöz, Kai Gehring, Katrin Göring-Eckardt, Priska Hinz (Herborn), Thilo Hoppe, Ute Koczy, Fritz Kuhn, Kerstin Müller (Köln), Winfried Nachtwei, Claudia Roth (Augsburg), Krista Sager, Rainer Steenblock, Jürgen Trittin und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 16/3402 16. Wahlperiode 08. 11. 2006 Antrag der Abgeordneten Dr. Gregor Gysi, Oskar Lafontaine, Dr. Diether Dehm, Alexander Ulrich, Dr. Hakki Keskin, Hüseyin-Kenan Aydin, Wolfgang Gehrcke, Inge Höger-Neuling, Katrin Kunert, Dr. Norman Paech, Paul Schäfer (Köln), Dr. Kirsten Tackmann und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 16/3327 16. Wahlperiode 08. 11. 2006 Antrag der Abgeordneten Rainer Steenblock, Jürgen Trittin, Omid Nouripour, Marieluise Beck (Bremen), Dr. Uschi Eid, Kai Gehring, Thilo Hoppe, Ute Koczy, Kerstin Müller (Köln), Winfried Nachtwei, Claudia Roth (Augsburg), Margareta Wolf (Frankfurt) und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 16/3617 16. Wahlperiode 29. 11. 2006 Antrag der Abgeordneten Volker Beck (Köln), Rainer Steenblock, Omid Nouripour, Marieluise Beck (Bremen), Dr. Uschi Eid, Thilo Hoppe, Ute Koczy, Kerstin Müller (Köln), Winfried Nachtwei, Claudia Roth (Augsburg), Jürgen Trittin und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 16/3621 16. Wahlperiode 29. 11. 2006 Antrag der Abgeordneten

Markus Löning, Michael Link (Heilbronn), Christian Ahrendt, Dr. Karl Addicks, Daniel Bahr (Münster), Uwe Barth, Rainer Brüderle, Angelika Brunkhorst, Ernst Burgbacher, Patrick Döring, Mechthild Dyckmans, Jörg van Essen, Otto Fricke, Horst Friedrich (Bayreuth), Hans-Michael Goldmann, Miriam Gruß, Joachim Günther (Plauen), Dr. Christel Happach-Kasan, Heinz-Peter Haustein, Elke Hoff, Birgit Homburger, Michael Kauch, Hellmut Königshaus, Dr. Heinrich L. Kolb, Gudrun Kopp, Heinz Lanfermann, Harald Leibrecht, Ina Lenke, Sabine Leutheusser-Schnarrenberger, Horst Meierhofer, Patrick Meinhardt, Jan Mücke, Burkhardt Müller-Sönksen, Detlef Parr, Cornelia Pieper, Gisela Piltz, Jörg Rohde, Frank Schäffler, Marina Schuster, Dr. Max Stadler, Dr. Rainer Stinner, Carl-Ludwig Thiele, Florian Toncar, Christoph Waitz, Dr. Claudia Winterstein, Dr. Volker Wissing, Hartfrid Wolff (Reims-Murr), Martin Zeil, Dr. Guido Westerwelle und der Fraktion der FDP

Deutscher Bundestag Drucksache 16/3607 16. Wahlperiode 29. 11. 2006 Antrag der Abgeordneten Erika Steinbach, Holger Haibach, Carl-Eduard von Bismarck, Michael Brand, Hartwig Fischer (Göttingen), Ute Granold, Hermann Gröhe, Hubert Hüppe, Alois Karl, Hartmut Koschyk, Eduard Lintner, Dr. Norbert Röttgen, Arnold Vaatz, Peter Weiß (Emmendingen), Volker Kauder, Dr. Peter Ramsauer und der Fraktion der CDU/CSU sowie der Abgeordneten Christoph Strässer, Angelika Graf (Rosenheim), Niels Annen, Doris Barnett, Klaus Brandner, Detlef Dzembitzki, Kurt Bodewig, Dr. Herta Däubler-Gmelin, Wolfgang Gunkel, Petra Heß, Gerd Höfer, Johannes Jung (Karlsruhe), Walter Kolbow, Ernst Kranz, Ute Kumpf, Lothar Mark, Johannes Pflug, Christel Riemann-Hanewinkel, Walter Riester, Sönke Rix, Marlene Rupprecht (Tuchenbach), Dr. Hermann Scheer, Olaf Scholz, Rolf Stöckel, Dr. Wolfgang Wodarg, Dr. Peter Struck und der Fraktion der SPD

Plenarprotokoll 16/70 Deutscher Bundestag Stenografischer Bericht 70. Sitzung Berlin, Donnerstag, den 30. November 2006

Deutscher Bundestag Drucksache 16/3737 16. Wahlperiode 04. 12. 2006 Die Antwort wurde namens der Bundesregierung mit Schreiben des Auswärtigen Amts vom 30. November 2006 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr. Uschi Eid, Marieluise Beck (Bremen), Volker Beck (Köln), weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 16/3206 –

Deutscher Bundestag Drucksache 16/4171 16. Wahlperiode 31. 01. 2007 Antrag der Abgeordneten Rainer Steenblock, Jürgen Trittin, Omid Nouripour, Marieluise Beck (Bremen), Dr. Uschi Eid, Thilo Hoppe, Ute Koczy, Kerstin Müller (Köln), Winfried Nachtwei, Claudia Roth (Augsburg) und der Fraktion

BÜNDNIS 90/DIE GRÜNEN

Plenarprotokoll 16/79 Deutscher Bundestag Stenografischer Bericht 79. Sitzung Berlin, Donnerstag, den 1. Februar 2007

Plenarprotokoll 16/80 Deutscher Bundestag Stenografischer Bericht 80. Sitzung Berlin, Freitag, den 2. Februar 2007

Deutscher Bundestag Drucksache 16/4445 16. Wahlperiode 28. 02. 2007 Antrag der Abgeordneten Omid Nouripour, Silke Stokar von Neuforn, Volker Beck (Köln), Monika Lazar, Jerzy Montag und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Plenarprotokoll 16/94 Deutscher Bundestag Stenografischer Bericht 94. Sitzung Berlin, Donnerstag, den 26. April 2007

Deutscher Bundestag Drucksache 16/5441 16. Wahlperiode 23. 05. 2007 Antrag der Abgeordneten Rainer Steenblock, Jürgen Trittin, Omid Nouripour, Dr. Gerhard Schick, Marieluise Beck (Bremen), Volker Beck (Köln), Alexander Bonde, Dr. Uschi Eid, Ulrike Höfken, Thilo Hoppe, Ute Koczy, Kerstin Müller (Köln), Winfried Nachtwei, Claudia Roth (Augsburg) und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag 16. Wahlperiode Drucksache 16/5560 08. 06. 2007 Schriftliche Fragen mit den in der Zeit vom 29. Mai bis 8. Juni 2007 eingegangenen Antworten der Bundesregierung

Deutscher Bundestag Drucksache 16/5619 16. Wahlperiode 13. 06. 2007 Entschließungsantrag der Abgeordneten Dr. Diether Dehm, Alexander Ulrich, Dr. Hakki Keskin, Monika Knoche, Hüseyin-Kenan Aydin, Wolfgang Gehrcke, Heike Hänsel, Inge Höger, Katrin Kunert, Michael Leutert, Ulla Lötzer, Dr. Norman Paech, Paul Schäfer (Köln), Dr. Kirsten Tackmann, Dr. Gregor Gysi, Oskar Lafontaine und der Fraktion DIE LINKE

Plenarprotokoll 16/103 Deutscher Bundestag Stenografischer Bericht 103. Sitzung Berlin, Donnerstag, den 14. Juni 2007

Deutscher Bundestag Drucksache 16/5736 16. Wahlperiode 20. 06. 2007 Antrag der Fraktionen der CDU/CSU und SPD

Plenarprotokoll 16/105 Deutscher Bundestag Stenografischer Bericht 105. Sitzung Berlin, Donnerstag, den 21. Juni 2007

Plenarprotokoll 16/106 Deutscher Bundestag Stenografischer Bericht 106. Sitzung Berlin, Freitag, den 22. Juni 2007

Deutscher Bundestag Drucksache 16/5882 16. Wahlperiode 03. 07. 2007 Antrag der Abgeordneten Markus Löning, Dr. Werner Hoyer, Michael Link (Heilbronn), Florian Toncar, Jens Ackermann, Dr. Karl Addicks, Christian Ahrendt, Daniel Bahr (Münster), Uwe Barth, Rainer Brüderle, Angelika Brunkhorst, Ernst Burgbacher, Mechthild Dyckmans, Jörg van Essen, Ulrike Flach, Otto Fricke, Paul K. Friedhoff, Horst Friedrich (Bayreuth), Dr. Edmund Peter Geisen, Dr. Wolfgang Gerhardt, Hans-Michael Goldmann, Miriam Gruß, Joachim Günther (Plauen), Dr. Christel Happach-Kasan, Heinz-Peter Haustein, Elke Hoff, Birgit Homburger, Michael Kauch, Hellmut Königshaus, Dr. Heinrich L. Kolb, Gudrun Kopp, Jürgen Koppelin, Heinz Lanfermann, Sibylle Laurischk, Harald Leibrecht, Sabine Leutheusser-Schnarrenberger, Horst Meierhofer, Patrick Meinhardt, Jan Mücke, Burkhardt Müller-Sönksen, Dirk Niebel, Cornelia Pieper, Gisela Piltz, Jörg Rohde, Frank Schäffler, Dr. Konrad Schily, Marina Schuster, Dr. Hermann Otto Solms, Dr. Max Stadler, Dr. Rainer Stinner, Carl-Ludwig Thiele, Christoph Waitz, Dr. Claudia Winterstein, Dr. Volker Wissing, Hartfrid Wolff (Rems-Murr), Martin Zeil, Dr. Guido Westerwelle und der Fraktion der FDP

Deutscher Bundestag Drucksache 16/5888 16. Wahlperiode 04. 07. 2007 Antrag der Abgeordneten Rainer Steenblock, Jürgen Trittin, Omid Nouripour, Marieluise Beck (Bremen), Volker Beck (Köln), Alexander Bonde, Dr. Uschi Eid, Thilo Hoppe, Ute Koczy, Kerstin Müller (Köln), Winfried Nachtwei, Claudia Roth (Augsburg) und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Plenarprotokoll 16/107 Deutscher Bundestag Stenografischer Bericht 107. Sitzung Berlin, Mittwoch, den 4. Juli 2007

Deutscher Bundestag Drucksache 16/6254 16. Wahlperiode 23. 08. 2007 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 21. August 2007 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Sevim Dagdelen, Jan Korte und der Fraktion DIE LINKE. – Drucksache 16/6202 –

Plenarprotokoll 16/111 Deutscher Bundestag Stenografischer Bericht 111. Sitzung Berlin, Mittwoch, den 12. September 2007

Plenarprotokoll 16/115 Deutscher Bundestag Stenografischer Bericht 115. Sitzung Berlin, Donnerstag, den 20. September 2007

Plenarprotokoll 16/118 Deutscher Bundestag Stenografischer Bericht 118. Sitzung Berlin, Donnerstag, den 11. Oktober 2007

Deutscher Bundestag Drucksache 16/6757 16. Wahlperiode 19. 10. 2007 Kleine Anfrage der Abgeordneten Rainer Steenblock, Volker Beck (Köln), Omid Nouripour, Jürgen Trittin und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 16/6942 16. Wahlperiode 07 11. 2007 Antrag der Fraktionen CDU/CSU, SPD, FDP und BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Stenografischer Bericht 123. Sitzung Berlin, Donnerstag, den 8. November 2007

Deutscher Bundestag Drucksache 16/6917 16. Wahlperiode 06. 11. 2007 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums der Justiz vom 5. November 2007 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Rainer Steenblock, Volker Beck (Köln), Omid Nouripour, Jürgen Trittin und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 16/6757 –

Deutscher Bundestag Drucksache 16/7271 16. Wahlperiode 14. 11. 2007 Große Anfrage der Abgeordneten Gisela Piltz, Dr. Max Stadler, Jens Ackermann, Christian Ahrendt, Daniel Bahr (Münster), Rainer Brüderle, Ernst Burgbacher, Patrick Döring, Mechthild Dyckmans, Jörg van Essen, Ulrike Flach, Otto Fricke, Paul K. Friedhoff, Horst Friedrich (Bayreuth), Hans-Michael Goldmann, Miriam Gruß, Joachim Günther (Plauen), Dr. Christel Happach-Kasan, Heinz-Peter Haustein, Elke Hoff, Birgit Homburger, Michael Kauch, Hellmut Königshaus, Dr. Heinrich L. Kolb, Gudrun Kopp, Jürgen Koppelin, Heinz Lanfermann, Sibylle Laurischk, Harald Leibrecht, Ina Lenke, Patrick Meinhardt, Jan Mücke, Burkhardt Müller-Sönksen, Dirk Niebel, Hans-Joachim Otto (Frankfurt), Detlef Parr, Cornelia Pieper, Jörg Rohde, Frank Schäffler, Dr. Konrad Schily, Marina Schuster, Dr. Hermann Otto Solms, Carl-Ludwig

Thiele, Christoph Waitz, Dr. Claudia Winterstein, Dr. Volker Wissing, Hartfrid Wolff (Rems-Murr), Martin Zeil, Dr. Guido Westerwelle und der Fraktion der FDP

Plenarprotokoll 16/126 Deutscher Bundestag Stenografischer Bericht 126. Sitzung Berlin, Donnerstag, den 15. November 2007

Plenarprotokoll 16/132 Deutscher Bundestag Stenografischer Bericht 132. Sitzung Berlin, Mittwoch, den 12. Dezember 2007

Deutscher Bundestag Drucksache 16/7484 16. Wahlperiode 12. 12. 2007 Entschließungsantrag der Abgeordneten Dr. Diether Dehm, Alexander Ulrich, Dr. Hakki Keskin, Monika Knoche, Hüseyin-Kenan Aydin, Wolfgang Gehrcke, Heike Hänsel, Inge Höger, Michael Leutert, Dr. Norman Paech, Paul Schäfer (Köln), Dr. Kirsten Tackmann und der Fraktion DIE LINKE.

Plenarprotokoll 16/133 Deutscher Bundestag Stenografischer Bericht 133. Sitzung Berlin, Donnerstag, den 13. Dezember 2007

Deutscher Bundestag Drucksache 16/11604 16. Wahlperiode 14. 01. 2009 Antrag der Abgeordneten Ulrike Höfken, Priska Hinz (Herborn), Jerzy Montag, Cornelia Behm, Hans-Josef Fell, Winfried Hermann, Bettina Herlitzius, Nicole Maisch, Undine Kurth (Quedlinburg), Sylvia Kotting-Uhl, Dr. Anton Hofreiter, Bärbel Höhn und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Plenarprotokoll 16/136 Deutscher Bundestag Stenografischer Bericht 136. Sitzung Berlin, Donnerstag, den 17. Januar 2008

Deutscher Bundestag Drucksache 16/7992 16. Wahlperiode 07. 02. 2008 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums für Arbeit und Soziales vom 6. Februar 2008 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr. Hakki Keskin, Monika Knoche, Dr. Diether Dehm, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 16/7714 –

Deutscher Bundestag Drucksache 16/8300 16. Wahlperiode 28. 02. 2008 Gesetzentwurf der Bundesregierung

Deutscher Bundestag Drucksache 16/8365 16. Wahlperiode 05. 03. 2008 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums für Gesundheit vom 3. März 2008 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Frank Spieth, Klaus Ernst, Dr. Martina Bunge, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 16/8081 –

Deutscher Bundestag Drucksache 16/8595 16. Wahlperiode 14. 03. 2008 Die Antwort wurde namens der Bundesregierung mit Schreiben des Auswärtigen Amts vom 12. März 2008 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Große Anfrage der Abgeordneten Florian Toncar, Burkhardt Müller-Sönksen, Dr. Karl Addicks, weiterer Abgeordneter und der Fraktion der FDP – Drucksache 16/6370 –

Deutscher Bundestag Drucksache 16/8927 16. Wahlperiode 23. 04. 2008 Entschließungsantrag der Abgeordneten Markus Löning, Michael Link (Heilbronn), Florian Toncar, Dr. Werner Hoyer, Christian Ahrendt, Daniel Bahr (Münster), Uwe Barth, Rainer Brüderle, Angelika Brunkhorst, Ernst Burgbacher, Patrick Döring, Mechthild Dyckmans, Jörg van Essen, Paul K. Friedhoff, Horst Friedrich (Bayreuth), Dr. Edmund Peter Geisen, Hans-Michael Goldmann, Miriam Gruß, Joachim Günther (Plauen), Dr. Christel Happach-Kasan, Heinz-Peter Haustein, Birgit Homburger, Michael Kauch, Hellmut Königshaus, Dr. Heinrich L. Kolb, Gudrun Kopp, Heinz Lanfermann, Harald Leibrecht, Sabine Leutheusser-Schnarrenberger, Horst Meierhofer, Patrick Meinhardt, Burkhardt Müller-Sönksen, Dirk Niebel, Hans-Joachim Otto (Frankfurt), Detlef Parr, Cornelia Pieper, Gisela Piltz, Jörg Rohde, Frank Schäffler, Marina Schuster, Dr. Max Stadler, Dr. Rainer Stinner, Carl-Ludwig Thiele, Christoph Waitz, Dr. Claudia Winterstein, Dr. Volker Wissing, Hartfrid Wolff (Rems-Murr), Dr. Guido Westerwelle und der Fraktion der FDP

Deutscher Bundestag Drucksache 16/8926 16. Wahlperiode 23. 04. 2008 Entschließungsantrag der Abgeordneten Dr. Diether Dehm, Monika Knoche, Hüseyin-Kenan Aydin, Dr. Lothar Bisky, Sevim Dagdelen, Wolfgang Gehrcke, Heike Hänsel, Inge Höger, Dr. Hakki Keskin, Michael Leutert, Ulla Lötzer, Dr. Norman Paech, Paul Schäfer (Köln), Alexander Ulrich und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 16/8925 16. Wahlperiode 23. 04. 2008 Entschließungsantrag der Abgeordneten Jerzy Montag, Volker Beck (Köln), Monika Lazar, Omid Nouripour, Irmingard Schewe-Geigk, Rainer Steenblock, Silke Stokar von Neuforn, Hans-Christian Ströbele, Jürgen Trittin, Wolfgang Wieland, Josef Philip Winkler und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 16/8974 16. Wahlperiode 24. 04. 2008 Kleine Anfrage der Abgeordneten Volker Beck (Köln), Josef Philip Winkler, Omid Nouripour, Marieluise Beck (Bremen), Alexander Bonde, Dr. Uschi Eid, Thilo Hoppe, Ute Koczy, Monika Lazar, Kerstin Müller (Köln), Winfried Nachtwei, Claudia Roth (Augsburg), Irmingard Schewe-Gerigk, Rainer Steenblock, Silke Stokar von Neuforn, Jürgen Trittin und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 16/9204 16. Wahlperiode 15. 05. 2008 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 14. Mai 2008 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Volker Beck (Köln), Josef Philip Winkler, Omid Nouripour, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 16/8974 –

Deutscher Bundestag Drucksache 16/9607 16. Wahlperiode 18. 06. 2008 Gesetzentwurf der Abgeordneten Renate Künast, Silke Stokar von Neuforn, Jerzy Montag, Wolfgang Wieland, Volker Beck (Köln), Monika Lazar, Irmingard Schewe-Gerigk, Hans-Christian Ströbele, Josef Philip Winkler und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 16/9721 16. Wahlperiode 24. 06. 2008 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums für Arbeit und Soziales vom 20. Juni 2008 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr. Diether Dehm, Monika Knoche, Dr. Lothar Bisky, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 16/9416 –

Deutscher Bundestag Drucksache 16/9888 16. Wahlperiode 01. 07. 2008 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 30. Juni 2008 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung

Deutscher Bundestag Drucksache 16/10613 16. Wahlperiode 15. 10. 2008 Antrag der Abgeordneten Florian Toncar, Burkhardt Müller-Sönksen, Jens Ackermann, Dr. Karl Addicks, Christian Ahrendt, Rainer Brüderle, Angelika Brunkhorst, Ernst Burgbacher, Patrick Döring, Mechthild Dyckmans, Jörg van Essen, Ulrike Flach, Otto Fricke, Paul K. Friedhoff, Dr. Edmund Peter Geisen, Hans-Michael Goldmann, Miriam

Gruß, Joachim Günther (Plauen), Dr. Christel Happach-Kasan, Heinz-Peter Haustein, Elke Hoff, Birgit Homburger, Dr. Werner Hoyer, Hellmut Königshaus, Dr. Heinrich L. Kolb, Gudrun Kopp, Jürgen Koppelin, Heinz Lanfermann, Sibylle Laurischk, Harald Leibrecht, Ina Lenke, Michael Link (Heilbronn), Markus Löning, Horst Meierhofer, Patrick Meinhardt, Jan Mücke, Dirk Niebel, Hans-Joachim Otto (Frankfurt), Detlef Parr, Gisela Piltz, Frank Schäffler, Marina Schuster, Dr. Rainer Stinner, Carl-Ludwig Thiele, Christoph Waitz, Dr. Claudia Winterstein, Dr. Volker Wissing, Hartfrid Wolff (Rems-Murr), Dr. Guido Westerwelle und der Fraktion der FDP

Deutscher Bundestag Drucksache 16/10139 16. Wahlperiode 20. 08. 2008 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums für Familie, Senioren, Frauen und Jugend vom 18. August 2008 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr. Ilja Seifert, Klaus Ernst, Cornelia Hirsch, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 16/10020 –

Deutscher Bundestag Drucksache 16/10264 16. Wahlperiode 17. 09. 2008 Antrag der Abgeordneten Katja Kipping, Katrin Kunert, Klaus Ernst, Dr. Gesine Löttsch, Dr. Dietmar Bartsch, Karin Binder, Dr. Lothar Bisky, Heidrun Bluhm, Eva BullingSchröter, Dr. Martina Bunge, Roland Claus, Dr. Dagmar Enkelmann, Diana Golze, Lutz Heilmann, Hans-Kurt Hill, Michael Leutert, Dorothee Menzner, Elke Reinke, Volker Schneider (Saarbrücken), Dr. Ilja Seifert, Frank Spieth, Dr. Kirsten Tackmann, Jörn Wunderlich und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 16/10469 16. Wahlperiode 07. 10. 2008 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums der Justiz vom 2. Oktober 2008 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Große Anfrage der Abgeordneten Gisela Piltz, Dr. Max Stadler, Jens Ackermann, weiterer Abgeordneter und der Fraktion der FDP – Drucksache 16/7271 –

Deutscher Bundestag Drucksache 16/11215 16. Wahlperiode 03. 12. 2008 Antrag der Fraktionen CDU/CSU, SPD, FDP und BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 16/11644 16. Wahlperiode 21. 01. 2009 Gesetzentwurf der Bundesregierung

Deutscher Bundestag Drucksache 16/11855 16. Wahlperiode 09. 02. 2009 Die Antwort wurde namens

der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 5. Februar 2009 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Wolfgang Neskovic, Sevim Dagdelen, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 16/11688 –

Deutscher Bundestag Drucksache 16/11873 16. Wahlperiode 10. 02. 2009 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 6. Februar 2009 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Silke Stokar von Neuforn, Wolfgang Wieland, Volker Beck (Köln), weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 16/11711 –

Plenarprotokoll 16/143 Deutscher Bundestag Stenografischer Bericht 143. Sitzung Berlin, Freitag, den 15. Februar 2008

Deutscher Bundestag Drucksache 16/12098 16. Wahlperiode 03. 03. 2009 Gesetzentwurf der Fraktionen der CDU/CSU und SPD Entwurf eines Gesetzes zur Stärkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz)

Plenarprotokoll 16/150 Deutscher Bundestag Stenografischer Bericht 150. Sitzung Berlin, Mittwoch, den 12. März 2008

Plenarprotokoll 16/151 Deutscher Bundestag Stenografischer Bericht 151. Sitzung Berlin, Donnerstag, den 13. März 2008

Plenarprotokoll 16/142 Deutscher Bundestag Stenografischer Bericht 142. Sitzung Berlin, Donnerstag, den 14. Februar 2008

16/157 Deutscher Bundestag Stenografischer Bericht 157. Sitzung Berlin, Donnerstag, den 24. April 2008

Plenarprotokoll 16/158 Deutscher Bundestag Stenografischer Bericht 158. Sitzung Berlin, Freitag, den 25. April 2008

Plenarprotokoll 16/155 Deutscher Bundestag Stenografischer Bericht 155. Sitzung Berlin, Freitag, den 11. April 2008

Plenarprotokoll 16/169 Deutscher Bundestag Stenografischer Bericht 169. Sitzung Berlin, Donnerstag, den 19. Juni 2008

Plenarprotokoll 16/172 Deutscher Bundestag Stenografischer Bericht 172. Sitzung Berlin, Donnerstag, den 26. Juni 2008

Plenarprotokoll 16/173 Deutscher Bundestag Stenografischer Bericht 173. Sitzung Berlin, Freitag, den 27. Juni 2008

Plenarprotokoll 16/194 Deutscher Bundestag Stenografischer Bericht 194. Sitzung Berlin, Freitag, den 5. Dezember 2008

Plenarprotokoll 16/217 Deutscher Bundestag Stenografischer Bericht 217. Sitzung Berlin, Donnerstag, den 23. April 2009

Plenarprotokoll 16/220 Deutscher Bundestag Stenografischer Bericht 220. Sitzung Berlin, Donnerstag, den 7. Mai 2009

Deutscher Bundestag Drucksache 16/13040 16. Wahlperiode 13. 05. 2009 Kleine Anfrage der Abgeordneten Mechthild Dyckmans, Jörg van Essen, Sabine Leutheusser-Schnarrenberger, Dr. Max Stadler, Jens Ackermann, Dr. Karl Addicks, Christian Ahrendt, Uwe Barth, Rainer Brüderle, Angelika Brunkhorst, Ernst Burgbacher, Patrick Döring, Ulrike Flach, Otto Fricke, Paul K. Friedhoff, Dr. Edmund Peter Geisen, Hans-Michael Goldmann, Miriam Gruß, Joachim Günther (Plauen), Dr. Christel Happach-Kasan, Heinz-Peter Haustein, Birgit Homburger, Michael Kauch, Hellmut Königshaus, Dr. Heinrich L. Kolb, Gudrun Kopp, Dr. h. c. Jürgen Koppelin, Heinz Lanfermann, Harald Leibrecht, Ina Lenke, Michael Link (Heilbronn), Horst Meierhofer, Patrick Meinhardt, Jan Mücke, Burkhardt Müller-Sönksen, Dirk Niebel, Hans-Joachim Otto (Frankfurt), Cornelia Pieper, Gisela Piltz, Frank Schäffler, Dr. Konrad Schily, Marina Schuster, Dr. Hermann Otto Solms, Carl-Ludwig Thiele, Florian Toncar, Dr. Daniel Volk, Dr. Claudia Winterstein, Dr. Volker Wissing, Hartfrid Wolff (Rems-Murr), Dr. Guido Westerwelle und der Fraktion der FDP

Deutscher Bundestag Drucksache 16/13117 16. Wahlperiode 25. 05. 2009 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 22. Mai 2009 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Florian Toncar, Hartfrid Wolff (Rems-Murr), Dr. Daniel Volk, weiterer Abgeordneter und der Fraktion der FDP – Drucksache 16/12931 –

Plenarprotokoll 16/224 Deutscher Bundestag Stenografischer Bericht 224. Sitzung Berlin, Donnerstag, den 28. Mai 2009

Plenarprotokoll 16/225 Deutscher Bundestag Stenografischer Bericht 225. Sitzung Berlin, Freitag, den 29. Mai 2009

Deutscher Bundestag Drucksache 16/13271 16. Wahlperiode 02. 06. 2009 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums der Justiz vom 28. Mai 2009 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Mechthild Dyckmans, Jörg van Essen, Sabine Leutheusser-Schnarrenberger, weiterer Abgeordneter und der Fraktion der FDP – Drucksache 16/13040 –

Plenarprotokoll 16/227 Deutscher Bundestag Stenografischer Bericht 227. Sitzung Berlin, Donnerstag, den 18. Juni 2009

Deutscher Bundestag 16. Wahlperiode Drucksache 16/13498 19. 06. 2009 Schriftliche Fragen mit den in der Woche vom 15. Juni 2009 eingegangenen Antworten der Bundesregierung

Deutscher Bundestag Drucksache 16/13568 16. Wahlperiode 24. 06. 2009 Kleine Anfrage der Abgeordneten Manuel Sarrazin, Brigitte Pothmer, Jürgen Trittin, Rainer Steenblock, Marieluise Beck (Bremen), Volker Beck (Köln), Birgitt Bender, Alexander Bonde, Dr. Uschi Eid, Britta Haßelmann, Thilo Hoppe, Ute Koczy, Markus Kurth, Kerstin Müller (Köln), Winfried Nachtwei, Omid Nouripour, Claudia Roth (Augsburg), Irmingard Schewe-Gerigk und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 16/13781 16. Wahlperiode 13. 07. 2009 Die Antwort wurde namens

der Bundesregierung mit Schreiben des Bundesministeriums für Arbeit und Soziales vom 9. Juli 2009 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Manuel Sarrazin, Brigitte Pothmer, Jürgen Trittin, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 16/13568

Deutscher Bundestag Drucksache 16/13791 16. Wahlperiode 14. 07. 2009 Gesetzentwurf der Abgeordneten Wolfgang Neskovic, Heidrun Bluhm, Dr. Martina Bunge, Sevim Dagdelen, Dr. Diether Dehm, Klaus Ernst, Diana Golze, Cornelia Hirsch, Dr. Barbara Höll, Dr. Lukrezia Joachimsen, Katja Kipping, Jan Korte, Ulrich Maurer, Kersten Naumann, Dr. Norman Paech, Petra Pau, Bodo Ramelow, Elke Reinke, Paul Schäfer (Köln), Dr. Ilja Seifert, Frank Spieth, Dr. Kirsten Tackmann, Dr. Axel Troost, Alexander Ulrich, Jörn Wunderlich, Sabine Zimmermann und der Fraktion DIE LINKE.

Plenarprotokoll 16/232 Deutscher Bundestag Stenografischer Bericht 232. Sitzung Berlin, Mittwoch, den 26. August 2009

Plenarprotokoll 17/3 Deutscher Bundestag Stenografischer Bericht 3. Sitzung Berlin, Dienstag, den 10. November 2009

Plenarprotokoll 17/20 Deutscher Bundestag Stenografischer Bericht 20. Sitzung Berlin, Freitag, den 29. Januar 2010

Plenarprotokoll 17/24 Deutscher Bundestag Stenografischer Bericht 24. Sitzung Berlin, Donnerstag, den 25. Februar 2010

Plenarprotokoll 17/27 Deutscher Bundestag Stenografischer Bericht 27. Sitzung Berlin, Donnerstag, den 4. März 2010

Plenarprotokoll 17/31 Deutscher Bundestag Stenografischer Bericht 31. Sitzung Berlin, Donnerstag, den 18. März 2010

Plenarprotokoll 17/35 Deutscher Bundestag Stenografischer Bericht 35. Sitzung Berlin, Freitag, den 26. März 2010

Plenarprotokoll 17/46 Deutscher Bundestag Stenografischer Bericht 46. Sitzung Berlin, Donnerstag,

den 10. Juni 2010

Plenarprotokoll 17/59 Deutscher Bundestag Stenografischer Bericht 59. Sitzung Berlin, Donnerstag, den 16. September 2010

Plenarprotokoll 17/61 Deutscher Bundestag Stenografischer Bericht 61. Sitzung Berlin, Mittwoch, den 29. September 2010

Plenarprotokoll 17/77 Deutscher Bundestag Stenografischer Bericht 77. Sitzung Berlin, Mittwoch, den 1. Dezember 2010

Plenarprotokoll 17/79 Deutscher Bundestag Stenografischer Bericht 79. Sitzung Berlin, Freitag, den 3. Dezember 2010

Plenarprotokoll 17/84 Deutscher Bundestag Stenografischer Bericht 84. Sitzung Berlin, Donnerstag, den 20. Januar 2011

Plenarprotokoll 17/155 Deutscher Bundestag Stenografischer Bericht 155. Sitzung Berlin, Donnerstag, den 26. Januar 2012

Plenarprotokoll 17/87 Deutscher Bundestag Stenografischer Bericht 87. Sitzung Berlin, Donnerstag, den 27. Januar 2011

Plenarprotokoll 17/96 Deutscher Bundestag Stenografischer Bericht 96. Sitzung Berlin, Donnerstag, den 17. März 2011

Plenarprotokoll 17/99 Deutscher Bundestag Stenografischer Bericht 99. Sitzung Berlin, Donnerstag, den 24. März 2011

Plenarprotokoll 17/108 Deutscher Bundestag Stenografischer Bericht 108. Sitzung Berlin, Donnerstag, den 12. Mai 2011

Plenarprotokoll 17/111 Deutscher Bundestag Stenografischer Bericht 111. Sitzung Berlin, Donnerstag, den 26. Mai 2011

Plenarprotokoll 17/117 Deutscher Bundestag Stenografischer Bericht 117. Sitzung Berlin, Donnerstag, den 30. Juni 2011

Plenarprotokoll 17/120 Deutscher Bundestag Stenografischer Bericht 120. Sitzung Berlin, Donnerstag, den 7. Juli 2011

Plenarprotokoll 17/133 Deutscher Bundestag Stenografischer Bericht 133. Sitzung Berlin, Donnerstag, den 20. Oktober 2011

Plenarprotokoll 17/139 Deutscher Bundestag Stenografischer Bericht 139. Sitzung Berlin, Donnerstag, den 10. November 2011

Plenarprotokoll 17/143 Deutscher Bundestag Stenografischer Bericht 143. Sitzung Berlin, Donnerstag, den 24. November 2011

Deutscher Bundestag Stenografischer Bericht 168. Sitzung Berlin, Donnerstag, den 22. März 2012

Plenarprotokoll 17/173 Deutscher Bundestag Stenografischer Bericht 173. Sitzung Berlin, Freitag, den 30. März 2012

Plenarprotokoll 17/175 Deutscher Bundestag Stenografischer Bericht 175. Sitzung Berlin, Donnerstag, den 26. April 2012

Plenarprotokoll 17/178 Deutscher Bundestag Stenografischer Bericht 178. Sitzung Berlin, Donnerstag, den 10. Mai 2011

Plenarprotokoll 17/201 Deutscher Bundestag Stenografischer Bericht 201. Sitzung Berlin, Donnerstag, den 25. Oktober 2012

Plenarprotokoll 17/204 Deutscher Bundestag Stenografischer Bericht 204. Sitzung Berlin, Donnerstag, den 8. November 2012

Plenarprotokoll 17/213 Deutscher Bundestag Stenografischer Bericht 213. Sitzung Berlin, Mittwoch, den 12. Dezember 2012

Plenarprotokoll 17/216 Deutscher Bundestag Stenografischer Bericht 216. Sitzung Berlin, Mittwoch, den 16. Januar 2013

Plenarprotokoll 17/240 Deutscher Bundestag Stenografischer Bericht 240. Sitzung Berlin, Donnerstag, den 16. Mai 2013

Plenarprotokoll 17/237 Deutscher Bundestag Stenografischer Bericht 237. Sitzung Berlin, Donnerstag, den 25. April 2013

Deutscher Bundestag Drucksache 17/13829 17. Wahlperiode 10. 06. 2013 Gesetzentwurf der Bundesregierung

17. Wahlperiode 12. 06. 2013 Antrag der Abgeordneten Dr. Frithjof Schmidt, Kerstin Andreae, Bärbel Höhn, Josef Philip Winkler, Ekin Deligöz, Viola von Cramon-Taubadel, Hans-Josef Fell, Dr. Thomas Gambke, Kai Gehring, Ingrid Hönlinger, Thilo Hoppe, Uwe Kekelitz, Katja Keul, Susanne Kieckbusch, Sven-Christian Kindler, Sylvia Kotting-Uhl, Dr. Tobias Lindner, Dr. Konstantin von Notz, Dr. Hermann E. Ott, Tabea Rößner, Claudia Roth (Augsburg), Manuel Sarrazin, Elisabeth Scharfenberg, Arfst Wagner (Schleswig), Beate Walter-Rosenheimer und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 17/13888 17. Wahlperiode 11. 06. 2013 Antrag der Abgeordneten Michael Stübgen, Michael Grosse-Brömer, Stefan Müller (Erlangen), Volker Kauder, Gerda Hasselfeldt und der Fraktion der CDU/CSU sowie der Abgeordneten Joachim Spatz, Gabriele Molitor, Rainer Brüderle und der Fraktion der FDP

Plenarprotokoll 17/249 Deutscher Bundestag Stenografischer Bericht 249. Sitzung Berlin, Mittwoch, den 26. Juni 2013

Deutscher Bundestag Drucksache 17/14146 17. Wahlperiode 26. 06. 2013 Entschließungsantrag der Abgeordneten Renate Künast, Dr. Konstantin von Notz, Volker Beck (Köln), Ingrid Hönlinger, Memet Kilic, Jerzy Montag, Wolfgang Wieland, Josef Philip Winkler und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/40 18. Wahlperiode 07.11.2013 Kleine Anfrage der Abgeordneten Andrej Hunko, Jan Korte, Jan van Aken, Christine Buchholz, Sevim Dağdelen, Wolfgang Gehrcke, Annette Groth, Dr. André Hahn, Ulla Jelpke, Katrin Kunert, Stefan Liebich, Niema Movassat, Thomas Nord, Kersten Steinke, Frank Tempel, Kathrin Vogler, Halina Wawzyniak und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/55 18. Wahlperiode 14.11.2013 Antrag der Abgeordneten Jan Korte, Dr. Petra Sitte, Wolfgang Gehrcke, Annette Groth, Dr. Andre Hahn, Andrej Hunko, Ulla Jelpke, Katrin Kunert, Stefan Liebich, Petra Pau, Harald Petzold, Martina Renner, Kersten Steinke, Frank Tempel und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/65 18. Wahlperiode 18.11.2013 Entschließungsantrag der Fraktion BÜNDNIS 90/DIE GRÜNEN zu der vereinbarten Debatte zu den Abhöraktivitäten der NSA und den Auswirkungen auf Deutschland und die transatlantischen Beziehungen

Deutscher Bundestag Drucksache 18/159 18. Wahlperiode 12.12.2013 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 10. Dezember 2013 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Jan Korte, Christine Buchholz, Ulla Jelpke, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/39 –

Deutscher Bundestag Drucksache 18/168 18. Wahlperiode 13.12.2013 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 11. Dezember 2013 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Andrej Hunko, Jan Korte, Jan van Aken, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/40 –

Deutscher Bundestag 18. Wahlperiode Drucksache 18/166 13.12.2013 Schriftliche Fragen mit den in der Woche vom 9. Dezember 2013 eingegangenen Antworten der Bundesregierung

Deutscher Bundestag Drucksache 18/182 18. Wahlperiode 16.12.2013 Antrag der Fraktion BÜNDNIS 90/DIE GRÜNEN Die Demokratie verteidigen im digitalen Zeitalter

Deutscher Bundestag Drucksache 18/302 18. Wahlperiode 17.01.2014 Antrag der Abgeordneten Jan

Korte, Dr. Petra Sitte, Dr. André Hahn, Ulla Jelpke, Katrin Kunert, Petra Pau, Martina Renner, Kersten Steinke, Frank Tempel, Halina Wawzyniak und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/254 18. Wahlperiode 07.01.2014 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 19. Dezember 2013 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Andrej Hunko, Christine Buchholz, Annette Groth, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/76 –

Deutscher Bundestag Drucksache 18/317 18. Wahlperiode 20.01.2014 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 16. Januar 2014 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Sevim Dağdelen, Annette Groth, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/229 –

Deutscher Bundestag Drucksache 18/381 18. Wahlperiode 29.01.2014 Antrag der Abgeordneten Dr. Konstantin von Notz, Katja Keul, Luise Amtsberg, Kerstin Andreae, Volker Beck (Köln), Dieter Janecek, Renate Künast, Monika Lazar, Irene Mihalic, Özcan Mutlu, Cem Özdemir, Brigitte Pothmer, Manuel Sarrazin, Hans-Christian Ströbele, Claudia Roth (Augsburg) und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/639 18. Wahlperiode 19.02.2014 Kleine Anfrage der Abgeordneten Irene Mihalic, Volker Beck (Köln), Luise Amtsberg, Britta Haßelmann, Monika Lazar, Özcan Mutlu und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/762 18. Wahlperiode 10.03.2014 Kleine Anfrage der Abgeordneten Sevim Dağdelen, Annette Groth, Heike Hänsel, Inge Höger, Andrej Hunko, Ulla Jelpke, Niema Movassat, Harald Petzold (Havelland), Martina Renner und der Fraktion DIE LINKE

Deutscher Bundestag Drucksache 18/740 18. Wahlperiode 10.03.2014 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 6. März 2014 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Irene Mihalic, Volker Beck (Köln), Luise Amtsberg, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 18/639 –

Deutscher Bundestag Drucksache 18/937 18. Wahlperiode 27.03.2014 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 25. März 2014 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Sevim Dağdelen, Annette Groth, Heike Hänsel, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/762 –

Deutscher Bundestag 18. Wahlperiode Drucksache 18/1041 04.04.2014 Schriftliche Fragen mit den in der Woche vom 31. März 2014 eingegangenen Antworten der Bundesregierung

Deutscher Bundestag Drucksache 18/1116 18. Wahlperiode 09.04.2014 Antrag der Abgeordneten Sabine Zimmermann (Zwickau), Wolfgang Gehrcke, Matthias W. Birkwald, Dr. Diether Dehm, Andrej Hunko, Katja Kipping, Jutta Krellmann, Azize Tank, Alexander Ulrich, Kathrin Vogler, Harald Weinberg, Birgit Wöllert, Pia Zimmermann und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/1339 18. Wahlperiode 07.05.2014 Antrag der Abgeordneten Katja Keul, Dr. Konstantin von Notz, Luise Amtsberg, Volker Beck (Köln), Kai Gehring, Renate Künast, Monika Lazar, Irene Mihalic, Özcan Mutlu, Hans-Christian Ströbele und der Fraktion BÜNDNIS 90/ DIE GRÜNEN

Plenarprotokoll 18/33 Deutscher Bundestag Stenografischer Bericht 33. Sitzung Berlin, Donnerstag, den 8. Mai 2014 - reference to situation of health in Greece and the Troika

Deutscher Bundestag Drucksache 18/1565 18. Wahlperiode 28.05.2014 Gesetzentwurf der Bundesregierung

Plenarprotokoll 18/34 Deutscher Bundestag Stenografischer Bericht 34. Sitzung Berlin, Freitag, den 9. Mai 2014

Deutscher Bundestag Drucksache 18/1646 18. Wahlperiode 04.06.2014 Antrag der Abgeordneten Halina Wawzyniak, Jan Korte, Dr. Gregor Gysi, Jan van Aken, Dr. Dietmar Bartsch, Matthias W. Birkwald, Eva Bulling-Schröter, Klaus Ernst, Dr. André Hahn, Dr. Rosemarie Hein, Sigrid Hupach, Ulla Jelpke, Susanna Karawanskij, Kerstin Kassner, Katrin Kunert, Sabine Leidig, Petra Pau, Harald Petzold (Havelland), Richard Pitterle, Martina Renner, Dr. Petra Sitte, Kersten Steinke, Dr. Kirsten Tackmann, Frank Tempel, Alexander Ulrich, Kathrin Vogler, Harald Weinberg, Katrin Werner, Jörn Wunderlich, Pia

Zimmermann und der Fraktion der DIE LINKE.

Deutscher Bundestag Drucksache 18/1739 18. Wahlperiode 12.06.2014 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 10. Juni 2014 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung

Deutscher Bundestag Drucksache 18/2393 18. Wahlperiode 25.08.2014 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums für Familie, Senioren, Frauen und Jugend vom 21. August 2014 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Cornelia Möhring, Diana Golze, Karin Binder, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/2248 –

Deutscher Bundestag Drucksache 18/2848 18. Wahlperiode 13.10.2014 Gesetzentwurf der Bundesregierung

Deutscher Bundestag Drucksache 18/2896 18. Wahlperiode 15.10.2014 Entschließungsantrag der Fraktion DIE LINKE. zu der Beratung der Beschlussempfehlung und des Berichts des Ausschusses für Menschenrechte und humanitäre Hilfe (17. Ausschuss) – Drucksache 18/2866 – zu dem EU-Jahresbericht 2012 über Menschenrechte und Demokratie in der Welt (Themenspezifische Berichte) Ratsdok. 9431/13 – Drucksache 18/419 Nr. A.156 – zu dem Entwurf des EU-Jahresberichts 2013 über Menschenrechte und Demokratie in der Welt Ratsdok. 10848/14 – Drucksache 18/2533 Nr. A.60 –

Plenarprotokoll 18/60 Deutscher Bundestag Stenografischer Bericht 60. Sitzung Berlin, Donnerstag, den 16. Oktober 2014

Deutscher Bundestag Drucksache 18/2955 18. Wahlperiode 22.10.2014 Gesetzentwurf der Bundesregierung

Plenarprotokoll 18/62 Deutscher Bundestag Stenografischer Bericht 62. Sitzung Berlin, Mittwoch, den 5. November 2014

Deutscher Bundestag Drucksache 18/3122 18. Wahlperiode 10.11.2014 Gesetzentwurf der

Bundesregierung

Deutscher Bundestag Drucksache 18/3151 18. Wahlperiode 12.11.2014 Antrag der Abgeordneten Doris Wagner, Beate Walter-Rosenheimer, Dr. Franziska Brantner, Katja Dörner, Christian Kühn (Tübingen), Kordula Schulz-Asche, Özcan Mutlu, Luise Amtsberg, Matthias Gastel, Kai Gehring, Maria Klein-Schmeink, Tabea Rößner, Claudia Roth (Augsburg), Elisabeth Scharfenberg, Ulle Schauws, Dr. Harald Terpe, Markus Tressel, Dr. Julia Verlinden und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Plenarprotokoll 18/66 Deutscher Bundestag Stenografischer Bericht 66. Sitzung

Plenarprotokoll 18/69 Deutscher Bundestag Stenografischer Bericht 69. Sitzung Berlin, Mittwoch, den 26. November 2014

Plenarprotokoll 18/75 Deutscher Bundestag Stenografischer Bericht 75. Sitzung Berlin, Mittwoch, den 17. Dezember 2014 maybe?

Deutscher Bundestag Drucksache 18/3658 18. Wahlperiode 19.12.2014 Kleine Anfrage der Abgeordneten Azize Tank, Hubertus Zdebel, Sevim Dağdelen, Herbert Behrens, Heidrun Bluhm, Andrej Hunko, Kerstin Kassner, Katja Kipping, Sabine Leidig, Dr. Kirsten Tackmann, Kathrin Vogler, Dr. Sahra Wagenknecht, Harald Weinberg und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/3562 18. Wahlperiode 17.12.2014 Gesetzentwurf der Bundesregierung

Deutscher Bundestag Drucksache 18/3603 18. Wahlperiode 17.12.2014 Entschließungsantrag der Abgeordneten Dr. Konstantin von Notz, Irene Mihalic, Katja Keul, Renate Künast, Luise Amtsberg, Volker Beck (Köln), Anja Hajduk, Monika Lazar, Özcan Mutlu, Hans-Christian Ströbele und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/3601 18. Wahlperiode 17.12.2014 Änderungsantrag der Abgeordneten Dr. Konstantin von Notz, Irene Mihalic, Renate Künast, Katja Keul, Luise Amtsberg, Volker Beck (Köln), Monika Lazar, Özcan Mutlu, Hans-Christian Ströbele und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/3784 18. Wahlperiode 20.01.2015 Gesetzentwurf der Bundesregierung

Deutscher Bundestag Drucksache 18/3821 18. Wahlperiode 26.01.2015 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums für Wirtschaft und Energie vom 22. Januar 2015 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Azize Tank, Hubertus Zdebel, Sevim Dağdelen, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/3658 –

Deutscher Bundestag Drucksache 18/3942 18. Wahlperiode 04.02.2015 Kleine Anfrage der Abgeordneten Volker Beck (Köln), Luise Amtsberg, Corinna Rütter, Katja Keul, Renate Künast, Monika Lazar, Irene Mihalic, Özcan Mutlu, Dr. Konstantin von Notz, Hans-Christian Ströbele und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/3971 18. Wahlperiode 05.02.2015 Kleine Anfrage der Abgeordneten Andrej Hunko, Wolfgang Gehrcke, Christine Buchholz, Sevim Dağdelen, Dr. Diether Dehm, Annette Groth, Dr. Alexander S. Neu, Dr. Axel Troost, Alexander Ulrich, Kathrin Vogler, Dr. Sahra Wagenknecht, Harald Weinberg und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/4097 18. Wahlperiode 25.02.2015 Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung

Deutscher Bundestag Drucksache 18/4169 18. Wahlperiode 03.03.2015 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums der Finanzen vom 27. Februar 2015 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Andrej Hunko, Wolfgang Gehrcke, Christine Buchholz, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/3971 –

Deutscher Bundestag Drucksache 18/4262 18. Wahlperiode 09.03.2015 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 5. März 2015 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Volker Beck (Köln), Luise Amtsberg, Corinna Rütter, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache

18/3942 –

Deutscher Bundestag Drucksache 18/4287 18. Wahlperiode 11.03.2015 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 9. März 2015 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Andrej Hunko, Ulla Jelpke, Wolfgang Gehrcke, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/4066 –

Deutscher Bundestag Drucksache 18/4347 18. Wahlperiode 18.03.2015 Gesetzentwurf der Bundesregierung

Deutscher Bundestag Drucksache 18/4429 18. Wahlperiode 19.03.2015 Kleine Anfrage der Abgeordneten Sevim Dağdelen, Wolfgang Gehrcke, Jan Korte, Annette Groth, Heike Hänsel, Inge Höger, Andrej Hunko, Ulla Jelpke, Kerstin Kassner, Katrin Kunert, Kathrin Vogler, Katrin Werner und der Fraktion DIE LINKE.

Plenarprotokoll 18/96 Deutscher Bundestag Stenografischer Bericht 96. Sitzung Berlin, Mittwoch, den 25. März 2015

Deutscher Bundestag Drucksache 18/4746 18. Wahlperiode 22.04.2015 Die Antwort wurde namens der Bundesregierung mit Schreiben der Beauftragten der Bundesregierung für Kultur und Medien vom 21. April 2015 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Luise Amtsberg, Dr. Konstantin von Notz, Dr. Valerie Wilms, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 18/4488 –

Deutscher Bundestag Drucksache 18/4686 18. Wahlperiode 22.04.2015 Antrag der Abgeordneten Dr. Franziska Brantner, Annalena Baerbock, Marieluise Beck (Bremen), Agnieszka Brugger, Uwe Kekeritz, Tom Koenigs, Dr. Tobias Lindner, Omid Nouripour, Cem Özdemir, Claudia Roth (Augsburg), Manuel Sarrazin, Dr. Frithjof Schmidt, Jürgen Trittin, Doris Wagner, Luise Amtsberg, Renate Künast, Dr. Konstantin von Notz und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/4765 18. Wahlperiode 24.04.2015 Die Antwort wurde namens der Bundesregierung mit Schreiben des Auswärtigen Amts vom 22. April 2015 übermittelt. Die

Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Sevim Dağdelen, Wolfgang Gehrcke, Jan Korte, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/4429 –

Deutscher Bundestag Drucksache 18/4894 18. Wahlperiode 13.05.2015 Gesetzentwurf der Bundesregierung

Deutscher Bundestag Drucksache 18/5088 18. Wahlperiode 09.06.2015 Gesetzentwurf der Fraktionen der CDU/CSU und SPD

Deutscher Bundestag Drucksache 18/5171 18. Wahlperiode 15.06.2015 Gesetzentwurf der Bundesregierung

Deutscher Bundestag Drucksache 18/4933 18. Wahlperiode 19.05.2015 Antrag der Abgeordneten Cornelia Möhring, Sigrid Hupach, Matthias W. Birkwald, Nicole Gohlke, Annette Groth, Dr. Rosemarie Hein, Susanna Karawanskij, Katja Kipping, Caren Lay, Sabine Leidig, Norbert Müller (Potsdam), Petra Pau, Harald Petzold (Havelland), Dr. Petra Sitte, Kersten Steinke, Dr. Kirsten Tackmann, Azize Tank, Dr. Axel Troost, Kathrin Vogler, Harald Weinberg, Katrin Werner, Birgit Wöllert, Jörn Wunderlich, Sabine Zimmermann (Zwickau), Pia Zimmermann und der Fraktion DIE LINKE

Deutscher Bundestag Drucksache 18/4971 18. Wahlperiode 20.05.2015 Antrag der Abgeordneten Jan Korte, Dr. André Hahn, Ulla Jelpke, Katrin Kunert, Petra Pau, Harald Petzold (Havelland), Martina Renner, Kersten Steinke, Frank Tempel, Halina Wawzyniak und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/5370 18. Wahlperiode 30.06.2015 Antrag der Abgeordneten Harald Weinberg, Ulla Jelpke, Sabine Zimmermann (Zwickau), Dr. Dietmar Bartsch, Herbert Behrens, Karin Binder, Matthias W. Birkwald, Heidrun Bluhm, Eva Bulling-Schröter, Roland Claus, Dr. André Hahn, Kerstin Kassner, Katja Kipping, Caren Lay, Sabine Leidig, Ralph Lenkert, Michael Leutert, Dr. Gesine Löttsch, Thomas Lutze, Birgit Menz, Martina Renner, Dr. Petra Sitte, Dr. Kirsten Tackmann, Azize Tank, Frank Tempel, Kathrin Vogler, Birgit Wöllert, Hubertus Zdebel, Pia Zimmermann und der Fraktion DIE LINKE.

Plenarprotokoll 18/115 Deutscher Bundestag Stenografischer Bericht 115. Sitzung Berlin, Donnerstag, den 2. Juli 2015

Deutscher Bundestag Drucksache 18/5564 18. Wahlperiode 15.07.2015 Die Antwort wurde namens der Bundesregierung mit Schreiben des Bundesministeriums des Innern vom 15. Juli 2015 übermittelt. Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext. Antwort der Bundesregierung auf die Große Anfrage der Abgeordneten Luise Amtsberg, Beate Walter-Rosenheimer, Dr. Franziska Brantner, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 18/2999

Deutscher Bundestag Drucksache 18/5839 18. Wahlperiode 19.08.2015 Antrag der Abgeordneten Jan Korte, Halina Wawzyniak, Karin Binder, Harald Petzold (Havelland), Dr. Petra Sitte und der Fraktion DIE LINKE.

Plenarprotokoll 18/130 Deutscher Bundestag Stenografischer Bericht 130. Sitzung Berlin, Donnerstag, den 15. Oktober 2015

Plenarprotokoll 18/131 Textrahmenoptionen: 16 mm Abstand oben Deutscher Bundestag Stenografischer Bericht 131. Sitzung Berlin, Freitag, den 16. Oktober 2015

Deutscher Bundestag Drucksache 18/6479 18. Wahlperiode 23.10.2015 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Sevim Dağdelen, Wolfgang Gehrcke, Annette Groth, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/6269 –

Deutscher Bundestag Drucksache 18/6760 18. Wahlperiode 20.11.2015 Schriftliche Fragen mit den in der Woche vom 16. November 2015 eingegangenen Antworten der Bundesregierung

Deutscher Bundestag Drucksache 18/6877 18. Wahlperiode 01.12.2015 Gesetzentwurf der Abgeordneten Halina Wawzyniak, Frank Tempel, Ulla Jelpke, Jan Korte, Caren Lay, Petra Pau, Harald Petzold (Havelland), Martina Renner, Dr. Petra Sitte, Azize Tank, Jörn Wunderlich und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/6970 18. Wahlperiode 08.12.2015 Antwort der Bundesregierung auf die Große Anfrage der Abgeordneten Volker Beck (Köln), Ulla Schauws, Monika Lazar, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 18/4723 –

Plenarprotokoll 18/145 Textrahmenoptionen: 16 mm Abstand oben Deutscher Bundestag
Stenografischer Bericht 145. Sitzung Berlin, Mittwoch, den 16. Dezember 2015

Deutscher Bundestag Drucksache 18/7134 18. Wahlperiode 21.12.2015 Antwort der Bundesregierung
auf die Kleine Anfrage der Abgeordneten Jan Korte, Frank Tempel, Annette Groth, weiterer
Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/6756 –

Deutscher Bundestag Drucksache 18/7204 18. Wahlperiode 06.01.2016 Gesetzentwurf der
Bundesregierung

Deutscher Bundestag Drucksache 18/7211 18. Wahlperiode 08.01.2016 Schriftliche Fragen mit den in
der Woche vom 4. Januar 2016 eingegangenen Antworten der Bundesregierung

Deutscher Bundestag Drucksache 18/7413 18. Wahlperiode 28.01.2016 Antrag der Abgeordneten
Harald Weinberg, Ulla Jelpke, Sabine Zimmermann (Zwickau), Frank Tempel, Herbert Behrens, Karin
Binder, Matthias W. Birkwald, Heidrun Bluhm, Eva Bulling-Schröter, Roland Claus, Kerstin Kassner, Dr.
André Hahn, Katja Kipping, Caren Lay, Sabine Leidig, Ralph Lenkert, Michael Leutert, Dr. Gesine
Löttsch, Thomas Lutze, Birgit Menz, Martina Renner, Dr. Petra Sitte, Dr. Kirsten Tackmann, Azize Tank,
Kathrin Vogler, Birgit Wöllert, Hubertus Zdebel, Pia Zimmermann und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/7746 18. Wahlperiode 17.02.2016 Kleine Anfrage der
Abgeordneten Dr. Konstantin von Notz, Renate Künast, Dieter Janecek, Luise Amtsberg, Volker Beck
(Köln), Katja Keul, Monika Lazar, Irene Mihalic, Özcan Mutlu, Tabea Rößner, Ulle Schauws, Hans-
Christian Ströbele und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Plenarprotokoll 18/156 Textrahmenoptionen: 16 mm Abstand oben Deutscher Bundestag
Stenografischer Bericht 156. Sitzung Berlin, Freitag, den 19. Februar 2016

Plenarprotokoll 18/157 Deutscher Bundestag Stenografischer Bericht 157. Sitzung Berlin, Mittwoch,
den 24. Februar 2016

Deutscher Bundestag Drucksache 18/7603 18. Wahlperiode 19.02.2016 Fragen für die Fragestunde
der 157. Sitzung des Deutschen Bundestages am Mittwoch, dem 24. Februar 2016

Deutscher Bundestag Drucksache 18/8013 18. Wahlperiode 31.03.2016 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr. Konstantin von Notz, Renate Künast, Dieter Janecek, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 18/7746 –

Deutscher Bundestag Drucksache 18/8052 18. Wahlperiode 08.04.2016 Schriftliche Fragen mit den in der Woche vom 4. April 2016 eingegangenen Antworten der Bundesregierung

Deutscher Bundestag Drucksache 18/8246 18. Wahlperiode 27.04.2016 Gesetzentwurf der Abgeordneten Tabea Rößner, Dr. Konstantin von Notz, Hans-Christian Ströbele, Ulle Schauws, Katja Dörner, Kai Gehring, Dr. Franziska Brantner, Maria Klein-Schmeink, Elisabeth Scharfenberg, Kordula Schulz-Asche, Dr. Harald Terpe, Doris Wagner, Beate Walter-Rosenheimer, Luise Amtsberg, Renate Künast, Claudia Roth (Augsburg) und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/8244 18. Wahlperiode 27.04.2016 Antrag der Abgeordneten Luise Amtsberg, Manuel Sarrazin, Annalena Baerbock, Dr. Franziska Brantner, Dr. Wolfgang Strengmann-Kuhn, Claudia Roth (Augsburg), Marieluise Beck (Bremen), Agnieszka Brugger, Uwe Kekeritz, Tom Koenigs, Dr. Tobias Lindner, Omid Nouripour, Cem Özdemir, Dr. Frithjof Schmidt, Jürgen Trittin, Doris Wagner, Kerstin Andreae, Ekin Deligöz, Dr. Thomas Gambke, Anja Hajduk, Renate Künast, Markus Kurth, Özcan Mutlu, Dr. Konstantin von Notz, Lisa Paus, Brigitte Pothmer und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/8555 18. Wahlperiode 24.05.2016 Kleine Anfrage der Abgeordneten Ulla Jelpke, Wolfgang Gehrcke, Christine Buchholz, Annette Groth, Inge Höger, Andrej Hunko, Kerstin Kassner, Jan Korte, Niema Movassat, Harald Petzold (Havelland) und der Fraktion DIE LINKE.

Plenarprotokoll 18/176 Deutscher Bundestag Stenografischer Bericht 176. Sitzung Berlin, Donnerstag, den 9. Juni 2016

Deutscher Bundestag Drucksache 18/8826 18. Wahlperiode 20.06.2016, Gesetzentwurf der Bundestregierung

Deutscher Bundestag Drucksache 18/8937 18. Wahlperiode 24.06.2016 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Wolfgang Gehrcke, Christine Buchholz, weiterer

Abgeordneter und der Fraktion DIE LINKE.

Plenarprotokoll 18/183 Deutscher Bundestag Stenografischer Bericht 183. Sitzung Berlin, Donnerstag, den 7. Juli 2016

Deutscher Bundestag Drucksache 18/9283 18. Wahlperiode 26.07.2016 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Frank Tempel, Wolfgang Gehrcke, weiterer Abgeordneter und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/9401 18. Wahlperiode 12.08.2016 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Norbert Müller (Potsdam), Sigrid Hupach, weiterer Abgeordneter und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/9492 18. Wahlperiode 29.08.2016 Kleine Anfrage der Abgeordneten Luise Amtsberg, Beate Walter-Rosenheimer, Volker Beck (Köln), Dr. Franziska Brantner, Katja Dörner, Katja Keul, Maria Klein-Schmeink, Monika Lazar, Irene Mihalic, Özcan Mutlu, Dr. Konstantin von Notz, Tabea Rößner, Claudia Roth (Augsburg), Elisabeth Scharfenberg, Dr. Harald Terpe und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/9554 18. Wahlperiode 06.09.2016 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Volker Beck (Köln), Özcan Mutlu, Luise Amtsberg, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/9609 18. Wahlperiode 09.09.2016 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Kai Gehring, Cem Özdemir, Marieluise Beck (Bremen), weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/9634 18. Wahlperiode 15.09.2016 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Luise Amtsberg, Beate Walter-Rosenheimer, Volker Beck (Köln), weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Plenarprotokoll 18/190 Deutscher Bundestag Stenografischer Bericht 190. Sitzung Berlin, Donnerstag, den 22. September 2016

Deutscher Bundestag Drucksache 18/9757 18. Wahlperiode 26.09.2016 Gesetzentwurf der Bundesregierung

Plenarprotokoll 18/193 Deutscher Bundestag Stenografischer Bericht 193. Sitzung Berlin, Donnerstag, den 29. September 2016

Deutscher Bundestag Drucksache 18/10036 18. Wahlperiode 19.10.2016 Antrag der Abgeordneten Hans-Christian Ströbele, Tabea Rößner, Luise Amtsberg, Volker Beck (Köln), Katja Keul, Renate Künast, Monika Lazar, Irene Mihalic, Özcan Mutlu, Dr. Konstantin von Notz und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/10144 18. Wahlperiode 26.10.2016 Gesetzentwurf der Bundesregierung

Deutscher Bundestag Drucksache 18/10196 18. Wahlperiode 03.11.2016 Kleine Anfrage der Abgeordneten Volker Beck (Köln), Luise Amtsberg, Dr. Franziska Brantner, Kai Gehring, Katja Keul, Maria Klein-Schmeink, Tom Koenigs, Irene Mihalic, Özcan Mutlu, Dr. Konstantin von Notz, Brigitte Pothmer, Tabea Rößner, Corinna Rüffer, Elisabeth Scharfenberg, Ullrich Schauws, Dr. Wolfgang Strengmann-Kuhn, Hans-Christian Ströbele, Beate Walter-Rosenheimer und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/10243 18. Wahlperiode 08.11.2016 Antrag der Abgeordneten Ulla Jelpke, Sevim Dağdelen, Frank Tempel, Sigrid Hupach, Nicole Gohlke, Dr. André Hahn, Dr. Rosemarie Hein, Jan Korte, Ralph Lenkert, Cornelia Möhring, Norbert Müller (Potsdam), Petra Pau, Harald Petzold (Havelland), Martina Renner, Kersten Steinke, Halina Wawzyniak, Katrin Werner, Jörn Wunderlich und der Fraktion DIE LINKE

Plenarprotokoll 18/199 Deutscher Bundestag Stenografischer Bericht 199. Sitzung Berlin, Donnerstag, den 10. November 2016

Deutscher Bundestag Drucksache 18/10365 18. Wahlperiode 21.11.2016 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Volker Beck (Köln), Luise Amtsberg, Dr. Franziska Brantner, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/10860 18. Wahlperiode 17.01.2017 Gesetzentwurf der Abgeordneten Azize Tank, Katja Kipping, Sabine Zimmermann (Zwickau), Matthias W. Birkwald, Annette Groth, Inge Höger, Kathrin Vogler, Harald Weinberg, Birgit Wöllert, Pia Zimmermann und der Fraktion DIE LINKE.

Plenarprotokoll 18/212 Deutscher Bundestag Stenografischer Bericht 212. Sitzung Berlin, Donnerstag, den 19. Januar 2017

Deutscher Bundestag Drucksache 18/10936 18. Wahlperiode 23.01.2017 Gesetzentwurf der Bundesregierung

Plenarprotokoll 18/215 Deutscher Bundestag Stenografischer Bericht 215. Sitzung Berlin, Donnerstag, den 26. Januar 2017

Deutscher Bundestag Drucksache 18/11133 18. Wahlperiode 13.02.2017 Gesetzentwurf der Bundesregierung

Deutscher Bundestag Drucksache 18/11137 18. Wahlperiode 13.02.2017 Gesetzentwurf der Bundesregierung

Deutscher Bundestag Drucksache 18/11163 18. Wahlperiode 14.02.2017 Gesetzentwurf der Fraktionen der CDU/CSU und SPD

Deutscher Bundestag Drucksache 18/11325 18. Wahlperiode 24.02.2017 Gesetzentwurf der Bundesregierung

Deutscher Bundestag Drucksache 18/11401 18. Wahlperiode 07.03.2017 Antrag der Abgeordneten Jan Korte, Frank Tempel, Dr. André Hahn, Katrin Kunert, Petra Pau, Martina Renner, Dr. Petra Sitte und der Fraktion DIE LINKE

Deutscher Bundestag Drucksache 18/11546 18. Wahlperiode 16.03.2017 Gesetzentwurf der Bundesregierung

Plenarprotokoll 18/225, Deutscher Bundestag Stenografischer Bericht 225. Sitzung Berlin, Donnerstag,

den 23. März 2017

Deutscher Bundestag Drucksache 18/11885 18. Wahlperiode 07.04.2017 Schriftliche Fragen mit den in der Woche vom 3. April 2017 eingegangenen Antworten der Bundesregierung

Deutscher Bundestag Drucksache 18/11862 18. Wahlperiode 28.03.2017 Kleine Anfrage der Abgeordneten Jan Korte, Dr. André Hahn, Ulla Jelpke, Katrin Kunert, Martina Renner, Dr. Petra Sitte, Halina Wawzyniak und der Fraktion DIE LINKE

Deutscher Bundestag Drucksache 18/11863 18. Wahlperiode 28.03.2017 Kleine Anfrage der Abgeordneten Jan Korte, Dr. André Hahn, Ulla Jelpke, Katrin Kunert, Martina Renner, Dr. Petra Sitte, Halina Wawzyniak und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/11947 18. Wahlperiode 13.04.2017 Schriftliche Fragen mit den in der Woche vom 10. April 2017 eingegangenen Antworten der Bundesregierung

Deutscher Bundestag Drucksache 18/12037 18. Wahlperiode 24.04.2017, Gesetzentwurf der Bundesregierung

Deutscher Bundestag Drucksache 18/12089 18. Wahlperiode 25.04.2017 Antrag der Abgeordneten Andrej Hunko, Azize Tank, Wolfgang Gehrcke, Sabine Zimmermann (Zwickau), Jan van Aken, Matthias W. Birkwald, Christine Buchholz, Sevim Dağdelen, Dr. Diether Dehm, Annette Groth, Heike Hänsel, Inge Höger, Katja Kipping, Katrin Kunert, Stefan Liebich, Niema Movassat, Dr. Alexander S. Neu, Alexander Ulrich, Kathrin Vogler, Harald Weinberg, Birgit Wöllert, Pia Zimmermann und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/12132 18. Wahlperiode 26.04.2017 Entschließungsantrag der Fraktion BÜNDNIS 90/ DIE GRÜNEN zu der dritten Beratung des Gesetzentwurfs der Bundesregierung

Deutscher Bundestag Drucksache 18/12173 18. Wahlperiode 27.04.2017 Kleine Anfrage der Abgeordneten Ulla Jelpke, Jan van Aken, Christine Buchholz, Annette Groth, Inge Höger, Andrej Hunko, Katja Kipping, Jan Korte, Petra Pau, Martina Renner, Kersten Steinke, Alexander Ulrich und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/12201 18. Wahlperiode 27.04.2017 Kleine Anfrage der Abgeordneten Luise Amtsberg, Volker Beck (Köln), Franziska Brantner, Claudia Roth (Augsburg), Katja Keul, Renate Künast, Monika Lazar, Irene Mihalic, Özcan Mutlu, Dr. Konstantin von Notz, Hans-Christian Ströbele und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/12215 18. Wahlperiode 27.04.2017 Kleine Anfrage der Abgeordneten Stephan Kühn (Dresden), Matthias Gastel, Dr. Valerie Wilms, Tabea Rößner, Markus Tressel, Beate Müller-Gemmeke und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/12229 18. Wahlperiode 04.05.2017 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Jan Korte, Dr. André Hahn, Ulla Jelpke, weiterer Abgeordneter und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/12253 18. Wahlperiode 05.05.2017 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Jan Korte, Dr. André Hahn, Ulla Jelpke, weiterer Abgeordneter und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/12522 18. Wahlperiode 26.05.2017 Antwort der Bundesregierung

Deutscher Bundestag Drucksache 18/12622 18. Wahlperiode 30.05.2017 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Jan van Aken, Christine Buchholz, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 18/12173 –

Plenarprotokoll 18/231, Deutscher Bundestag Stenografischer Bericht 231. Sitzung Berlin, Donnerstag, den 27. April 2017

Deutscher Bundestag Drucksache 18/12329 18. Wahlperiode 15.05.2017 Gesetzentwurf der Bundesregierung

Plenarprotokoll 18/234 Deutscher Bundestag Stenografischer Bericht 234. Sitzung Berlin, Donnerstag, den 18. Mai 2017

Deutscher Bundestag Drucksache 18/12647 18. Wahlperiode 01.06.2017 Antwort der

Bundesregierung auf die Kleine Anfrage der Abgeordneten Luise Amtsberg, Volker Beck (Köln), Dr. Franziska Brantner, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN

Deutscher Bundestag Drucksache 18/12671 18. Wahlperiode 02.06.2017 Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Frank Tempel, Christine Buchholz, weiterer Abgeordneter und der Fraktion DIE LINKE.

Deutscher Bundestag Drucksache 18/12781 18. Wahlperiode 20.06.2017 Antrag der Fraktionen der CDU/CSU und SPD Sonderbeauftragten der Vereinten Nationen zum Schutz von Journalistinnen und Journalisten schaffen

3.2.2 Bundesrat Plenary Proceedings and Documents

Plenarprotokoll 756 BUNDESRAT Stenografischer Bericht 756. Sitzung Berlin, Freitag, den 10. November 2000

Plenarprotokoll 757 BUNDESRAT Stenografischer Bericht 757. Sitzung Berlin, Freitag, den 1. Dezember 2000

Plenarprotokoll 758 BUNDESRAT Stenografischer Bericht 758. Sitzung Berlin, Donnerstag, den 21. Dezember 2000

Plenarprotokoll 769 BUNDESRAT Stenografischer Bericht 769. Sitzung Berlin, Freitag, den 9. November 2001

Plenarprotokoll 778 BUNDESRAT Stenografischer Bericht 778. Sitzung Berlin, Freitag, den 12. Juli 2002

Plenarprotokoll 789 BUNDESRAT Stenografischer Bericht 789. Sitzung Berlin, Freitag, den 20. Juni 2003

Plenarprotokoll 811 BUNDESRAT Stenografischer Bericht 811. Sitzung Berlin, Freitag, den 27. Mai 2005

Bundesrat Drucksache 339/05 (Beschluss) 27.05.05 Vertrieb: Bundesanzeiger Verlagsgesellschaft mbH, Amsterdamer Straße 192, 50735 Köln Telefon: 0221/97668-0, Telefax: 0221/97668-338 ISSN 0720-2946 Beschluss des Bundesrates Gesetz zu dem Vertrag vom 29. Oktober 2004 über eine

Verfassung für Europa

Bundesrat Drucksache 339/1/05 (Grddrs. 339/05 und 340/05) 26.05.05 .Antrag der Länder Baden-Württemberg, Bayern, Berlin, Rheinland-Pfalz Gesetz zu dem Vertrag vom 29. Oktober 2004 über eine Verfassung für Europa und Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union

Plenarprotokoll 828 Gesamtherstellung: BUNDESRAT Stenografischer Bericht 828. Sitzung Berlin, Freitag, den 24. November 2006

Bundesrat Drucksache 154/08 Gesetzesantrag des Freistaates Bayern Entwurf eines Gesetzes zur Erleichterung ausländerrechtlicher Maßnahmen bei der Bekämpfung von Jugendgewalt und Kriminalität

Plenarprotokoll 846 Gesamtherstellung: BUNDESRAT Stenografischer Bericht 846. Sitzung Berlin, Freitag, den 4. Juli 2008

Bundesrat Drucksache 178/09 20.02.09 Entwurf eines Gesetzes zur Stärkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz)

Plenarprotokoll 862 Gesamtherstellung: BUNDESRAT Stenografischer Bericht 862. Sitzung Berlin, Freitag, den 16. Oktober 2009

Plenarprotokoll 864 Gesamtherstellung BUNDESRAT Stenografischer Bericht 864. Sitzung Berlin, Freitag, den 27. November 2009

Bundesrat Drucksache 222/10 21.04.10 Gesetzesantrag des Landes Nordrhein-Westfalen Entwurf eines Gesetzes zur Reform des strafrechtlichen Wiederaufnahmerechts

Plenarprotokoll 878 Gesamtherstellung: BUNDESRAT Stenografischer Bericht 878. Sitzung Berlin, Freitag, den 17. Dezember 2010

Bundesrat Drucksache 87/11 11.02.11 Gesetzesantrag des Landes Nordrhein-Westfalen Entwurf eines Gesetzes zur Förderung der Gleichberechtigung von Frauen und Männern in Aufsichtsräten

börsennotierter Unternehmen (FöGAbUG)

Plenarprotokoll 881 Gesamtherstellung BUNDESRAT Stenografischer Bericht 881. Sitzung Berlin, Freitag, den 18. März 2011

Bundesrat Drucksache 386/11 (neu) 29.06.11 Antrag des Landes Mecklenburg-Vorpommern EntschlieÙung des Bundesrates Kinderrechte im Grundgesetz verankern

Bundesrat Drucksache 680/11 BRFuss 04.11.11 R Gesetzesbeschluss des Deutschen Bundestages Gesetz zur Verbesserung des Austauschs von strafregisterrechtlichen Daten zwischen den Mitgliedstaaten der Europäischen Union und zur Änderung registerrechtlicher Vorschriften

Bundesrat Drucksache 386/11 (Beschluss) 25.11.11 Vertrieb: Beschluss des Bundesrates EntschlieÙung des Bundesrates Kinderrechte im Grundgesetz verankern

Plenarprotokoll 890 Gesamtherstellung: BUNDESRAT Stenografischer Bericht 890. Sitzung Berlin, Freitag, den 25. November 2011

Bundesrat Drucksache 330/12 29.05.12 Gesetzesantrag der Freien und Hansestadt Hamburg Entwurf eines Gesetzes zur Förderung gleichberechtigter Teilhabe von Frauen und Männern in Führungsgremien (GTeilhG)

Bundesrat Drucksache 330/12 (Beschluss) 21.09.12 Vertrieb: Gesetzentwurf des Bundesrates Entwurf eines Gesetzes zur Förderung gleichberechtigter Teilhabe von Frauen und Männern in Führungsgremien (GTeilhG)

Bundesrat Drucksache 597/12 BRFuss 11.10.12 R - FJ - FS - G Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes über den Umfang der Personensorge bei einer Beschneidung des männlichen Kindes

Bundesrat Drucksache 153/14 BRFuss 11.04.14 In - R Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Änderung des Antiterrordateigesetzes und anderer Gesetze

Bundesrat Drucksache 408/13 BRFuss 10.05.13 EU - Fz - Wi Gesetzentwurf der Bundesregierung

Entwurf eines Gesetzes zum Vorschlag für eine Verordnung des Rates zur Übertragung besonderer Aufgaben im Zusammenhang mit der Aufsicht über Kreditinstitute auf die Europäische Zentralbank

Bundesrat Drucksache 491/14 BRFuss 17.10.14 R Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Stärkung des Rechts des Angeklagten auf Vertretung in der Berufungsverhandlung und über die Anerkennung von Abwesenheitsentscheidungen in der Rechtshilfe

Bundesrat Drucksache 438/14 26. 09. 14 R – FJ – In Entwurf der Bundesregierung Entwurf eines Gesetzes zu dem Übereinkommen des Europarats vom 25. Oktober 2007 zum Schutz von Kindern vor sexueller Ausbeutung und sexuellem Missbrauch

Bundesrat Drucksache 397/14 BRFuss 29.08.14 R - FS Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Umsetzung der Richtlinie 2011/99/EU über die Europäische Schutzanordnung, zur Durchführung der Verordnung (EU) Nr. 606/2013 über die gegenseitige Anerkennung von Schutzmaßnahmen in Zivilsachen und zur Änderung des Gesetzes über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit

Plenarprotokoll 928 Gesamtherstellung: BUNDESRAT Stenografischer Bericht 928. Sitzung Berlin, Freitag, den 28. November 2014

Bundesrat Drucksache 636/14 BRFuss 29.12.14 Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst

Bundesrat Drucksache 642/14 BRFuss 29.12.14 Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Neubestimmung des Bleiberechts und der Aufenthaltsbeendigung

Bundesrat Drucksache 125/15 BRFuss 27.03.15 R Gesetzentwurf der Bundesregierung Entwurf eines ... Gesetzes zur Änderung des Gesetzes über die internationale Rechtshilfe in Strafsachen

Bundesrat Drucksache 249/15 28.05.15 R - In - Wi Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Einführung einer Speicherpflicht und einer Höchstspeicherfrist für Verkehrsdaten

Plenarprotokoll 934 Gesamtherstellung: BUNDESRAT Stenografischer Bericht 934. Sitzung Berlin,

Freitag, den 12. Juni 2015

Bundesrat Drucksache 492/1/15 03.11.15 Antrag des Freistaats Thüringen Gesetz zur Einführung einer Speicherpflicht und einer Höchstspeicherfrist für Verkehrsdaten

Plenarprotokoll 938 Gesamtherstellung: BUNDESRAT Stenografischer Bericht 938. Sitzung Berlin, Freitag, den 6. November 2015

Bundesrat Drucksache 282/16 27. 05. 16 R – Wi Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zu dem Übereinkommen vom 19. Februar 2013 über ein Einheitliches Patentgericht

Bundesrat Drucksache 171/16 (Beschluss) Beschluss des Bundesrates Entschließung des Bundesrates zur Einräumung eines Klagerechts für die Datenschutzaufsichtsbehörden von Bund und Ländern zur Umsetzung der Safe-Harbor-Entscheidung des EuGH

Bundesrat Drucksache 171/16 06.04.16 Antrag der Freien und Hansestadt Hamburg Entschließung des Bundesrates zur Einräumung eines Klagerechts für die Datenschutzaufsichtsbehörden von Bund und Ländern zur Umsetzung der Safe-Harbor-Entscheidung des EuGH

Bundesrat Drucksache 421/16 12.08.16 R - Fz Gesetzentwurf der Bundesregierung Entwurf eines ... Gesetzes zur Änderung des Gesetzes über die internationale Rechtshilfe in Strafsachen

Bundesrat Drucksache 109/17 02.02.17 In - R - Wi Gesetzentwurf der Bundesregierung

Bundesrat Drucksache 179/17 23.02.17 In - FJ - R Gesetzentwurf der Bundesregierung

Bundesrat Drucksache 751/16 09. 12. 16 R – K Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zu dem Übereinkommen vom 19. Februar 2013 über ein Einheitliches Patentgericht

Bundesrat Drucksache 8/17 12.01.17 FJ - AIS - Wi Gesetzentwurf der Bundesregierung Entwurf eines Gesetzes zur Förderung der Transparenz von Entgeltstrukturen

3.2.3 Bundesrat Committee proceedings

Deutscher Bundestag 17. Wahlperiode Protokoll Nr. 17/65 Ausschuss für Ernährung, Landwirtschaft und Verbraucherschutz Wortprotokoll der 65. Sitzung Berlin, den 21.03.2012

3.3 Wider German Health Legislation

2000: GKV-Gesundheitsreform 2000, Gesetz zur Rechtsangleichung in der gesetzlichen Krankenversicherung

2002: Stammzellgesetz

2004: GKV-Modernisierungsgesetz (GMG)

2007: GKV-Wettbewerbsstärkungsgesetz

2008: Gesetz zur Sicherstellung des Embryonenschutzes im Zusammenhang mit Einfuhr und Verwendung menschlicher embryonaler Stammzellen Stammzellgesetz (StZG- Stem Cell Act)

2009: GKV-Organisationsstruktur-Weiterentwicklungsgesetz (GKV-OrgWG)

2009: Gesetz über genetische Untersuchungen bei Menschen (Gendiagnostikgesetz - GenDG)

2011: Arzneimittelmarkt-Neuordnungsgesetz (AMNOG)

2011: GKV-Finanzierungsgesetz (GKV-FinG)

2012: GKV-Versorgungsstrukturgesetz (GKV-VStG)

2013: Patientenrechtegesetz

2015: GKV-Finanzstruktur- und Qualitätsweiterentwicklungsgesetz (GKV-FQWG)

2015: GKV-Versorgungsstärkungsgesetz (GKV-VSG)