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THE CHARTER OF FUNDAMENTAL RIGHTS:
HISTORY AND PROSPECTS IN POST-LISBON EUROPE

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Abstract

The EU Charter of Fundamental Rights has been incorporated into European constitutional law ten years after it was adopted by the EU institutions. In that time the Charter developed from a 'solemn proclamation' to a persuasive authority before the European Courts and now a binding Charter for the EU. It has been referred to in the case-law of both the European Court of Justice and the European Court of Human Rights. However, the Charter's history and future are the subject of political contest and academic debate. Along with the accession to the European Convention on Human Rights, it is likely to provide much scope for debate in coming years.

This paper assesses the Charter's development from a proposal to increase EU legitimacy to its current status as the Union's own Bill of Rights. It examines the rights protected by the Charter, their sources and how they may be interpreted in light of the 'Explanations' in the Official Journal. The case-law of the European Courts on the Charter is catalogued and analysed to determine the Charter's likely value in human rights litigation. Finally, the chapter analyses the application of the Charter across the EU and considers its implications in the Member States that have limited its effect. Three related themes are woven throughout the analysis: the conflicting motivations of the Member States and the EU institutions, the potential for broadening and strengthening human rights protection in the EU and the Charter's relationship with the European Convention on Human Rights.

Keywords

EU Charter of Fundamental Rights – Human Rights – Lisbon Treaty – ECHR – European Court of Justice

Introduction

Ten years after its “solemn proclamation” by the EU institutions, the EU Charter of Fundamental Rights has been given legal force by the Treaty of Lisbon and thus is incorporated into European constitutional law. This chapter traces the Charter’s development from a proposal to make rights more visible to its current status as a legally binding catalogue of civil, political, social and economic rights. It surveys the rights protected by the Charter, their sources and the horizontal provisions governing their scope and application, both generally and in the Member States that have sought to limit their effect. The rapidly-growing case-law of the European Courts on the Charter, both in Luxembourg and in Strasbourg, is analysed with a view to assessing the Charter’s likely future impact in litigation. The Charter to a large extent codifies rights already acknowledged by the European Court of Justice and draws strength from that very fact. Nonetheless, the act and manner of codification is likely to give fresh impetus to human rights litigation, not only against the EU institutions but against the Member States and will even, through the Council of Europe, influence the wider Europe outside the EU.

Origins & Evolution of the Charter

The genesis of the Charter lies in the decision of the European Court of Justice, in *Opinion 2/94*,¹ that the EC Treaty as it then stood did not grant competence to the European Community to accede to the European Convention of Human Rights (“ECHR”). Following the Opinion, the Member State governments might have amended the Treaties to provide a legal basis for accession to the Convention. This would however have required unanimity that did not exist. In place of accession, the German Presidency of the EU proposed a Charter of Fundamental Rights for the Union. The Presidency Conclusions of the Cologne European Council on June 4 1999 proclaimed that

Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy... There appears to be a need, at the present stage of the Union’s development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union’s citizens.²

The initial motivations for the Charter were mixed. Some alluded to the Charter as the creation of “grand new designs for their own sake”, commenting that there were many other measures that would have been more useful in improving the quality of human rights protection within the Union and in its policies towards the outside world.³ It may well be, indeed, that enthusiasm for the Charter derived in some quarters from factors barely connected with the wish to improve human rights protection: in particular, the federalising desire to create a constitution for the Union more closely resembling that of a state, or thoughts of replacing or rendering redundant the Council of Europe as the ultimate protector of human rights standards within the Union and its Member States.⁴ Others saw little merit in the Charter for any reason, as may perhaps be inferred from the UK Government’s consistently expressed view that the Charter “should take the form of a political statement, rather than a legal text to be incorporated into the Treaties”.⁵

It would be wrong, however, to diminish the significance of the achievement. Strong protection of individual rights, whatever its political or constitutional motivations, serves both as a compass for the formulation of policy and a necessary judicial safeguard for the individual against the growing

¹ *Opinion 2/94 on Accession by the Community to the ECHR* [1996] ECR I-1759.

² Cologne European Council, ‘Presidency Conclusions’ 3 and 4 June 1999.

³ Philip Alston and J.H.H. Weiler, “An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights” in *The EU and Human Rights* (ed. P. Alston, Oxford 1999), ch.1, p. 66.

⁴ For a contemporaneous analysis of the tensions between the EU and Council of Europe, as reflected for example in the case of *Matthews v UK* (1999) 28 EHRR 361, see D Anderson, “Shifting the Grundnorm and Other Tales” in D O’Keeffe (ed) *Judicial Review in European Union Law*, liber amicorum in honour of Lord Slynn of Hadley (Netherlands: Kluwer, 2000) chapter 22 at pp. 349-360.

⁵ Answer to written question of Mr Mitchell MP, Hansard HC Deb 30 November 1999 vol 340 c81W.

legislative and administrative power of the Union. As UK experience with the Human Rights Act 1998 has demonstrated, such protection can be strengthened by the enactment of legislation which “brings rights home” by giving them explicit effect in a familiar legal order.⁶ There was always a chance that the greater visibility envisaged in the Cologne Presidency Conclusions would translate, eventually, into a stronger legislative and judicial focus on fundamental rights protection in the EU legal order. Eleven years later this process is underway.

After the Cologne Presidency Conclusions the European Council set up a ‘body’ to draft the proposed Charter. Once the body was assembled, it adopted the rather grand title of ‘Convention’. However, opinions differed on the purpose and value of the Charter even within the Praesidium that constituted the Convention’s leadership. Whereas the Member States tended towards a declaratory text that would, at most, be politically binding, the European Commission and European Parliament intended to draft a more significant document.⁷ The speeches of the President of the Convention, Roman Herzog, and the two Vice-Presidents, Mendez de Vigo (European Parliament) and António Vitorino (European Commission) at the outset of the process demonstrate this internal division. The Convention’s Secretariat, principally consisting of civil servants from the European Council, acted as a ‘restraining influence’.⁸

The outcome was in the nature of a compromise. The Charter was not incorporated into the Treaties, via the Treaty of Nice. Rather, it was “solemnly proclaimed” by the European Parliament, Council of Ministers and European Commission (but not the Member States) at Nice on 7 December 2000.⁹ It is indicative of the Charter’s early status that it was included in the ‘C’ series of the Official Journal, rather than the ‘L’ series that is reserved for law.¹⁰ Nonetheless, the proclamation was not the ‘formal funeral’ for the Charter that some thought it might be.¹¹ Although it lacked for the time being the binding force of law, the Convention members had decided to proceed on the basis that the Charter should be drafted ‘as if’ it might become legally binding.¹² Its 54 Articles – which are for the most part replicated in the Charter as finally adopted in 2007 – were thus drafted with an eye to the possibility of judicial enforcement.¹³

After the proclamation, attention turned to the European judiciary to ascertain what effect the Charter might have in European litigation. In this regard, Advocates General and the Court of First Instance (since renamed the General Court) led the way, before the Court of Justice first mentioned it in a 2006 judgment concerning a challenge by the European Parliament to the Family Reunification Directive.¹⁴ However these cases suggested that the courts of the Union were reluctant to accord full legal force to the Charter in the absence of clear guidance from the political institutions. It remained for the Member State governments to determine its fate.

⁶ Secretary of State for the Home Department *Rights Brought Home: The Human Rights Bill* Cm 3782 24 October 1997.

⁷ G DeBurca, ‘The drafting of the European Union Charter of Fundamental Rights’ (2001) *ELRev* 126 at 134.

⁸ *ibid.*

⁹ In reality the declaration lacked solemnity: ‘the Charter was signed in five minutes, in the presence of the Heads of State and Governments, and neither Mrs Fontaine [European Parliament President] nor Mr Prodi [European Commission President] were allowed time to deliver the speeches they had prepared for the occasion’. ‘Editorial Comments: The EU Charter of Fundamental Rights still under discussion’ (2001) 38 *CMLRev* 1, at 1.

¹⁰ P Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 *CMLRev* 945, at 946.

¹¹ A J Menéndez, ‘Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union’ (2000) 40(3) *JCMS* 471 at 472.

¹² CHARTE 4105/00.

¹³ OJ 2000, C364/1 of 18 December 2000.

¹⁴ Case C-540/03 *European Parliament v Council* [2006] ECR I-5769 at para 38. See text at n 87 below for discussion.

At the time of the 2004 Intergovernmental Conference the Charter became part of a larger debate on rationalising EU constitutional law.¹⁵ Thus, the Laeken Declaration instructed a Convention on the Future of Europe to consider, amongst other matters, ‘whether the Charter of Fundamental Rights should be included in the basic treaty’.¹⁶ The task of considering this and other questions in the Declaration was given to a ‘Convention’ that emulated the body which had drafted the Charter itself.¹⁷ The Convention’s Working Group II was assigned the task of considering how the Charter might be incorporated and the implications of such incorporation. The question as to whether the Charter should be incorporated was strictly reserved to the Convention’s Plenary.¹⁸ Despite this reservation, the Working Group’s final report called for consideration of incorporation ‘in a form which would make the Charter legally binding and give it constitutional status’.¹⁹ The Constitutional Treaty, as agreed by the Convention and the later IGC, contained the full Charter as Part II of a three part text.²⁰

This means of incorporation came under criticism. Sir Francis Jacobs described the Constitutional Treaty as ‘wholly unwieldy, a colossus’. Furthermore, he noted that ‘the Charter as it emerges in Part II of the Constitutional Treaty is unsatisfactory’ and ‘is likely to disappoint expectations: to deliver less than it promises’.²¹ Some of these criticisms relate to the substance of the Charter and not the manner of incorporation into the Treaty. However, the form of incorporation – an approach that included not just the substantive provisions but also the lengthy preamble – was hardly an example of good draftsmanship.

The rejection of the Constitutional Treaty by the French and Dutch voters ended hopes of ratifying the Constitutional Treaty and with it this form of incorporation. When the Member State governments assembled once more to consider a new treaty, the grander ambitions of the Constitutional Treaty were abandoned. As part of the reconfiguration of the Treaty, it was decided to remove the Charter from the text of the treaty and instead to insert a cross-reference to the Charter in Article 6 of the revised EU Treaty. The intention to make this amendment was set out in the Presidency Conclusions of June 2007. The fact that the Charter was no longer to be included in the Treaty was only mentioned in a footnote.²² On 12 December 2007 the (slightly amended) Charter was solemnly proclaimed once more and signed by the Presidents of the European Parliament, the Council and the European Commission. The next day the Treaty of Lisbon was signed by representatives of the Member State governments in the Portuguese capital.

After Lisbon, the Charter – paradoxically, in view of the emphasis of the Cologne Presidency Conclusions on making rights “more visible to the Union’s citizens” – is not contained in the body of the EU Treaty or even in its protocols. Its absence, though perhaps thought important from a political point of view, is without legal significance: Article 6(1) TEU declares that the Charter ‘shall have the same legal value as the Treaties’. The attribution of legal force to the Charter remained a highly

¹⁵ Four unresolved matters remained left over from the Nice IGC: the status of the Charter, the role of national parliaments in EU affairs, the division of competences and Treaty simplification. See G DeBúrca & J B Aschenbrenner, ‘European Constitutionalism and the Charter’ in S Peers & A Ward (eds), *The European Union Charter of Fundamental Rights* (Hart Publishing, 2004).

¹⁶ European Council, ‘Laeken Declaration on the Future of the European Union’ Annex I to ‘Presidency Conclusions’ 14 and 15 December 2001.

¹⁷ For a discussion of the use of the Convention to draft human rights policy see A Williams, ‘EU human rights policy and the Convention on the Future of Europe: a failure of design’ (2003) *ELRev* 794.

¹⁸ The terms of reference for the Working Group were contained in a Memorandum from the Secretariat of the Convention to its Members. See document CONV 72/02, Brussels 31 May 2002.

¹⁹ The draft final report is Working Group II Working Document 25, Brussels 14 October 2002. Members’ comments on the draft may be found in Working Group II Working Document 26-REV 1, Brussels 18 October 2002. The final report presented to the Plenary is CONV 354/02, Brussels 22 October 2002.

²⁰ The horizontal provisions of the Charter were amended prior to inclusion in the Constitutional Treaty. These amendments and their significance are considered in section 4 below.

²¹ F G Jacobs, *The Sovereignty of Law: The European Way. The Hamlyn Lectures 2006* (Cambridge University Press, 2007) at 150-151.

²² European Council, ‘Presidency Conclusions’, 21 and 22 June 2007.

sensitive matter for two Member States. As a result, a Protocol was added to the Treaty on the application of the Charter to the UK and Poland.²³ Ratification by the final Member State – the Czech Republic – also required a political commitment to include a Protocol on the Charter’s application to the Czech Republic in a future treaty.²⁴ The significance of the Protocol is returned to below. Since its adaptation in 2007, the Charter has not been further amended (despite a brief flirtation with the idea of rendering it in poetic form).²⁵ Any amendment would presumably also require amendment to Article 6(1) TEU, which refers to the Charter “as adapted at Strasbourg, on 12 December 2007”, if it were to have legal effect via the Treaties.

The Protection of Rights by the EU Charter

Despite the desire to make rights more accessible to European citizens, the Charter is not a simple text to read or understand. Here we address the rights and their sources, the difficult distinction between rights, freedom and principles and the relationship with the ECHR.

The Rights Protected and Their Sources

Articles 1-50 of the EU Charter contain what are referred to in the title of the Charter as “fundamental rights” and in the last paragraph of its preamble as “rights, freedoms and principles” – echoing Article 6(1) TEU. The rights are organised in six Titles - I: Dignity, II: Freedoms, III: Equality, IV: Solidarity, V: Citizens’ Rights and VI: Justice. Though that scheme is generally coherent, the names of the Titles are not an infallible guide to their contents: for example, a majority of the Articles in V: Citizens’ Rights have at least some application to those who are not citizens of the Union.²⁶ Title VII, “General provisions governing the interpretation and application of the Charter”, contains the horizontal provisions, in accordance with which the rights, freedoms and principles in the Charter must be interpreted.²⁷

²³ Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

²⁴ ‘EU grants Czech Republic Lisbon Treaty concession’ *The Guardian* 30 October 2009.

²⁵ The EU Fundamental Rights Agency issued in 2010 a tender for poets to rewrite the instrument as an epic poem to raise awareness of its content for European citizens. The project was eventually abandoned following a public outburst by Commissioner Viviane Reding who claimed that “the language of the Charter is already clear and direct”: *EU Observer* 29 April 2010.

²⁶ The right to good administration applies to “every person” (Article 41). The rights regarding access to documents, the European ombudsman and petitioning the European Parliament apply to citizens of the Union and to natural and legal persons residing or having their registered office in a Member State (Articles 42-44). Freedom of movement and residence may be granted to nationals of third countries legally resident in a Member State (Article 45).

²⁷ Article 6(1) TEU, third indent.

The sources of the provisions in Titles I-VI are set out in the “explanations”, an updated version of those prepared under the authority of the Praesidium of the Convention.²⁸ The sources most frequently cited in the explanations are the ECHR,²⁹ the EC and EU Treaties,³⁰ the European Social Charter³¹ and the Community Charter on the Fundamental Social Rights of Workers.³² Other international treaty sources range from the Geneva Convention relating to the status of refugees to the New York Convention on the Rights of the Child.³³ Judgments of the Court of Justice are a principal source e.g. of the freedom to conduct a business and the right to good administration.³⁴ The constitutional traditions of Member States are referred to a number of times, usually as a subsidiary source.

It is difficult to point to any right for which there is no template in international or European Treaties, or the case law of the Court of Justice:³⁵ but the catalogue of fundamental rights contained in the Charter is by any standard extensive. To the extent that the Charter applies to acts of the Member States, it will have the effect of introducing some principles that have not been acknowledged as fundamental rights in national law. Where the UK is concerned, that is most obviously the case in relation to the social and economic rights in Title IV. Even within the category of orthodox civil liberties, however, new ground is broken by the rule on the retroactivity of a more lenient penal law,³⁶ which has not hitherto formed part of English criminal law or of the ECHR case-law.³⁷

Rights, Freedoms and Principles

Its use in the title of the EU Charter suggests that the phrase “fundamental rights” is intended as a catch-all term, encompassing not only the classic universal guarantees of freedom from interference by the State but also the right to participation in certain aspects of political, social and economic life and certain rights restricted only to citizens of the Union. The same is true of the German legal term *Grundrechte*, which appears to have been the origin of the term “fundamental rights” in the case law of the Court of Justice,³⁸ and which applies to the range of rights and freedoms that are guaranteed by the Basic Law of the Federal Republic.

²⁸ OJ 2007 C 303/17. The explanations do not have the status of law but are referred to in Article 6(1) TEU, third indent, and in Article 52(7) of the Charter itself as a source to which “due regard” should be paid by Union and national courts in interpreting the Charter.

²⁹ 19 Articles, including most of the provisions of Titles II and VI.

³⁰ All the Title V rights, amongst others.

³¹ 13 Articles, including all but the last two Articles of Title IV.

³² An additional source of some Title III and many Title IV provisions.

³³ Articles 18 and 24 respectively.

³⁴ Articles 16 and 41 respectively.

³⁵ Perhaps the closest to a “new” right is Article 13 (“Freedom of the arts and sciences”), which provides that “The arts and scientific research shall be free of constraint” and that “Academic freedom shall be respected”. The Explanations note that this right is deduced primarily from the right to freedom of thought and expression: whether it is so limited in practice remains to be seen.

³⁶ Article 49(1).

³⁷ C C Murphy “The Principle of Legality in Criminal Law under the European Convention of Human Rights” [2010] *European Human Rights Law Review* 192.

³⁸ The phrase is not taken from the ECHR, whose full title is the European Convention for the Protection of Human Rights and Fundamental Freedoms. The first cases in which the Court of Justice referred to “fundamental human rights” and “fundamental rights” as an integral part of the general principles of Community law were cases in which reliance had been placed on principles derived from the German Basic Law: Case 29/69 *Stauder v City of Ulm* [1969] ECR 419, para 7; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4.

The words “right” and “freedom” are distinguished in the preamble and in a number of Article titles: see for example Articles 2, 3, 6, 9 and 14, which are said to be rights, and Articles 10-13, 15 and 16 which are said in their titles to be freedoms. No consistent or legally relevant distinction is however drawn in the Charter between the concepts of right and freedom. Thus, what are described as the “rights” to liberty and security, private and family life, education, property and asylum are all present in Title II: Freedoms, and the conflation of the two concepts is exemplified by Article 11 which, like its counterparts in the Universal Declaration of Human Rights and the ECHR, protects “the right to freedom of expression”.³⁹

Of greater potential significance is the distinction between rights/freedoms on the one hand and “principles” on the other, a distinction which is made in the Preamble, echoed in Article 51(1) “respect the rights, observe the principles” and given more precise legal effect by Article 52. Article 52(5) provides that the provisions of the Charter which contain principles “may be implemented” by Union institutions and Member States, and that “they shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality”. No such restriction is placed on the “rights and freedoms” or “rights” referred to elsewhere in Article 52.

The distinction is evidently intended to be a significant one, given that principles do not give rise to direct claims for positive action by the Union’s institutions or Member States.⁴⁰ However it depends upon the existence of a dividing line between provisions of the Charter that contain “rights” and those that contain “principles”: and the Charter was not drafted with such a distinction in mind. Principles which appear unenforceable in the absence of implementing measures (e.g. the Article 27 principle that workers must be guaranteed information “under the conditions provided for by Union law and national laws and practices”, and the Article 30 provision for protection in the event of unjustified dismissal) are expressly described in their titles or their texts as rights. Conversely, the only provision referring to “principles” in its title is Article 49: “Principles of legality and proportionality of criminal offences and penalties”. Yet that Article confers rights that the Court of Justice has long felt able to apply without the need for implementing legislation.⁴¹

The explanations shed limited light on the problem when they cite Articles 25, 26 and 37 (concerning, respectively, the rights of the elderly, the integration of persons with disabilities and environmental protection) as examples of principles, and Articles 23, 33 and 34 as provisions containing “both elements of a right and of a principle”.⁴² Only one of those six examples (Article 34) includes the phrase “in accordance with the rules laid down by Union law and national laws and practices”, which might have been thought to be a good indicator of a “principle” requiring implementation;⁴³ and that is an Article which, despite being qualified in all respects by that phrase, is said in the explanations to include elements of a right. In the absence of precise guidance, the distinction between right and principle, though important, seems set to remain obscure and unpredictable.

³⁹ Article 19 Universal Declaration of Human Rights, Article 10 ECHR.

⁴⁰ As stated in the explanations with regard to Article 52 by reference *inter alia* to existing case law on the precautionary principle. If taken literally, however, the curious result will ensue that the mis-implementation of a principle could be condemned as invalid, whereas in the event that a “principle” is not implemented, that principle would apparently not be allowable even as an aid to the interpretation of related provisions of law.

⁴¹ Case C-63/83 *R v Kent Kirk* [1984] ECR 2689, para 22. See also Article 23, which describes the judicially enforceable right to equality between women and men as “the principle of equality”.

⁴² It is not plain whether these hybrid Articles contain separate rights and principles or whether the concepts of right and principle are blended in a single provision.

⁴³ In the light particularly of Article 1(2) of the UK-Polish Protocol, discussed at section 4.2 below, which states “for the avoidance of doubt” that nothing in Title IV creates justiciable rights applicable to Poland or the United Kingdom except in so far as they have provided for such rights in their national law. It should be noted however that not all the Title IV rights are qualified in that way: see Articles 29 (access to placement services), 31 (working conditions), 32 (child employment) and 33(2) (maternity protection).

The Relationship with the ECHR

Some ECHR rights are simply copied into the Charter. For example, the Article 3 prohibition on torture and inhuman or degrading treatment or punishment is replicated in Article 4 of the Charter. Others are updated in minor respects: “correspondence” in Article 8 ECHR is replaced by “communications” in Article 7 of the Charter; while others are reformulated more significantly. An example of the latter tendency is Article 8(1) ECHR, which is broken into its component parts, as they have been elaborated by the Strasbourg case law, and spread over Article 3 (integrity of the person), Article 7 (respect for private and family life) and Article 8 (protection of personal data).

Painstaking attempts, watched with close attention from Strasbourg, have been made to ensure that the Charter is interpreted consistently with the ECHR.⁴⁴ The central mechanism is Article 52(3), which provides that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of Charter rights shall be the same as those laid down by the ECHR. That statement is, however, qualified by the next sentence, which provides that Article 52(3) “shall not prevent Union law providing more extensive protection”. This suggests that the ECHR is intended to function as a floor but not necessarily as a ceiling.⁴⁵

There are obvious examples of Charter provisions which do provide more extensive protection than the ECHR. Thus, Article 21 of the Charter on non-discrimination goes further than Article 14 ECHR as the former is applicable even outside the scope of the other protected rights.⁴⁶ The right to a fair hearing under Article 47 of the Charter is not limited, as is Article 6(1) ECHR, to disputes relating to civil rights and obligations. Even where Charter and ECHR provisions are identical in scope, Article 52(3) may be assumed, consistently with the Strasbourg case law on the duties of contracting States, to permit a more generous interpretation of the Charter right.⁴⁷

Under the Convention scheme, the permitted grounds for interference with qualified rights such as Articles 8-11 ECHR are specified individually in the second paragraph of those Articles. The Charter takes the alternative approach of a general clause: Article 52(1) allows proportionate limitations to be made, if they are provided for by law, are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Any impression that no limits are placed on the permitted grounds for derogation is however illusory, because the effect of Article 52(3) is to prohibit derogations on grounds other than those sanctioned in the ECHR. The attractive simplicity of the single derogation clause is thus illusory also. The Charter is not a self-contained document: a copy of the ECHR needs to be at hand for the purpose of assessing the scope of the power to derogate from the rights that it guarantees.

An Exhaustive Catalogue of Rights?

Whilst the Charter’s catalogue of rights is extensive, it would be surprising if the Court of Justice were to treat it as exhaustive. By its amendments and additions to the ECHR, the Charter itself acknowledges that the formulation of fundamental rights is a dynamic process. Furthermore, Article 6(1) TEU, which recognises the Charter and accords it the same legal value as the Treaties, is followed by Article 6(3) which provides that fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States shall constitute general principles of the Union’s law. The freedom of the Court of Justice to identify and develop fundamental rights not contained in the Charter appears thereby to be expressly preserved.

⁴⁴ References to the Charter in the case-law of the European Court of Human Rights are considered in section 5.2 below.

⁴⁵ Article 53 of the Charter, with its reference to the ECHR and Member States’ constitutions, also evidences this point.

⁴⁶ It also goes further than the 12th Protocol to the ECHR by expressly including genetic features, disability, age and sexual orientation as grounds on which discrimination shall be prohibited.

⁴⁷ Save possibly in those relatively uncommon cases where two rights are in opposition to one another, with the result that a generous interpretation of one implies a niggardly interpretation of the other.

Difficult questions may arise as to whether such judicially developed fundamental rights are subject to the same or analogous restrictions, as regards their application, as the rights contained in the Charter. Those seeking to restrict the application of the Charter (or restrict the development of fundamental rights more generally) will no doubt argue that the scope to rely on fundamental rights similar to those in the Charter is limited by the doctrine of *lex specialis*, and that even where such reliance is permitted, the limitations on the enforceability of the Charter rights should apply by analogy.

Application of the Charter Rights

The scope of application of the Charter is indicated by the first of its “horizontal” provisions, Article 51, and by a number of Protocols, notably the UK-Poland Protocol, to the Treaty of Lisbon. These are considered in turn, followed by comments on the UK-Ireland Protocol on the area of freedom, security and justice and some recent UK case law on the application of the Charter rights.

Article 51 of the Charter

Article 51(1), as stated in the explanations, establishes that the Charter applies primarily to the institutions, bodies, offices and agencies of the Union, in compliance with the principle of subsidiarity. The institutions are defined in Article 13(1) TEU, and “bodies, offices and agencies” is a comprehensive formulation, from which no authority set up by the Treaties or by secondary legislation is likely to be excluded.⁴⁸

More problematic is the interpretation of Article 51 as it applies to the Member States. By its terms, the Charter applies “only when they are implementing Union law”.⁴⁹ On the face of it this is a narrow formulation, reflecting those cases in which fundamental rights have been held to apply to Member States when giving effect in national law to the requirements of EU rules.⁵⁰ However other cases – also referred to in the explanations – stand for the significantly broader proposition that fundamental rights may be invoked in relation to measures that *come within the scope* of Union law – a formulation which includes measures taken by Member States with a view not to implementing but to *derogating from* Union rules.⁵¹ The precise scope of the Charter in relation to Member States has not yet been resolved – as pointed out by more than one Advocate General since its coming into force with the Lisbon Treaty.⁵²

Whatever the literal words of Article 51, it seems inconceivable that the Court would retreat from the position established in relation to the general principle of fundamental rights and interpret the Charter as applicable to Member States only when giving effect to Union law. The High Court in England has indeed already ruled that a Member States in exercising a power of derogation is acting within the material scope of Union law for the purposes of the applicability of the Charter.⁵³ Yet once it is accepted that the Charter can apply also to national measures derogating from Union law, its application becomes potentially extremely broad. The remarkable range of national activity falling within the scope of the “four freedoms” – particularly the free movement of goods and the freedom to provide services – is evident from cases such as *Carpenter*,⁵⁴ *Karner*⁵⁵ and *Derwin*.⁵⁶ When the

⁴⁸ Cf. the use of the same formulation in Articles 15 and 16 TFEU.

⁴⁹ For a discussion of the drafting of this clause, see P Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 CMLRev 945, at 954.

⁵⁰ Case 5/88 *Wachauf* [1989] ECR 2609, para 19; Case C-292/97 *Karlsson* [2000] ECR I-2737, para 37. These cases (each of which is cited in the explanations) concern national implementation of Community milk quota rules.

⁵¹ Case C-260/89 *ERT* [1991] ECR I-2925, para 43.

⁵² See, for example, Case C-108/10 *Ivana Scattolon* Opinion of Bot A-G of 5 April 2011, paras 116-120 and Joined Cases C-483/09 and C-1/10 *Magatte Gueye and Valentín Sánchez Salmerón* Opinion of Kokott A-G of 12 May 2011, para 77.

⁵³ *R (Zagorski) v Secretary of State for Business, Innovation & Skills* [2010] EWHC 3110 (Admin), paras 66-71: see further under section 4.4, below.

⁵⁴ Case C-60/00 *Carpenter* [2002] ECR I-6279.

deportation of a third country national has to comply with fundamental rights because of its incidental effect on occasional cross-frontier service provision by the deportee's husband (*Carpenter*), and when an apparently domestic concern such as the banning of fox-hunting in England has (at least arguably) to be reviewed for compliance with general principles of EU law because of its possible impact on the import of hunting horses from Ireland, and the desire of Belgians to visit England to hunt (*Derwin*), it will be apparent that the scope of EU law, and thus the applicability of the Charter to national measures, may, with a little lawyerly or judicial imagination, be rendered very broad indeed. Early indications are that the Court may indeed be encouraged to take a broad view of the applicability of the Charter to actions of the Member States.⁵⁷

Article 51(2), building on Article 6(1), second indent, and the reference in Article 51(1) to “the limits of the powers of the Union as conferred on it in the Treaties”, confirms that the Charter does not in itself serve as a distinct legal basis for competences and tasks not otherwise provided for. This point is reaffirmed by Declaration No. 1 attached to the Lisbon Treaty.⁵⁸ Similarly, by Article 52(2), rights recognised by the Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by the Treaties. This seems clear, and uncontentious. The likely influence of the Charter will be not as a distinct legal basis for legislation, or as a means of bypassing the legal bases set out in the Treaties, but as an aid to the interpretation of the Treaties and measures adopted under them, and as a benchmark against which the validity of such measures – as well as of national measures falling within the scope of Union law – may be judged.

The UK-Poland Protocol

Speaking in October 2001, the then UK Minister for Europe, Keith Vaz, claimed “This is not a litigator's Charter. Nobody can sue on it. Nobody will be able to litigate on it”. Vaz proceeded to suggest that the Charter would be about as persuasive an authority as the *Beano* or *The Sun*.⁵⁹ To similar effect, the Prime Minister himself claimed that it was “absolutely clear that the Charter of Fundamental Rights is not going to be justiciable in British courts or alter British law”.⁶⁰ While Messrs Blair and Vaz appear to have been proven wrong, discord between the legal status of the Charter and political acceptance of that status remains.

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⁵⁵ Case C-71/02 *Karner* [2004] ECR I-3025.

⁵⁶ *R (Derwin and others) v Attorney General* [2007] QB 305 (Court of Appeal), [2008] 1 AC 719 (House of Lords).

⁵⁷ Case C-34/09 *Zambrano*, Opinion of Sharpston A-G of 30 September 2010, paras 156-177. See the text at note 97 below.

⁵⁸ “Declaration concerning the Charter of Fundamental Rights of the European Union” OJ C 306/249 17.12.2009.

⁵⁹ *The Times* 14 October 2000.

⁶⁰ “EU Leaders Agree on Reform Treaty” *BBC News* 23 June 2007.

Having succeeded in limiting the Charter's effect when it was first agreed in 2000, the proposed incorporation of the Charter by the Lisbon Treaty led to renewed calls in the UK for an opt-out. The principal aim of the UK Protocol was to limit the impact of the economic and social rights in the Charter in the UK's legal systems. During the drafting of the Charter, it was the UK that argued for such rights to be limited by reference to "national laws and practices".⁶¹ This limitation is cited in relation to worker's rights and collective bargaining,⁶² social security,⁶³ health care⁶⁴ and access to services of general economic interest.⁶⁵ Article 52(6) adds that full account shall be taken of national laws and practices as specified in the Charter. In addition to these provisions, the UK insisted upon a Protocol to the Lisbon Treaty, which subsequently attracted the support of Poland. The Czech Republic, which already has a Declaration to the Lisbon Treaty addressing the Charter, extracted an agreement to take the benefit of the UK-Poland Protocol when the Member States next enter into a treaty.⁶⁶

A threshold question in relation to the Protocol is whether it provides a limited opt-out from the Charter in favour of specific Member States (Poland, the United Kingdom and in due course the Czech Republic), or whether it simply clarifies the uniform effect of the Charter across all Member States. The text of the Protocol is not wholly clear on the point. In favour of the former proposition is the fact that Poland and the United Kingdom are singled out in the title of the Protocol, in its preamble and in each of its Articles. Furthermore, the 11th recital – which "reaffirms" that the Protocol is without prejudice to the application of the Charter "to other Member States", might be taken to imply a differential application to Poland and the United Kingdom. In favour of the latter proposition, however, is the 8th recital, which notes the wish of Poland and the United Kingdom "to clarify certain aspects of the application of the Charter" (without geographical limitation). It thus provides a possible explanation of why those States are singled out: as States which requested a clarification (which, once obtained, is of general scope) rather than States in which the Charter is to have some lesser degree of application. In addition, Article 1(2) of the Protocol uses the words "for avoidance of doubt", as if confirming in relation to two Member States a proposition that can be derived generally from the Charter.

The United Kingdom Government is certain to argue that the Protocol is an aid to understanding (and limiting) the applicability of the Charter. It appears to have decided, however, that such arguments are likely to be more productive before the Court of Justice if they are coupled with an acceptance that the application of the Charter is uniform, rather than contending for special treatment for the two named Member States. Thus, Lord Goldsmith, UK Attorney General when the Charter was first negotiated, has stated:

It will be clear the UK Protocol does not in any way constitute an 'opt out' in the sense of trying to disapply certain rights to UK citizens. That would be neither necessary nor desirable given that the UK fully accepts the rights reaffirmed in the Charter.

⁶¹ Lord Goldsmith noted of this reference to "national laws and practices" that it "was a reference that was (rightly) reported at the time, extremely important to the UK and for which we had to fight very hard". Lord Goldsmith Q.C. "A Charter of Rights, Freedoms and Principles" [2001] 38 CMLRev 1201 at 1213.

⁶² Articles 27, 28, 30.

⁶³ Article 34.

⁶⁴ Article 35.

⁶⁵ Article 36.

⁶⁶ The Czech Declaration does little more than reiterate statements from the Charter itself, the explanations and Article 6 TEU regarding the scope and impact of the Charter. "Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union" OJ C 306/267 17.12.2009.

To similar effect, Daniel Denman, who was involved in negotiating the Protocol on behalf of the UK, has written (albeit in a personal capacity):

Although the Protocol is in terms that are specific to the United Kingdom and Poland, it does no more than set out some of the implications of the way in which EU law gives effect to the Charter. So every proposition in the Charter, although it only refers to the United Kingdom and Poland, is equally true for every other Member State.⁶⁷

The European Union Committee of the House of Lords, echoing evidence it had received from the then Lord Chancellor, Jack Straw, concluded in similar vein that the Protocol “should not lead to a different application of the Charter in the United Kingdom and Poland when compared with the rest of the Member States”.⁶⁸ It appears unlikely, even if the UK Government were to argue for it, that the Court of Justice would interpret the Protocol as providing for differential application of the Charter as between different Member States.

Turning to the operative provisions, Article 1(1) of the Protocol notes that the Charter does not

extend the ability of the Court of Justice of the European Union, or any court or tribunal... of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of ... the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

The key term here is “extend”. Article 1(1) makes it clear that the Charter cannot of itself afford a *new* competence to the courts of Poland, the UK or the Union. However, it does not limit their *existing* competences. Since national and EU courts have long possessed the competence to measure national law within the scope of EU law against the yardstick of EU fundamental rights, freedoms and principles, and since those rights freedoms and principles are said only to be *re-affirmed* by the Charter, it will no doubt be argued – with some force – that the Article 1(1) prohibition on the extension of powers has little if any practical effect. As Lord Goldsmith expressed the point:

As the Charter reflects only existing rights, the underlying rights will continue to have effect in the UK, as in all Member States, as they always have done.⁶⁹

He went on to suggest that were the courts to “seek to conjure new or extended rights out of the Charter, then the UK’s Protocol would indeed have teeth”. This may be correct. However, it is not easy to see how Article 1(1) of the Protocol could prevent the Court of Justice from identifying “new or extended rights” as aspects of the general principles of law whose continuance is assured by Article 6(3) of the TEU. That is an ability that the Court of Justice has always possessed, and that the Charter cannot therefore be accused of extending.

The solidarity rights in Title IV receive special treatment in Article 1(2) of the Protocol, which declares “in particular and for the avoidance of doubt” that nothing in Title IV creates justiciable rights applicable to Poland or the United Kingdom except insofar as is provided for in their national laws.⁷⁰ The phrase “for the avoidance of doubt” appears to suggest that no special rule is intended to

⁶⁷ D Denman, “The Charter of Fundamental Rights” (2010) 4 EHRLR 349-359 at 355.

⁶⁸ “The Treaty of Lisbon: an Impact Assessment”, 10th Report of Session 2007-2008, HL Paper 62-1 at 5.42, 5.96 and 5.103(d). The members of the Committee (whose conclusions however carry no judicial weight) included Lord Mance, then a Law Lord and now a member of the Supreme Court.

⁶⁹ The Rt Hon Lord Goldsmith Q.C. “The Charter of Fundamental Rights: Speech to BIICL” 15 January 2008.

⁷⁰ “Solidarity rights” are actually far less controversial in Poland than they are in the UK, as may be seen from Declaration 62 to the Lisbon Treaty, which pays tribute to the struggle for solidarity rights in that subject and declares that Poland “fully respects social and labour rights, as established by European Union law”: “Declaration by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom”, OJ C 306/249 17.12.2009. Declaration 61 would suggest that the concerns which impelled the then Polish Government to associate itself with the Protocol had more to do with “public morality, family

apply to the UK and Poland. It may therefore be that Article 1(2) of the Protocol is admitted as an aid to the interpretation of Article 52, which governs the scope of the Charter rights and principles in all cases. The authority accorded to “principles” in Article 52(5) appears similar to the authority accorded to solidarity provisions in Article 1(2) of the Protocol: in each case, they are to be judicially cognisable (or to create justiciable rights) only when implemented by national legislation.⁷¹

Six of the solidarity provisions already contain a reference to “national laws and practices”⁷² and so it is unlikely that Article 1(2) of the Protocol offers any further limitation on them. However, a further six solidarity provisions do not contain this reference: right of access to placement services, fair and just working conditions, prohibition of child labour and protection of young people at work, family and professional life, environmental protection and consumer protection.⁷³ Several of these articles are not formulated as rights as such but rather as broad statements of social principle. For example, Article 33(1) declares that the family “shall enjoy legal, economic and social protection”. Article 37 calls for a “high level of environmental protection” while Article 29 requires Union policies to “ensure a high level of consumer protection”. Article 1(2) of the Protocol appears to confirm that none of these provisions can be justiciable in the UK or in Poland (or, it would seem, in any other Member State) unless it is so provided in their national law. In relation to those Articles, therefore, the Protocol may prove to be of real legal significance – if, that is, the same conclusion cannot be reached by the limitation on the justiciability of “principles” accorded by Article 52(5) of the Charter.

Article 2 of the Protocol provides that where a provision of the Charter refers to national laws and practices, it shall only apply to Poland and the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of those States. This appears not to be a further limitation, but rather an clarification of what should already be obvious from the references to national law and practice in the Charter: that those provisions operate as limits on the operation of the relevant Charter principles.⁷⁴

The UK-Ireland Protocol

The UK-Ireland Protocol on the area of freedom, security and justice may also impact on the application of the Charter in the UK.⁷⁵ That Protocol exempts the UK and Ireland from measures adopted under Title V of Part Three of the Treaty on the Functioning of the European Union. Thus, the UK participates in the area of freedom, security and justice on a measure-by-measure basis considering each legislative proposal on its merits. A question which is likely to arise is whether or not the Charter and jurisprudence based on the Charter applies in the UK where that Member State has not opted in to a measure. A literal application of the Article 51 test on “implementing Union law” suggests that the UK should not be bound by the Charter in such instances. However, if the Charter applies more broadly within the “scope” of EU law, the answer is less clear. It seems at least possible that UK justice and home affairs legislation might be considered to remain within the scope of EU law, even in circumstances where the United Kingdom had not opted in to a Union measure. The

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law, as well as the protection of human dignity and respect for human physical and moral integrity”: Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union”, OJ C 306/270 17.12.2009.

⁷¹ It seems difficult however to argue, consistently with the explanations, that the “principles” referred to in Article 52(5) are coterminous with the Title IV provisions referred to in Article 1(2) of the Protocol. As discussed in section 3.2 above, the examples of “principles” given in the explanations are inconsistent with the suggestion that “principles” are limited to Title IV, or indeed with the suggestion that they are restricted to provisions which are expressly stated to take effect only under the conditions provided for by national laws and practices.

⁷² Articles 27, 28, 30, 34 (all three parts), 35 and 36.

⁷³ Articles 29, 31, 32, 33, 37 and 38 respectively.

⁷⁴ A point reinforced by Article 52(6) of the Charter. For a well-known application of this principle in the context of Article 28 of the Charter (right to collective bargaining and action), see Case C-438/05 *International Transport Workers’ Federation (“Viking”)* [2007] ECR I-10779, para 44. For a discussion see C Barnard “The ‘Opt-Out’ for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?” Conference Paper 11-12 April 2010 at 12 – 15.

⁷⁵ Protocol on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice.

Member State would be derogating from the harmonised rules by not opting-in, but would still be acting within the scope of EU law when it adopted national legislation in this sphere.⁷⁶ The applicability of the Charter under these circumstances will need to be tested before the courts. It may be difficult to conceive of an appropriate test case as the advantages to an applicant of invoking the Charter over the ECHR in cases of domestic criminal justice may be minimal due to the equivalent protection given to the relevant rights. However the existing case-law suggests that it would be foolish to bet against some such litigation arising in the coming years.

UK Case-law on the Charter

The status of the Protocol arose soon after the coming into force of the Lisbon Treaty in a case variously known as *S*, *NS* and *Saeedi*.⁷⁷ The claimant asylum-seeker sought unsuccessfully to rely on the Charter to contest the decision of the UK Government to return him under the Dublin Regulation to Greece, where he said his Charter rights would not be respected – a claim supported by the United Nations High Commissioner for Refugees. Cranston J noted without comment the conclusions of the European Union Committee to the effect that the UK and Poland were not put in a special position by reason of the Charter,⁷⁸ before concluding that:

Given the Polish and United Kingdom Protocol, the Charter cannot be directly relied on as against the United Kingdom although it is an indirect influence as an aid to interpretation.⁷⁹

In the ensuing appeal, the Secretary of State conceded the applicability of the Charter to the appellant's case but continued to dispute the scope of protection provided. The Court of Appeal referred the matter to the Court of Justice for consideration of, amongst other questions, the scope and applicability of Articles 1, 4, 18, 19(2) and 47 of the Charter.⁸⁰ The final question referred is whether the answer to the preceding questions are “qualified in any respect” by the Protocol. As such, the Court of Justice is being invited to offer a definitive opinion on the status of the Protocol in EU law. Whatever the outcome of *Saeedi*, claimants in the United Kingdom seem certain to argue for an extensive application of the Charter in order to take advantage of rights or remedies that are not available to them under the Human Rights Act. Since the majority of Charter rights are not derived from the ECHR, and since a breach of EU law (unlike a breach of a Convention right under the HRA) carries with it the possibility of disapplying even primary legislation, there are strong incentives for developing such arguments.

An imaginative attempt to apply the Charter, on the basis of its allegedly broader scope *ratione personae* than the ECHR, has already been made in the case of *R (Zagorski) v Secretary of State for Business, Innovation & Skills*.⁸¹ The claimant, a death row prisoner in Tennessee, sought to rely upon the Charter in order to require the UK Government to prevent the export of a drug used in lethal injections. The Human Rights Act was of no use because Article 1 ECHR requires rights and freedoms to be secured only to those within the jurisdiction of contracting States.⁸² The applicant argued however that the Charter contained no equivalent jurisdictional limitation. Rejecting that argument, Lloyd Jones J held that an equivalent limitation on the personal application of the Charter

⁷⁶ Compare the rejection by the English High Court, in a somewhat different context, of the argument “that in the present case the Defendant has decided not to legislate and that it is difficult to see how a Member State, in deciding not to legislate, can be described as ‘implementing EU law’ even if, had it done so, it would have been acting under a power of derogation conferred by the EU Regulation”: *R (Zagorski) v Secretary of State for Business, Innovation & Skills* [2010] EWHC 3110 (Admin), paras 69-70. See further under section 4.4, below.

⁷⁷ *R (S) v Secretary of State for the Home Department* [2010] EWHC 705 Admin; *R (NS) v. Secretary of State for the Home Department* [2010] EWCA Civ. 990.

⁷⁸ [2010] EWHC 705 Admin., para 58.

⁷⁹ *Ibid.*, para 155.

⁸⁰ The case has been registered as C-411/10 *NS v Secretary of State for the Home Department* OJ C 274/21 9.10.2010.

⁸¹ *R (Zagorski) v Secretary of State for Business, Innovation & Skills* [2010] EWHC 3110 (Admin).

⁸² *Ibid.*, paras 53-59.

was afforded by the stipulation in Article 52(3) that the “scope” of Charter rights was to be the same as that of the equivalent ECHR rights. Were it to be otherwise, “the Charter would confer such rights on anyone, anywhere in the world, regardless of whether they have any connection with the EU”.⁸³ Lloyd Jones J also commented on the UK-Polish Protocol, noting that Article 1(1) could be read as precluding the claim under the Charter. However, he declined to rule on this ground because of the reference pending before the Court of Justice in *Saeedi*. The *Zagorski* judgment evidences both the potential for imaginative litigation based on the Charter and the need for courts to read the various human rights instruments in tandem with each other.

Other national courts have of course also made use of the Charter. A reference to the Court of Justice from a Belgian court asks if Article 35 of the Charter, which provides for “a high level of human rights protection” precludes Belgium from permitting the manufacture, importation, promotion and sale of smoking tobacco.⁸⁴ In Germany, the Higher Regional Court in Stuttgart has used the Charter to read a proportionality requirement into national legislation on the European Arrest Warrant.⁸⁵ There is likely to be a steady stream of traffic from national courts to both Luxembourg and Strasbourg as the limits of Charter protection are tested in the coming years.

Use of the Charter before the European Courts

Although only legally binding since the coming into force of the Lisbon Treaty, the Charter has been invoked by both the EU Courts and the European Court of Human Rights since soon after its proclamation. It has become a strong persuasive and eventually binding source of rights before the EU Courts and provided the impetus for review of leading case-law in Strasbourg.

The Charter before EU Courts

Given the failure of the Convention which drafted it to agree the appropriate role for the Charter in the EU legal order, the task of articulating that role naturally fell to the Courts. Advocates General were the first to invoke the Charter, followed by the Court of First Instance and the Court of Justice. The first, incidental reference to the Charter, came from Alber A-G in an Opinion concerning the Italian postal service.⁸⁶ The first citation by the Court of First Instance merely involved the citation with approval of the rights to sound administration and to an effective remedy.⁸⁷ Thus, the Charter was used simply to confirm rights already existing in the EU legal order. Early references to the Charter therefore suggest that the Courts were no clearer on its appropriate use than were the political institutions.

The first reliance on the Charter by the Court of Justice was prompted by its citation in the preamble to the Family Reunification Directive.⁸⁸ The Parliament challenged the validity of the Directive, citing a breach of the rights of children as protected by Article 24 of the Charter (amongst other sources). The Council disputed the use of the Charter, claiming it did not constitute a source of Community law. The Court favoured the Parliament’s argument. The Court used the text of the preamble to the Directive and the preamble to the Charter itself to effectively hoist the Council on its own petard. It noted that the Directive claimed to be in compliance with the Charter and that the Charter itself merely affirmed rights already existing in EU law.⁸⁹ Although the Parliament was unsuccessful in the claim on its

⁸³ *Ibid.*, paras 72-74.

⁸⁴ Case C-267/10 *André Rossius v État belge* OJ C 221/22 14.8.2010.

⁸⁵ *General Public Prosecution Services v C 1 Ausl.* (24) 1246/2010 (OLG (Stuttgart)). See J Vogel and J R Spencer “Case Comment: Proportionality and the European Arrest Warrant” (2010) *Criminal Law Review* 474 for a translation and brief comment on the judgment.

⁸⁶ Case C-340/99 *TNT Traco* [2001] ECR I-4112. A detailed account of early opinions is not offered here. See P Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 *CMLRev* 945, at 948-950.

⁸⁷ Case T-54/99 *max.mobil v Commission* [2002] ECR II-313.

⁸⁸ Case C-540/03 *Parliament v Council* [2006] ECR I-5769.

⁸⁹ *ibid.*, para 38.

merits, the case clearly established the Charter as a useful benchmark in EU law. It also evidenced the link between legitimacy and potency: the desire to legitimate the Directive by citing the Charter in the preamble rendered the Charter a benchmark against which the substantive law could be reviewed.

The Charter was used in a more systematic fashion by Maduro A-G in a case concerning legal privilege and anti-money laundering legislation.⁹⁰ The Advocate General noted that the Charter, then not legally binding, could have a “dual function”. First, it might give rise to a presumption of the existence of a right, which would need to be confirmed by reference to accepted authorities (eg ECHR). Second, where a right does exist in the legal order, the Charter is useful “for determining the content, scope and meaning” of the right in question. Where a right exists and is interfered with, the Advocate General suggested that the Court should have recourse to Article 52(1) of the Charter to determine the lawfulness of that interference. Such use of the Charter amounts to the strongest possible form of persuasive authority as the only requirement for further authority is to confirm the presumption raised by the Charter which subsequently is used to determine the nature of the right.

Given the reliance on the Charter in the pre-Lisbon years, it was already a familiar part of the legal landscape even before it was given binding force by the Treaty. However, according to it “the same legal value as the Treaties” can only increase its prominence. In the first year of the post-Lisbon settlement, the Charter was cited on 24 occasions by Advocates General, twice by the General Court and in 30 judgments of the Court of Justice.⁹¹ Two recent cases evidence the potential for the Charter to have a broader constitutional impact: *Küçükdeveci* and *Ruiz Zambrano*. The former case concerned a claim of age discrimination based on a German employment law that did not take periods of work served prior to the employee’s 25th birthday into account when calculating the notice period prior to dismissal. The German law was incompatible with the requirements of Directive 78/2000, the transposition period for which had passed prior to the applicant’s dismissal. However, as the respondent was a private party, the general prohibition on horizontal direct effect would ordinarily have hindered Ms Küçükdeveci’s case. Nonetheless, the Court of Justice held that the principle of non-discrimination on grounds of age was a general principle of EU law which was given “specific expression” in the Directive.⁹² The Court also made reference to Article 21(1) of the Charter which declares that “[a]ny discrimination based on ... age ... shall be prohibited”.⁹³ As a result the Court held that

It follows that it is the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether European Union law precludes national legislation such as that at issue in the main proceedings.⁹⁴

The Court proceeded to examine the matter at hand and concluded that the principle, as given expression by the Directive, precluded the German national legislation. The case appears to further erode the prohibition on the horizontal direct effect of directives.⁹⁵ To the existing list of exceptions to this prohibition it is necessary to add the proviso that unimplemented directives may have horizontal effect where they constitute the expression of a general principle of EU law. The Court of Justice’s decision does not set out criteria to explain which principles may be relied upon in this way and which may not. The reference to “general principles” may hearken to more fundamental values than simply the rights, freedom and principles contained in the Charter.⁹⁶ Nonetheless, in both *Viking* and

⁹⁰ C-305/05 *Ordre des barreaux francophones et germanophone* [2007] ECR I-5305.

⁹¹ Data based on a search of the Eur-lex database on 26 November 2010.

⁹² Case C-555/07 *Küçükdeveci v Swedex GmbH & Co* Judgment of the Court of Justice (Grand Chamber) of 19 January 2010, para 21.

⁹³ *ibid*, para 22.

⁹⁴ *ibid*, para 27.

⁹⁵ As most readers will know, there were previously three ways in which that prohibition was eroded: (1) by the Court of Justice’s broad conception of the “state”; (2) by the requirement that national law be interpreted in a manner that conforms with unimplemented directives; and (3) by requiring national law to be set aside if it has not met with procedural or technical requirements laid down in a directive. See S Prechal *Directives in EC Law* 2nd Edition (Oxford: Oxford University Press, 2006) pp 255-260.

⁹⁶ For a wider discussion see A Wiesbrock “Case Note” (2010) 11(5) *German Law Journal* 539.

Küçükdeveci the Charter was held to be evidence of the existence of a general principle.⁹⁷ Thus, *Küçükdeveci* underlines the potential significance of the Charter as a tool of EU law. If Charter rights are considered either to be, or to evidence the existence of, “general principles” then where a directive gives effect to such a right it may be held to have horizontal effect prior to the directive being transposed. As a result, while the Charter cannot extend the Union’s competences it may be used to facilitate the more swift implementation of EU law in national legal orders. This is most likely to be the case when the directive in question is one which intends to give further effect to fundamental rights protection.

The Opinion of Sharpston A-G in *Ruiz Zambrano* offers the potential for the Charter to have an even greater impact.⁹⁸ The latter part of the Opinion addressed the need to determine with certainty what “the scope of Union law” means when fundamental rights are at issue. While the solution was not required for the case before her, she proposed a new formula for the determination of this question. The Advocate General argued that the scope should depend, for the purpose of the applicability of the Charter to the acts of the Member States, on the existence of a material EU competence, even if that competence had not yet been exercised.⁹⁹ Four reasons were offered for this new formula: first, it avoids the need to create “fictitious” links with EU law; second, it keeps EU fundamental rights protection within the boundaries of EU competences; third, it would encourage Member States to adopt minimum rules on protection in key areas – e.g. immigration and criminal law; and fourth, it would be consistent with a coherent idea of European citizenship.¹⁰⁰ On the latter point, Sharpston A-G finds common cause with Maduro A-G, who in *Centro Europa 7* argued that an EU citizen was entitled to travel to another Member State saying “*civis europeus sum*” and be treated “in accordance with a common code of fundamental values”.¹⁰¹ However, if Sharpston’s solution were adopted, it appears that the Charter would be applicable in a case such as *Carpenter*, even if the applicant’s husband had never exercised a free movement right. The federalising effect of such a choice was clear to the Advocate General, who noted that such a change “requires both an evolution in the case-law and an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU”.¹⁰² Such an evolution would be a long and uncertain process but the recent case-law suggests that if it does occur the Charter is likely to play a role. The ECJ did not address the Advocate General’s proposition in its judgment in *Ruiz Zambrano*. However, the Court did hold that Member States were precluded from taking action that would deprive a Member State national of “genuine enjoyment of the substance of the rights attaching to the status of European Union citizen” – even if that national had never travelled to another Member State.¹⁰³ Taken together, *Küçükdeveci* and *Ruiz Zambrano* suggest there may be scope for a renewed legal integration in the EU, with the Court of Justice as the driver and fundamental rights as the engine.

The Charter and the European Court of Human Rights

A less widely anticipated development than the use of the Charter by the Union courts is the role that it has begun to play in the jurisprudence of the European Court of Human Rights. The first reference to the Charter came in 2001 when Judge Costa’s separate opinion in *Hatton & Others v UK* referred to Article 37 of the Charter as an example of the growing recognition of the importance of environmental rights.¹⁰⁴ In 2002 it was regarded as a persuasive authority in a joint partly dissenting opinion of Judge Sir Nicholas Bratza and Judges Fuhrmann and Tulkens.¹⁰⁵ Later that year the Grand Chamber

⁹⁷ *Viking*, op. cit., para 43.

⁹⁸ C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi* Opinion Sharpston A-G of 30 September 2010.

⁹⁹ *ibid* para 163

¹⁰⁰ *ibid* paras 165-170.

¹⁰¹ C-380/05 *Centro Europa 7 Srl* [2008] ECR I-349.

¹⁰² *ibid* para 173.

¹⁰³ C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi* Judgment of the Court of 8 March 2011.

¹⁰⁴ *Hatton & Others v United Kingdom* (2002) 34 EHRR 1.

¹⁰⁵ *Fretté v France* (2002) 38 EHRR 438.

confirmed the Charter's status as an authority when it was considered in both *Goodwin* and *I*.¹⁰⁶ Subsequently, the Court has accepted what might be described as the orthodox view regarding the Charter and its significance in the EU legal order. In *Bosphorus* the Strasbourg Court declared that

Although not fully binding, the provisions of the Charter of Fundamental Rights of the European Union were substantially inspired by those of the Convention, and the Charter recognises the Convention as establishing the minimum human rights standards.¹⁰⁷

The Court observed that the Constitutional Treaty would have made the Charter "primary law" for the EU. In 2007 the Grand Chamber held that the explanations attached to the Charter "do not have equal authority as the Charter" but that they are a "valuable tool of interpretation".¹⁰⁸ Most recently, in *Neulinger and Shuruk*, it observed that the Charter "became legally binding with the entry into force of the Lisbon Treaty".¹⁰⁹ Thus, the Strasbourg judiciary have kept a watchful eye on the Charter's evolving legal status and have used it where appropriate.

The use of the Charter as a persuasive authority is demonstrated by decisions in a number of cases relating to transsexual and same-sex marriage. In *Goodwin*, the European Court departed from its earlier jurisprudence on the rights of transsexuals following gender reassignment surgery.¹¹⁰ The Court found that the failure to allow a transsexual to change the sex recorded on their birth certificate was a violation of Article 8 ECHR. In relation to Article 12 ECHR (right to marry), the Court noted that, unlike the Convention article, the language of Article 9 of the Charter omitted, "no doubt deliberately" the phrase "man and woman". It concluded that these words could no longer be interpreted in a strictly biological sense and that the applicant's status as a transsexual should not be a barrier to her exercising her right to marry. As such, it found a violation of Article 12 ECHR. The case of *I v UK*, decided on the same day, also followed this logic.¹¹¹ While it appears from the text of the judgment that the impetus for the re-evaluation of the Court's case-law was the evolving social and political recognition of the rights of transsexuals across Europe,¹¹² its invocation as evidence of the new international consensus demonstrates the Charter's status as a persuasive authority in Strasbourg.

The limits of that persuasiveness have recently been tested in *Schalk and Kopf*. The 2010 case concerned a challenge to Austria's failure to permit same-sex marriages. The Court held that, in historical context, it was clear that the right to marry was understood as being exercised by a man and a woman.¹¹³ Furthermore, it held that there is no "European consensus" on same-sex marriage.¹¹⁴ It distinguished the situation of couples seeking same-sex marriage to that of a couple wherein one party is a post-operative transsexual. Turning to the Charter, the Court acknowledged that Article 9, which did not contain a "man and women" clause, was now legally binding in the EU. However, it noted that the explanations of the Article made reference to national law and observed that "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another".¹¹⁵ Thus, while it found that the Article 12 ECHR right cannot be limited to opposite-sex couples, states were not yet under an obligation to permit same-sex marriage. In a concurring opinion, Judge Malinverni (joined by Judge Kovler) strongly denied the applicability of Article 9 to the interpretation of the Convention on this point. It may be that *Schalk & Kopf* is simply an idiosyncratic example of the ECtHR using the Charter as a helpful authority to justify a conclusion it had already reached. On the

¹⁰⁶ *Christine Goodwin v UK* (2002) 35 EHRR 18; *I v UK*

¹⁰⁷ *Bosphorus v Ireland* (2006) 42 EHRR 1, para 159.

¹⁰⁸ *Eskelinen & Others v Finland* (2007) 45 EHRR 43, para 30.

¹⁰⁹ *Neulinger and Shuruk v Switzerland* Judgment of the Grand Chamber 6 July 2010, para 55.

¹¹⁰ *Christine Goodwin v UK* (2002) 35 EHRR 18.

¹¹¹ *I v UK* (2003) 36 EHRR 53.

¹¹² See A Mowbray, 'An examination of the European Court of Human Rights' approach to overruling its previous case law', (2009) *Human Rights Law Review* 179, 194.

¹¹³ *Schalk and Kopf v Austria* Judgment of the Court (First Section) 24 June 2010, para 55.

¹¹⁴ *ibid*, para 58.

¹¹⁵ *ibid*, para 62.

other hand the judgment may be the most recent evidence of a trend in the case-law. The Court may use the Charter not just to revise, but effectively to reverse its previous case-law. However, the Court's actions in doing so have not always attracted unanimous support.

One of the most dramatic reverses in ECtHR jurisprudence in recent years, *Scoppola (No 2)* involved the reinterpretation of Article 7 ECHR as a result of the Charter.¹¹⁶ In direct contradiction of its earlier case-law, the European Court held that the *nullum crimen* principle in the Convention must now include the retrospective application of a more lenient penalty. The Court's judgment made reference to a number of international instruments which contained the *lex mitior* rule including the American Convention on Human Rights, the Rome Statute on the International Criminal Court and the case-law of the International Criminal Tribunal for the former Yugoslavia. The Court also made reference to Article 49 of the Charter and the ECJ decision in *Berlusconi and Others*, which found the principle to be part of the common constitutional traditions of the Member States.¹¹⁷ It therefore held that a consensus had emerged in Europe that the *lex mitior* rule was part of European human rights law and as a result found a violation of Article 7 ECHR.¹¹⁸

In response to the majority's decision in *Scoppola*, a dissenting opinion criticised the Court's reversal of its earlier case-law.¹¹⁹ The dissent noted that the *X v Germany* precedent had been followed "relatively recently" in decisions concerning Bulgaria and the UK.¹²⁰ While the dissent acknowledged that the Convention was a living instrument, it argued that "no judicial interpretation, however creative, can be entirely free of constraints". It concluded that the majority opinion had "re-written" Article 7 ECHR "to accord with what they consider it ought to have been". This, the dissent concluded, "oversteps the limits". This dissent, which is written with strong references to both textual and teleological approaches to judicial interpretation, reflects an uneasiness on the part of certain members of the judiciary when it comes to significantly revising rights. Although the Charter was not explicitly mentioned in the opinion, the disquiet expressed might cast doubt over the willingness of all of the judiciary to use the Charter as a vehicle for the evolution of rights.

The Charter has been explicitly discussed in various other concurring and dissenting opinions. In *Martinie v France* three judges issued a separate concurring opinion which suggested that certain aspects of the right to a fair trial should be "fundamentally reviewed" in light of Article 47 of the Charter.¹²¹ In *VO v France* Judge Ress dissented from the majority decision not to find a violation of Article 2 ECHR, noting that he considered that "Article 2 applies to human beings even before they are born".¹²² The Judge claimed that this interpretation was "consistent" with the Charter's approach. The Charter itself does not pronounce on whether there are rights for the unborn, an issue so far avoided in EU law.¹²³ It may be that the Judge was referring to Article 1 of the Charter which declares human dignity to be inviolable. The existing case-law of the European Court of Human Rights on Article 3 ECHR and its prohibition on inhuman and degrading treatment suggests that Article 1 of the Charter might offer fertile ground for judicial interpretation in future.

The Charter occupies a peculiar position for the Strasbourg Court. It is, as the Court has noted, legally binding for 27 of its members, at least within the scope of EU law. On the other hand, looked at more formally, the Charter can be described as effectively part of an international agreement (the Lisbon Treaty) to which just over half of the Council of Europe members are party. Viewed in this light, it may be over-zealous to use the Charter to revolutionise rights protection across all Council of Europe

¹¹⁶ *Scoppola v Italy (No 2)* Judgment of the Court (Grand Chamber) 17 September 2009.

¹¹⁷ *ibid*, para 105.

¹¹⁸ *ibid*, para 106.

¹¹⁹ Partly Dissenting Opinion of Judge Nicolaou, Joined by Judges Bratza, Lorenzen, Jocien , Villiger and Saj .

¹²⁰ *X v Germany* (1984) 7 EHRR 152; *Zaprianov v. Bulgaria* Admissibility Decision of the Court (First Section) of 6 March 2003; *Le Petit v UK* Judgment of the Court (Fourth Section) of 15 June 2004.

¹²¹ *Martinie v France* (2006) 42 EHRR 15.

¹²² *VO v France* (2005) 40 EHRR 259.

¹²³ Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685.

states. However, the case-law of the Strasbourg Court to date does suggest a willingness to review the level of protection in light of the Charter. This willingness to revise Convention protection must be considered alongside Article 52 of the Charter which provides for at least equivalent protection of Convention rights under the Charter system. If the Strasbourg Court uses the Charter to revise the Convention and the Convention interpretation in turn influences the Charter the result may be ongoing improvement in the level of protection. The relationship between the two courts is referred to in Declaration 2 to the Lisbon Treaty which “notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention”.¹²⁴ Therefore, those interested in fundamental rights in Europe will need to keep an eye on Strasbourg as well as on Luxembourg to assess the Charter’s significance.

Conclusion

By affording the Charter the same legal value as the Treaties, the Member States and institutions – for their various motives – have finally articulated a detailed bill of rights for the EU. That in itself is gratifying for those who saw the Charter as a vehicle for improving the constitutional and political legitimacy of the Union. Together with the creation of the Fundamental Rights Agency, it has also provided a focus for a system of EU human rights protection that will be less reliant than previously on the Council of Europe and that is already beginning to influence the Strasbourg system.¹²⁵ It could be argued that nothing much has changed on the judicial plane. The horizontal provisions, supplemented by the UK-Poland Protocol, impose tight prohibitions on the use of the Charter as a legal basis, or as a vehicle for extending the powers of the Union. Whilst the Charter will be used as a basis for interpreting (and, where appropriate, striking down) both EU measures and national measures falling within the scope of EU law, the general principle of fundamental rights – expressly preserved in the post-Lisbon regime – has long been available for this purpose.

It may well be, however, that the act of codification proves more significant than these dry facts suggest. The Charter may never achieve in Europe the level of popular awareness enjoyed by the Bill of Rights in the United States. But the domestication in a single place of so comprehensive a range of rights will prompt European lawyers, judges and students to read them, to become familiar with them and to apply them. Reduced to written form and given the authority of the Treaties, they have the potential to be developed more consistently and more coherently than is possible when rights have to be identified and applied by judges on a case-by-case basis. One must hope, also, that it will improve the quality of policy-making and legislation within the Union – for whilst that topic lies outside the scope of this paper, it is a mistake to judge the efficacy of any human rights instrument by reference only to those matters which come to court.¹²⁶

The subjection of Union and national rules to such a powerful and open-textured instrument does require enormous faith to be placed in the Court of Justice, its ultimate arbiter. Arguments over fundamental rights go, after all, to the heart of what different Member States hold dear, whether it is a particular social model, or economic model, or concept of personal morality. Sensitivity will be required to resolve the inevitable battles about such legal issues as the location and significance of the distinction between rights and principles, the applicability of the Charter outside the territory of the Union, the nature of the link with Union law that is required to trigger Charter protection and the degree to which it applies (if at all) “horizontally” as against non-public bodies.

¹²⁴ “Declaration on Article 6(2) of the Treaty on European Union” OJ C 306/249 17.12.2009.

¹²⁵ Though suggestions of an incipient disconnection – or takeover – must be balanced by the Strasbourg-friendly Article 52(3) of the Charter and Article 6(3) TEU, and, more fundamentally, by the requirement that the Union accede to the ECHR, whose significance and implementation is discussed elsewhere in this volume.

¹²⁶ In this respect the scrutiny by the European Commission since 13 March 2001 of all legislative proposals for compliance with the Charter is to be welcomed. See SEC(2001) 380/3, COM(2005) 172 final.

The best argument for the Charter is the simplest, and one which should appeal to Europhile and Europhobe alike: the need for robust and accessible judicial protection for individuals against the ever-increasing powers of the Union and of the Member States when acting within the scope of Union law. It is thus a particularly appropriate companion to perhaps the most important of all the Lisbon Treaty developments: the merging of the pillars and the extension of judicial control over such areas as asylum, immigration, national security and criminal justice. Sharpston A-G has suggested that in “the long run, only seamless protection of fundamental rights under EU law... matches the concept of EU citizenship”.¹²⁷ The reference to the long run was well-judged, because as she pointed out, the achievement of that aim will require action by political as well as legal institutions. In the meantime, however, the Charter is likely to be invoked in a substantial number of cases. If they are decided wisely, it has the potential to be an effective vehicle for the advancement of civil liberties, fairness and democratic values in the Union.

¹²⁷ C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* Opinion Sharpston A-G of 30 September 2010, para 170.

