

# The Right Answer? An assessment of the Charter of Fundamental Rights and its necessity in Europe

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## Abstract

*The Charter of Fundamental Rights of the European Union has not been universally welcomed to the human rights arena, with many rejecting it as a mere young pretender against the long reigning European Convention of Human Rights. This essay seeks to determine the role of the Charter and thus determine whether it is truly necessary in an already crowded marketplace of human rights models in Europe. This study approaches the question first by considering the historical prominence of rights in the EU, then discussing the functioning of the new Charter within the context of the current European human rights systems and finally, considering the value of the newly legal Charter. From this, it is evident that the Charter does have an importance within the EU's own laws and institutions, but is ultimately subservient to the ECHR.*

## I. Introduction

The Charter of Fundamental Rights of the European Union (herein known as “the Charter”) has experienced an ascension from its inception as a guide of sorts detailing the aspirations of the EU’s human rights policy to its current form; a binding document with the same legal status as all the treaties which preceded it. The Charter has fulfilled the original intentions of its creators by performing the role of a compilation of accepted rights and principles that already existed in Europe, albeit dispersed amongst different sources. However, the Charter has proved to be a contentious issue in European politics, with doubts being voiced about the

functionality of the European Union's own "Bill of Rights", with questions regarding the necessity of the Charter lingering since it made its first appearance in December 2000. To effectively respond to these concerns the Charter must be evaluated, and thus it can be determined if this relatively new set of human rights regulations is a necessary and desirable development.

## II. A history of rights and the EU

It is first important to set the Charter in context by examining the history and development of rights within the EU. The EU itself can trace roots back to a purely economic arrangement that emerged from the ashes of World War II, a conflict that ravaged Europe not just physically, but economically and diplomatically too. Therefore, a series of treaties and agreements led to closer co-operation between the European heavyweights who resolved to both rebuild Europe and tie previously warring nations closely together economically so that any future clashes would be prevented. Natural progression led to new aims of a common European market characterised by the free movement of goods and workers and, as first proposed by the Maastricht Treaty of 1992, a single European currency<sup>2</sup>.

This vision of the EU as a purely economic organisation serves to provide an explanation as to why the EU had shied away from the difficult social issues, such as human rights. General feeling was that rights were issues for the individual member states (MS) to determine, and that the EU and its judiciary would rule on matters of mere economic significance. Thus, rights were developed by the European Court of Justice (ECJ) in a basic form, although not enshrined in any legally binding treaties the court made room for rights by stating that 'respect for fundamental rights forms

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<sup>1</sup> Paul Craig and Grainne De Burca, *EU LAW Text, Cases and Materials* (OUP 2008), 412.

<sup>2</sup> Josephine Steiner, Lorna Woods and Christian Twigg-Flesner *EU Law* (OUP 2006), 7.

an integral part of the general principle of Community law<sup>3</sup>. It is also interesting to note that the civil and political rights that did develop through case law may have emerged because they rarely threatened the economic principles on which the EU was built. For example, the prevention of discrimination with regards to nationality<sup>4</sup> bolsters the EU objective of maintaining a healthy internal market<sup>5</sup>.

Move forward and the EU had become a different beast. Maastricht afforded Europe all the characteristics of a “superstate”, as evidenced by Weiler; ‘[Maastricht] appropriates the deepest symbols of statehood: European citizenship, defence, foreign policy’<sup>6</sup>. This major political evolution in the 1990’s led to a shift in attitudes as to what Europe had become. The new European Union had indicated that Europe was ready to integrate politically at a much greater level than previously known. Naturally, the issue of human rights within the EU came to the forefront, and as a result of much debate and a Convention, the Charter came into being as an adjunct to the Treaty of Nice. The Charter has, after 60 years of treaties, minor legislation and decisions of the ECJ, combined the rights and freedoms which were enshrined but scattered into one comprehensive document that gained legally binding status as a result of the ratification of the Treaty of Lisbon. Hence, given the disorganised condition of human rights within the EU and, arguably, their previous status as being the poor relatives of more important economic issues and policies, surely the Charter was well timed, if not overdue.

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<sup>3</sup> Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>4</sup> Treaty on the Functioning of the European Union, Article 18.

<sup>5</sup> Dorota Leczykiewicz “Effective judicial protection” of human rights after Lisbon: should national courts be empowered to review EU secondary law? *E.L.Rev* 2010, 35(3), 326-348.

<sup>6</sup> Alan Dashwood, Publication review on ‘The Constitution of Europe: “do the clothes have a new emperor?” and other essays on European Integration’ - Joseph H H Weiler, *CLJ* 2000, 59(2), 402-406.

### III. The Charter in practice

One of the main initial aims of the Charter was to make the rights contained in the various treaties and judgements within the EU ‘more visible and accessible’<sup>7</sup> for the everyman. With rights consolidated into one neat document one does not need to trawl through case law and legal provisions in order to establish what fundamental right the aggrieved party feels has been violated. This characteristic of the Charter has proven effective both before and after it’s elevation to treaty status when ratified alongside the Treaty of Lisbon. Despite initially lacking legally binding standing, the institutions of the European Union were shown to be eager to adhere to the Charter, with the ECJ and European Parliament citing the Charter prominently in the case *EP v Council*<sup>8</sup>. Since the Charter’s entry into legal force at Lisbon, its claim to provide legal certainty has solidified.

Ratification of the Charter has further provided for better access to legal institutions when asserting ones rights. Where a party feels wronged due to an action by a MS when implementing EU law, the case can now be heard in a national court instead of being directly referred to the ECJ, a course that is both expensive and inconvenient. Hence, more individuals will be encouraged to assert their rights. This clarification of rights must be considered a positive and desirable step proving the Charter to be worth its salt.

However, it would be a mistake to think that the rights afforded by the Charter are universal to all citizens in all circumstances outlined in the articles. Here, it is vital to take account of two factors. Firstly, the rights afforded by the Charter fall into different categories: freedoms and principles. Freedoms are straightforward; they are the classic civil and political rights that are completely justiciable, such as freedom from torture<sup>9</sup>. However, some of the rights outlined in the Charter are labelled principles. This has led

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<sup>7</sup> Official website of the EU Charter on Fundamental Rights - Introduction  
<[http://www.eucharter.org/home.php?page\\_id=66?>](http://www.eucharter.org/home.php?page_id=66?>) Accessed 11/12/2010.

<sup>8</sup> Case C-540/03 *EP v Council* [2006] ECR I-5769.

<sup>9</sup> The Charter of Fundamental Rights of the European Union, Article 4.

to much confusion and debate over the definition of the term “principle”. It is suggested under Article 52(5) of the Charter that principles are food-for-thought when MSs or the EU are drafting legislation, but they are not free standing, directly enforceable rights<sup>10</sup>. To confuse even more, there appears to be no clear and defining distinction between principles and freedoms, leaving some articles up in the air. The Revised Principles offer some explanation as to the nature of the contained rights; however, rights such as equality of the sexes offered under Article 23 can be interpreted as being both a right and a principle. It is these legal confusions that undermine the claims that the Charter is an easy guide to human rights in the EU.

Secondly, the Charter applies only horizontally in that the rights provided can only be utilised when it is an institution of the EU or a MS implementing EU law that strips the aggrieved party of their rights. The Charter has not provided an over arching human rights doctrine that must be adhered to both in the EU’s own institutions but also domestically. On its face, this appears to promote the long standing principle of subsidiarity. Yet, it may serve to ultimately undermine the EU in its human rights functions, as MSs cannot be challenged on non-compliance with EU measures using the Charter<sup>11</sup>. Moreover, the adoption of Protocol 30 has emphasised the apparent weakness of the Charter, as the UK, Poland and the Czech Republic have all been granted protection against the ECJ finding practices within their state to be ‘inconsistent with the fundamental rights’<sup>12</sup> that the Charter affords. Whilst Protocol 30 does not amount to an “opt out”, it remains to be seen how the relationship between these three states and the ECJ develops. The pending *Saeedi*<sup>13</sup> case should serve to clarify some of the implications of Protocol 30 when it reached the ECJ. It could be the first

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<sup>10</sup> Alina Kaczorowska *European Union Law* (Routledge 2011), 245.

<sup>11</sup> *Ibid.* 244

<sup>12</sup> Damien Chalmers, Gareth Davies and Giorgio Monti *European Union Law* (Cambridge University Press 2010), 257.

<sup>13</sup> Case C-411/10 *Saeedi* (pending reference to ECJ).

warning signal that the Charter will not be as successful as envisaged, and as such has potential become one of the EU's more undesirable brainchild.

Nonetheless, to suggest this may be to wrongly write off the Charter. The Charter can be thought of as an instrument to seal the cracks with respect to human rights law in the EU. In many ways, the Charter does not need to extend past an outline of entrenched rights and principles that are only applicable to rulings originating from the EU. Most member states have their own constitutionally protected human rights legislation that adequately promotes the respect of rights in a way that is appropriate for the MS when considering questions of morality and locality. It is also important to note that all MSs of the EU are required to adhere to the European Convention of Human Rights (ECHR). Therefore human rights systems already exist which extensively govern the actions of individual states.

The Charter's strength lies in that it ensures that the EU measures up to, at least, the same standards as the MSs already follow. Indeed, it has routinely been boasted by the ECJ that the EU has built its rights law by adopting common standards of rights that already exist in MSs as a group<sup>14</sup>. Evidence of this commitment can be found in Article 6 of the Treaty of the European Union, where it is stated, 'the Union shall respect fundamental rights... as they result from the constitutional traditions common to the member states, as general principles of Community law'. Hence, the Charter can be regarded as complimentary to national rights legislation, and as such, it maintains an important balance whereby the EU has been brought up to the same legal standard as the member states.

Yet, this serves to puzzle one further when determining the reasoning behind EU's ascension to the ECHR. Surely if the Charter brings the EU into line with the MSs, then signing an external agreement on human rights makes little sense. Outside of considerations of the possible conflict with

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<sup>14</sup> Chalmers, Davies and Monti (n12), 236.

the Charter, there are a number of good reasons why the EU should join the Convention system.

Importantly, it establishes an equal level of protection of human rights throughout all political institutions in Europe. The EU, with its relatively new invigoration for the promotion of human rights, has thus adopted the ECHR as a lowest common denominator for rights within its jurisdiction, providing a floor rather than a ceiling<sup>15</sup> for rights aspirations. It is also of significance that the EU has acceded to the ECHR whilst embarking on this drive to provide a more substantive human rights armoury. It is conceivable that the EU will look to the example of the old-hand of European human rights, the ECHR, as it tries to establish its own rights system. The ECHR can play the role of a check on the Charter in its early days of functioning<sup>16</sup>. This ties in with the current relationship between the two courts, as the ECJ has on many previous occasions referred to the ECHR and decisions made by the European Court of Human Rights<sup>17</sup>.

Again, as mentioned previously, the ECJ has evolved from its initial role as a forum to settle economic disputes into a court with a much wider jurisdiction that now encompasses the promotion of rights in its work. One commentator has commended the ECJ's role in the radical expansion of rights in the EU, and suggests that the court should continue to deal with rights as within its competence<sup>18</sup>. However, an alternative school would suggest that the acceptance of the ECHR should see a change in the operation of the ECJ, with a return to operating primarily as an arbitrator on economic disputes whilst allowing rights questions to be dealt with in national courts or Strasbourg. As the EU now falls under the remit of the ECtHR, Strasbourg will now have the final say

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<sup>15</sup> Craig and De Burca (n1), 385.

<sup>16</sup> Chalmers, Davies and Monti (n12), 259.

<sup>17</sup> Aida Torres Perez *Conflicts of Rights in the European Union* (OUP 2009) 32. The ECJ has referred to decisions by the ECtHR on a number of occasions, a specific example being as case involving equal treatment to transsexuals, Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2145.

<sup>18</sup> Francis G Jacobs "Human Rights in the European Union: the Role of the Court of Justice" *E.L.Rev.* 2001 26(4), 331-341.

on the application of rights within the EU, although the ECJ should retain a role similar to that of national courts. Strasbourg has in the past shown itself willing to step in where no remedy can be found by the ECJ, as evidenced in the case of *Matthews v UK*<sup>19</sup>.

#### IV. Europe's best option?

Following this, given that the EU now bows to the ECHR, as evident in the supremacy of the ECtHR, how then can the Charter claim to necessary and desirable?

The Charter can be confirmed as a major player in the field of European human rights as it goes above and beyond the rights laid out in the ECHR. The ECHR has been accused of concentrating too heavily on civil and political rights<sup>20</sup>, despite protestations from Strasbourg insisting it is a "living document". The Charter aims to modernise rights in Europe and has expanded the scope of fundamental freedoms and principles to include social and economic rights, alongside provisions for "third generation rights"<sup>21</sup> relating to modern innovations such as biogenetics. With this radical rethinking of rights in Europe, the Charter has proven itself to be the foremost authority on modern day rights, having emulated the progression of attitudes to reflect the 21<sup>st</sup> Century. One authority suggests that 'it is up to date, in a way the Convention...cannot be'<sup>22</sup>. This has led to an interesting paradox. The EU has surpassed the level of rights protection afforded by the ECHR, yet if any of the differing rights are found contrary to the interpretation of the ECHR at Strasbourg, the Charter's provisions should be technically struck down<sup>23</sup>. This is not to suggest that the Charter is rendered impotent, it still is of much benefit to the EU and its citizens as we have already discussed.

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<sup>19</sup> Appl. No 24833/94 *Matthews v UK* [1999] 28 EHRR 361

<sup>20</sup> Kaczorowska (n10), 242.

<sup>21</sup> Lammy Betten "European Community Law: human rights" I.C.L.Q. 2001, 50(3) 690-701

<sup>22</sup> Jacobs (n18)

<sup>23</sup> Kaczorowska (n10), 250.



Aside from critiques of the Charter itself, its necessity and desirability can be measured by considering other measures that, in place of the Charter, may have been more effective. Instead of compiling existing rights into one document, a complete reassessment of the EU's human rights policy may have been more appropriate. Indeed, Opinion 2/94 highlighted the EU's apathy to the furtherance of rights, stating that it not a main policy aim<sup>24</sup>, suggesting that ascension to the ECHR would be a better option given its 'special significance' in EU law<sup>25</sup>. Weiler has proposed that reform to the system that existed before the Charter would have been the most effective route. These reforms would have encompassed a full rights policy facilitated by a budget, a Commissioner and a Directorate-General. However, these suggestions do not prove that the Charter is entirely undesirable, merely that alternatives may have had more effect.

## V. Conclusion

The Charter has been introduced amongst much debate and controversy. Whilst providing a greater level of legal certainty as to rights in the EU it may be overshadowed by the EU's adoption of the ECHR, which will emerge the final arbiter of rights law in Europe, despite the more comprehensive rights protection offered by the Charter. Difficulties have been presented with respect to the distinction between freedoms and principles, with the current understanding of the terms remaining unclear and unsatisfactory. Moreover, the Protocol 30 opt-out has presented itself as a threat to the stability and future success of the EU's new human rights regime. All this evidence seems to suggest that the Charter is an entirely redundant instrument.

Regardless of this previous criticism, the Charter has filled the void of internal EU rights policy, a most important

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<sup>24</sup> J H H Weiler "Editorial: Does the European Union Truly Need a Charter of Rights?" E.L.J. 2000, Vol.6 No.2, 95-97.

<sup>25</sup> Opinion 2/94 on Accession by the Community to the ECHR [1996] ECR I-1759, para. 33.

development. It does not merely bow to the ECHR, but has provided an enhanced, modern doctrine of rights that should compliment and expand on the older Convention. Its flaws are easy to establish at this early stage, but ultimately the necessity of the Charter can only be measured by its future successes, or indeed, failures. Therefore, we should allow time to tell if it will be the most desirable course of action.

**BIBLIOGRAPHY****Books**

- Torres Perez A, *Conflicts of Rights in the European Union* (OUP 2009)
- Kaczorowska A, *European Union Law* (Routledge 2011)
- Chalmers D, Davies G and Monti G, *European Union Law* (Cambridge University Press 2010)
- Steiner J, Woods L and Twigg-Flesner C, *EU Law* (OUP 2006)
- Foster N, *Blackstone's EU Treaties and Legislation 2010-2011* (OUP 2010)
- Craig P and De Burca G, *EU LAW Text, Cases and Materials* (OUP 2008)

**Journal Articles**

- Dashwood A, Publication review on 'The Constitution of Europe: "do the clothes have a new emperor?" and other essays on European Integration' - Joseph H. H. Weiler, *CLJ* 2000, 59(2), 402-406
- Leczykiewicz D, "Effective judicial protection" of human rights after Lisbon: should national courts be empowered to review EU secondary law? *E.L.Rev* 2010, 35(3), 326-348.
- Jacobs F G, Human Rights in the European Union: the Role of the Court of Justice. *E.L.Rev.* 2001 26(4) 331-341
- Weiler J H H, Editorial: Does the European Union Truly Need a Charter of Rights? *E.L.J.* 2000, Vol.6 No.2, 95-97
- Betten L, European Community Law: human rights *I.C.L.Q.* 2001, 50(3) 690-701
- Alonso Garcia R, The General provisions of the Fundamental Rights of the European Union. *E.L.J.* Vol. 8 No.4, December 2002, 492-514

**Cases**

- Case C-540/03 *EP v Council* [2006] ECR I-5769

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

Appl. No 24833/94 *Matthews v UK* [1999] 28 EHRR 361

Case C- 13/94 *P v S and Cornwall County Council* [1996]  
ECR I-2145

Case C-411/10 *Saeedi* (pending reference to the ECJ)