

HUMAN RIGHTS IN EUROPE

Commentary on the Charter of Fundamental Rights of the European Union

William B.T. Mock

EDITOR

Gianmario Demuro

COORDINATING EDITOR

Raffaele Bifulco

Marta Cartabia

Alfonso Celotto

EUROPEAN EDITORS

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Foreword: The Charter's History and Current Legal Status

William Mock & Gianmario Demuro

I. A Short History of the Charter of Fundamental Rights

By late 2009, ten years after it was first discussed at a European Inter-Governmental Conference (“IGC”), the Charter of Fundamental Rights and Liberties was ratified by all 27 member states, after what had already been a remarkable life cycle.

The Drafting of the Charter

The Charter was drafted between 1999 and 2001, using a new procedure within the European Union. The traditional pattern for the drafting of major European legal texts had been for the European Commission to propose and pass a text on to the European Council or the European Parliament for approval, with any additional ratifications to follow. In this instance, perceived shortcomings with the traditional process, and ensuing difficulties with popular acceptance of European texts, led the Council, meetings in 1999 in Cologne, Germany, and Tampere, Finland, to call for the formation of an *ad hoc* Convention with the express mandate of crafting a Charter of Fundamental Rights and Liberties.¹ This Convention was formed in large part to increase partici-

1. See Cologne European Council: Annexes to the Presidency Conclusions, Annex IV (“European Council Decision on the drawing up of a Charter of Fundamental Rights of the Eu-

patory accountability, transparency and “buy-in” throughout Europe, and included among its members representatives of the European Commission, the European Parliament, national governments, and national parliaments. The latter is particularly noteworthy, in that it represents the first time that national politicians, as such and not as governmental leaders, participated in drafting a European legal text. In addition, as the text of the Charter was being drafted, public input was widely sought, and drafts were openly circulated and commented upon.

Following the promulgation of the Charter as an additional protocol to the Treaty of Nice,² the Community finally had a draft text designed to act as a fundamental human rights document. In this guise, the Charter was influential, but did not have the force of law. What remained was to find a way to give it that force of law, and the way that was chosen was to incorporate it into the next legal document being presented to the members of the Community for ratification. As it turned out, this was not to be a successful strategy.

The “Constitution for Europe”

In December 2000, the European Council at Nice ended their meeting by adopting a number of declarations. One of these, Declaration 23 (“Declaration on the Future of the Union”),³ encouraged the European Council meeting scheduled for December 2001 in Laeken, Belgium, to take up the issue of the legal status of the Charter of Fundamental Rights and the additional question of a simplification of the European Union treaty structure. It further called for an IGC to be scheduled for 2004, to take up the matter of taking up these issues through making corresponding treaty changes.⁴

At Laeken, the European Council took up consideration of the legal status of the Charter and the simplification of the EU treaty structure, as planned. This meeting, too, ended with a call for an IGC to be scheduled for 2004. As a pre-

ropean Union”)(3-4 June 1999), available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm (last accessed 4 Nov. 2009). Presidency conclusions of European Councils from 1994 through 2009 can be accessed at http://europa.eu/european_council/conclusions/index_en.htm (last accessed 4 Nov. 2009).

2. Treaty of Nice, signed 26 February 2001, entered into force 1 February 2003, O.J. C-80, p. 1 (10 March 2001).

3. Treaty of Nice, signed 26 February 2001, entered into force 1 February 2003, O.J. C-80, p. 1 (10 March 2001), Declaration 23 (“Declaration on the Future of the Union”), para.

5.

4. *Id.* at para. 7.

liminary matter, the Laeken meeting called a “Convention for the Future of Europe” into session to discuss how to incorporate the Charter into EU law and whether the EU should sign onto the European Convention, independent of the Charter’s fate and of European Convention membership by EU members themselves.⁵

This Convention met for the first time in February 2002, chaired by former French President Valéry Giscard D’Estaing. Working over nearly two years, it produced a draft Treaty Establishing a Constitution for Europe,⁶ the primary feature of which is that it consolidated into a unified document all prior EEC, EC, and EU treaty obligations. Once consolidated, all prior treaties would be repealed, so that only the “Constitution for Europe” would remain. Within this Constitution, the Charter appeared as Part II. The hope, and plan, was that the inexorable process of European unification would result in ratification of this treaty and, with it, adoption of the Charter throughout the EU. This was not to be.

After a period of political wrangling, the draft Treaty was signed by the member states in October 2004, after which it was sent out for national ratification. Within any given country, a decision as to method of ratification—parliamentary process or popular referendum—was a matter of constitutional law or political consideration left to local control. For a variety of reasons, both domestic and having to do with Euro-politics, both the French and Dutch governments decided to put ratification of the treaty to national referenda, which went down to defeat.⁷ Other nations which had planned to hold referenda or ratify the treaty through other procedures put their plans on hold, and the process stalled.

The Effect of the French and Dutch Rejection of the European Constitution

Once the French and Dutch people rejected the Treaty Establishing a Constitution for Europe, Article II of that treaty (which was the Charter of

5. Laeken Declaration on the Future of the European Union, Council of the European Union, Laeken European Council: Presidency Conclusions, Annex I, SN/300/1/01, pp.20-27 (14-15 Dec. 2001) http://ec.europa.eu/justice_home/unit/charte/en/declarations-laeken.html (last visited 4 Nov. 2009).

6. Treaty Establishing a Constitution for Europe, *signed* 29 October 2004, O.J. C-310, p. 1 (16 Dec. 2004).

7. The French referendum of May 29, 2005 resulted in a “No” vote of almost 55%. The Dutch referendum of June 1, 2005 resulted in a “No” vote of almost 62%. For a good summary of where the constitutional ratification process stood as of mid-2007, see “EU Constitution: Where Member States Stand,” BBC News online edition, <http://news.bbc.co.uk/2/hi/europe/3954327.stm> (last visited 4 Nov. 2009).

Fundamental Rights) fell with the rest of the treaty. This threw the processes of European unification and constitution-building into confusion and left the Charter in legal limbo. It also left proponents of the Charter in a quandary. On the one hand, the treaty had plainly failed to win popular acceptance and ratification. On the other hand, one could argue that these rejections had more to do with other aspects of the treaty and with domestic politics within those countries than with issues of fundamental human rights. Should the Charter, on which so much effort had been expended and on which so many hopes rested, be tossed out with the treaty results, or should the strategy of putting the Charter into the European constitution be rethought and a new way found to bring it into law? For a time, the way forward wasn't clear.

The Lisbon Treaty and Where the Charter Stands Today

Two years after the French and Dutch referenda brought the process of European constitutional reform to an abrupt standstill, the Brussels European Council of June 2007 began the process once again. At that gathering, the assembled European leadership decided to convene another IGC with the mandate to prepare and finalize a "Reform Treaty" to put the constitutional process back on track. In essence, the Reform Treaty was to differ from the 2004 Treaty Establishing a Constitution for Europe in that it coordinated the EC and EU Treaties, thus permitting them to remain in force, and added to them the innovations negotiated as part of the 2004 treaty. The Brussels European Council was also very careful to make clear that the IGC was to avoid any suggestion that their end product was a European constitution in any way, thus distancing their work from the political failures of 2004-05. Although similar in substance to the unratified 2004 treaty, the plan lacked the latter's radical flavor. The IGC began its work on the Reform Treaty in July 2007, immediately after the close of the European Council meeting.

With respect to the Charter of Fundamental Rights and Liberties, the IGC's mandate from the Brussels European Council was equally clear. It was to be excluded from the treaty to be prepared by the new IGC, but a way was to be found for it to be enshrined in European law nonetheless. In this way, the carefully-crafted human rights principles of the Charter, which had been influencing EU law since they had been promulgated as a protocol to the Treaty of Nice several years earlier, would be given a firm, though not constitutional, footing in European jurisprudence.

The Lisbon Treaty,⁸ signed by all the EU nations in December 2007 and ratified by the final member state in November 2009, is the result of this process. This treaty calls for increased roles for both the European Parliament and national parliaments in European law-making and policy-setting; alters the rules for attaining qualified majorities in the European Council; and sharpens some of the EU's external policy tools.

The Lisbon Treaty preserves the Charter's legal value by amending Article 6 of the Treaty on European Union (the Maastricht Treaty). Here is the Lisbon Treaty's operative language:⁹

Article 1

The Treaty on European Union shall be amended in accordance with the provisions of this Article.

...

8) Article 6 shall be replaced by the following:

"Article 6

1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

8. Treaty of Lisbon, *signed* 13 December 2007, O.J. C-306, p. 1 (17 Dec. 2007).

9. *Id.*, art. 1, §8. This language was drafted at the Brussels European Council and included as Annex I(1)(5) of the Presidency Conclusions, "to clarify the exact drafting where necessary." Council of the European Union, Brussels European Council: Presidency Conclusions, 11177/1/07 REV 1, Annex I(1)(5) (21/22 June 2007).

Thus, as ratified, the Lisbon Treaty makes the Charter of Fundamental Rights and Liberties a part of Europe's fundamental law by incorporating it into the 1993 Maastricht Treaty and, in so doing, declares that the Charter did not "extend in any way the competences of the Union..." The European Council and the IGC thus avoid having to request 27 different national ratifications of the Charter of Fundamental Rights. In reality, the ratification of the Lisbon Treaty is, essentially, a ratification of the Charter as fundamental European law, in the context of the Maastricht Treaty rather than *in haec verba* in the Lisbon Treaty, but this was undoubtedly seen as a less direct request, and less like the process that failed in 2005. Furthermore, it was explicit throughout the preparations for the Lisbon Treaty that the fundamental European documents are no longer to be considered "constitutional" in nature,¹⁰ so that some degree of apparent threat to national sovereignties of members states may have been assuaged.

The Final Issues

At the June 2007 IGC, the Polish and British governments expressed concern about application of the Charter to their own national and internal affairs and it was agreed that the Reform Treaty would reflect those concerns.¹¹ Thus, when the Lisbon Treaty was drafted, both Poland and the United Kingdom were provided with special protocols that recognize certain principles.¹² The first principle is that neither the European Court of Justice nor any domestic court would have the jurisdiction to find any law, regulation, practice, or action of Poland or the U.K. inconsistent with the Charter.¹³ The second principle is that any reference in the Charter to domestic laws or practices shall only apply to Poland and the U.K. to the extent that such rights are already present in the domestic laws of those two nations.¹⁴ As if to emphasize the root of concern, the protocol draws special attention to exempting Poland and the U.K. from application of one portion of the Charter: "In particular, and for the

10. "The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution,' is abandoned." *Id.* at Annex I(I)(1).

11. Council of the European Union, Brussels European Council: Presidency Conclusions, 11177/1/07 REV 1 (21/22 June 2007).

12. Treaty of Lisbon, *signed* 13 December 2007, O.J. C-306, p. 1, Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (17 Dec. 2007).

13. *Id.* at art. 1(1).

14. *Id.* at art. 2.

avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.”¹⁵ Title IV contains within it provisions relating to “Solidarity,” including various workers’ rights, social rights, and consumer rights. Czech concerns that the Charter might re-open post-World War II German land claims led to the same opt-out agreement being granted to the Czech Republic in late October 2009.

The effective date is December 1, 2009, under article 6(2) of the Lisbon Treaty.

II. Some Influences on the Charter’s Provisions and Interpretation

European Unification

Over time, as we know, momentum built for greater intra-European affiliation. On the broader political scale, this was achieved through the 1965 Merger Treaty (which consolidated and streamlined European political bodies), the 1986 Single European Act (which reformed European voting procedures and increased Community authority), and the 1992 Maastricht Treaty (which renamed the EEC the “European Community” or “EC,” created the European Union by combining the EC, the ECSC, and Euratom into a larger framework of international and pan-European policies, and expanded the authority of the European Parliament). Geographical increases occurred when the original six members of the ECSC expanded to nine (1973), ten (1981), twelve (1986), fifteen (1995), twenty-five (2004), and, most recently, twenty-seven (2007) members.

The Universal Declaration of Human Rights

External to this process of economic and growing political integration, the protection of human rights was an increasingly important concern. In 1948, the United Nations General Assembly passed what is still one of the key documents in this area—the Universal Declaration of Human Rights. The influence of the Universal Declaration will be seen throughout the chapters commenting on articles of the Charter of Fundamental Rights, as, indeed, it

15. *Id.* at art. 1(2).

will in any serious work on human rights law. In many ways, this document is fundamental to the Charter's terms and its very existence.

The European Convention for the Protection of Human Rights and Fundamental Freedoms

Not long after the Universal Declaration, in 1950, the Council of Europe enacted the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁶ The Council of Europe was created by the Treaty of London,¹⁷ originally a ten-member group of European nations that is not to be confused with the Council of the European Union. The Council of Europe was founded following World War II with the express purpose of addressing thorny issues of political and human rights concerns. In 1959, the Council of Europe established the European Court of Human Rights in Strasbourg, France, to address issues of national compliance with the European Convention on Human Rights. As more nations have joined the Council, the reach and importance of the Convention and the Court have grown.

Naturally, the European Convention for the Protection of Human Rights and Fundamental Freedoms can be seen as one of the primary influences on the Charter. The first, and more obvious, influence of the European Convention is on the language and reasonably expected interpretations of the Charter's provisions. In several instances, the language of the European Convention can be observed as echoes or direct parallels in the Charter. In other instances, the jurisprudence of the European Court of Human Rights, interpreting the European Convention, is significant in understanding the meaning of comparable Charter provisions.

The second influence of the European Convention can be seen in the final section of the Charter—the “General Provisions,” including Articles 51 through 54. That section expresses concern that adoption of the Charter not weaken or conflict with human rights obligations that the signatories had already undertaken as members of the European Convention. In fact, the following two provisions are noteworthy in this regard:

Article 52(3): In so far as this charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human

16. European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (“European Convention on Human Rights”)

17. Statute of the Council of Europe (“Treaty of London”), E.T.S. 1 (5 May 1949), signed by ten states: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said convention. This provision shall not prevent Union law providing more extensive protection.

Article 53: Nothing in this charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Further information about the interplay between the Charter and the European Convention can be found in the chapters on Articles 52 and 53, respectively.¹⁸

The Maastricht Treaty

Very importantly for the eventual appearance of the Charter, the Maastricht Treaty, now known as the Treaty on European Union, incorporated the European Convention into the basic law of Europe. In article 6,¹⁹ we find the following language:

Article 6 of the Treaty on European Union

2. The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

It is interesting to consider these sources of EU fundamental rights mentioned in article 6(2) from two perspectives: source and enforcement. The European Convention was, in a sense, extrinsic to the EU because, although each of the member states of the EU Treaty was also a member of the Council of Europe, the Council of Europe was an external organization containing additional members. Likewise, “the constitutional traditions common to Member States” was extrinsic to the EU, in the sense that these traditions arose prior to

18. See Tania Groppi, [Chapter on] Article 52, *infra*, and Marta Cartabia, [Chapter on] Article 53, *infra*.

19. *Ex* article F.

the creation of the Community and in national, rather than Community, contexts. Of the three sources, only “general principles of Community law,” which may or may not be considered distinct from “the constitutional traditions common to Member States” within the syntactical structure of the treaty language, can truly be called a Community source of human rights and fundamental freedoms.

Looked at from the standpoint of enforcement, then, Article 6 can be read as an effort to take three sources of human rights law—two of them extrinsic to the Community itself, though clearly linked to the nations of the Community—and to bring them into the enforcement mechanisms of the Community.

III. A Brief Comparative Analysis

Just as in the United States, the original constitutional framework in Europe lacked any human rights element. In the United States, the 1789 Constitution was quickly adjusted by adding the first ten amendments, known collectively as the Bill of Rights, which were ratified in 1791. At that point, the United States had both a core document and explicit human rights protections tied to that core document. In contrast, the European Community began with political and economic coordination, rather than unification, and did so after World War II. Institutionally, it did not take up the issue of human rights until half a century after its initial efforts to come together.

Comparing the two experiences, two key comparative elements to consider when reviewing the Charter of Fundamental Rights, its history, and its likely jurisprudential life are (a) the differing eras during which the United States and Europe made their documentary commitments to human rights, both historically and institutionally; and (b) the differing directions that human rights jurisprudence flowed in the United States—from a national, federal constitution towards the states—and in Europe—from Member State and external sources to the Community level. Both of these elements are significant to an understanding of the Charter.

This is not to say that either history is, in one sense or another, superior to the other, because it's very clear that, for better and worse, the history of human rights on both sides of the Atlantic is in many senses a shared history. On the positive side, the Enlightenment thinkers of both Europe and North America set the stage for some of the greatest human rights documents of the early revolutions—the United States Bill of Rights and the French Declaration of the Rights of Man and Citizen of 1789. On the other hand, slavery its profiteering, colonialism, political extremism, and the excesses of war have been shared vices.

What is of primary interest in these few pages is simply a few analytic distinctions that may prove of use in understanding the Charter and helping in its comparative analysis.

Differing Eras

Following the American and French revolutions, the U.S. Constitution, including the Bill of Rights, and the Declaration of the Rights of Man and Citizen of 1789 were the first major efforts to embody individual citizens' rights in fundamental national documents (with the arguable exception of the Magna Carta). These documents understandably focus on Enlightenment concepts of political, economic, and personality rights, such as the freedom of contract, the rights of property-holders, freedom from political oppression, and freedoms of speech and religion.

Comparing these 18th-century documents to a 20th-century counterparts such as the Charter, we find the latter to be far more detailed and complex, and to recognize a far wider range of rights. Some of these would arguably fall within historically familiar conceptions of human rights, such as the freedom from torture,²⁰ right to property,²¹ equal protection under the law,²² the right to vote,²³ and the protection against double jeopardy in criminal matters.²⁴ Other rights found in more modern human rights documents reflect the evolution of society, social issues, and political thinking in the past two hundred years. Among the many examples from the Charter would be the protection of personal data,²⁵ the right to asylum,²⁶ rights of the elderly,²⁷ protection against unjustified layoffs,²⁸ and the right to an ombudsman's services.²⁹

Differing Directions

Whereas the United States became a unified political body, as least as regards the original states, through armed opposition to a colonial master, the

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20. See Marco Olivetti, [Chapter on] Article 4, *infra*.
 21. See Alberto Lucarelli, [Chapter on] Article 17, *infra*.
 22. See Alfonso Celotto, [Chapter on] Article 20, *infra*.
 23. See Marta Cartabia, [Chapter on] Articles 39-40, *infra*.
 24. See Marilisa D'Amico, [Chapter on] Article 50, *infra*.
 25. See Filippo Donati, [Chapter on] Article 8, *infra*.
 26. See Giuditta Brunelli, [Chapter on] Article 18, *infra*.
 27. See Pier Francesco Lotito, [Chapter on] Article 25, *infra*.
 28. See Andrea Giorgis, [Chapter on] Articles 30-31, *infra*.
 29. See Raffaele Bifulco, [Chapter on] Article 43, *infra*.

idea of a united Europe originated in the political wisdom of those seeking to avoid repetition of an ongoing series of intra-European armed conflicts culminating in the disastrous world wars of the first half of the Twentieth Century. The unification of Europe has therefore been a much more gradual process. Unlike the U.S. Constitution, the first European documents were therefore not instruments of political unity, but instruments providing for shared administration of important industrial resources. In the beginning was the European Coal and Steel Community (“ECSC”),³⁰ followed shortly by the Treaties of Rome establishing the European Economic Community (“EEC”)³¹ and the European Atomic Energy Community (“Euratom”).³² Within these European communities centered around resources, energy, and economics, human rights were simply not the core issues. It wasn’t until decades later that the Charter was proposed, drafted, and debated.

This gave time for two processes to occur. One was that a rich body of national legislation and jurisprudence dealing with human rights issues grew up in every European country. Because of different national personalities and different national histories, including the nearly half-century continental rift following World War II, Member States have not approached many of the Charter’s topics in the same way, and there are substantial questions of negotiation, coordination, and harmonization. It is true that the United States has encountered ongoing issues with application of the Bill of Rights to the states, particularly in the civil rights arena, but one must recall that the Bill of Rights was not directly applicable to the individual states until after the 20th-century Supreme Court “ordered liberty” and “selective incorporation” debates about whether the 14th amendment imposed the specific obligations of most of the first eight amendments upon the states.³³ In Europe, on the other hand, issues

30. Treaty Establishing the European Coal and Steel Community (ECSC) (“Treaty of Paris”), signed 18 April 1951, entered into force 24 July 1952, expired 23 July 2002.

31. Treaty Establishing the European Economic Community (EEC) (“Treaty of Rome”), signed 25 March 1957, entered into force 1 January 1958.

32. Treaty Establishing the European Atomic Energy Community (Euratom), signed 25 March 1957, entered into force 1 January 1958.

33. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Justice Cardozo stating that certain protections in the Bill of Rights apply to the states on the basis that they are “implicit in the concept of ordered liberty”); *Rochin v. California*, 342 U.S. 165 (1952) (Justice Frankfurter utilizing the “ordered liberty” approach); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Justice Brennan applying portions of the First, Fourth, and Sixth amendments to the states through a process of selective incorporation); and *Griffin v. California*, 380 U.S. 609 (1965) (Justice Douglas applying the Fifth Amendment against the states through selective incorporation).

of differing national definitions and approaches to human rights were central to the debate around the creation and drafting of the Charter.

The second process that occurred due to the late arrival of the Charter was that a significant body of supra-national human rights law arose. As we have already seen, the Charter arose after, and was heavily influenced by, both the United Nations' Universal Declaration of Human Rights and the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms. This meant that, unlike the situation with the Bill of Rights, efforts to draft the Charter of Fundamental Rights were made against a crowded background.

Although membership in both the Council of Europe and what has variously been known as the EEC, the EC, and the EU have grown over time, it is fair to say two things: (a) the Council of Europe has consistently been the larger group and (b) every member nation of the EEC/EC/EU—every signatory to the Treaty of Rome—was first a member of the Council of Europe, often by decades. Consequently, every nation in the European Union became obligated to respect a wide range of human rights as a matter of national law, adopted through the sovereign acceptance of the European Convention for the Protection of Human Rights and Fundamental Freedoms and through domestic legislation, long before the Charter was drafted. The drafters of the Charter of Fundamental Rights were faced with a complex web of pre-existing national legislation and international obligations already covering much of the substantive scope of the area in which they were working.

Two consequences flow from this reality. The first is that the Charter met with resistance from those who were concerned that it might interfere with an established regime of human rights protections. The second is that the Charter met with resistance from those who disliked any attempt to Euro-federalize the field of human rights law. By contrast, since no serious field of human rights law had been established in the individual states in pre-revolutionary America, it was possible to federalize human rights law from the outset, leading to the Bill of Rights, and it is only when concerns arise that federal protections are insufficient that state constitutions and human rights protections are seriously explored.

This contrast between the early American *tabula rasa* and the later, more written-upon tablet of European human rights law also has consequences for judicial enforcement. Within the Council of Europe, the European Court of Human Rights has had jurisprudential authority over human rights issues since 1959. The European Human Rights Commission served a coordinating function, acting as a body of first instance that essentially weeded out many of the less significant or frivolous cases, until the merger of the two into the ECHR

in 1999.³⁴ Similarly, the inclusion of the Bill of Rights in the federal U.S. Constitution, and the *Marbury v. Madison*³⁵ decision of 1803 quickly established the principle that the U. S. Supreme Court was the ultimate arbiter of the guaranteed rights.³⁶ In the context of the European Union and its predecessors, however, there was from the outset neither an official body of human rights law nor a high court specifically designated as a human rights court. As a result, national courts were the natural locations for decision-making about national human rights regimes.

Within this system of overlapping jurisdictions, the European Court of Justice had no official human rights jurisdiction, but was the only court with Community-wide responsibility. Nevertheless, the various treaties entrusted the ECJ with certain duties that gave it increasing involvement in the area of human rights, even though the European Union initially had no court able to judge if European legislation was against the law or not, as judged against a fundamental human rights benchmark. One key element is that the treaties entrusted the ECJ to decide, from time to time, which court—national or European—had jurisdiction over particular matters. Through time, the Court also became involved in a number of individual cases in which European law questions, relating to single European citizens, raised thorny issues about such matters as abortion and freedom of expression. In this manner, by utilizing single cases presented to it, the Court gradually became a court of rights, making, decision by decision, a list of fundamental rights by stitching together a number of binding legal sources—including the constitutions of Member States, the European Convention for the Protection of Human Rights, the Universal Declaration of Human Rights, and various provisions of the unratified Charter of Fundamental Rights. Every Member State's courts knew that they could resort to the Court of Justice, when in doubt about the interpretation of European Rights, including those that impacted upon issues of fundamental human rights, even in the absence of a fundamental rights document.

The ECJ can rule against and nullify European directive, regulations, and other binding European legal instruments, which have been created contrary

34. This was brought about by Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 155 (1 Nov. 1998).

35. 5 U.S. (1 Cranch) 137 (1803).

36. Unfortunately, many people failed to benefit from this during the antebellum period, as the infamous *Dred Scott* case was to demonstrate. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

to the European legal order. It can also judge cases about Member State legislation, and may entertain suits filed by both Member States and private citizens. Unavoidably, this reach of jurisdiction, the clash of interests in a complex modern society, and the need for a central final arbiter of fundamental issues has over time led to the ECJ becoming a constitutional federal court capable of handling fundamental rights issues, much like the United States Supreme Court. It has done so, however, in the absence of a unifying document granting it that authority or embodying the fundamental rights principles. With the Treaty of Lisbon and the Charter of Fundamental Rights, the ECJ will finally and permanently have both the foundational authority and a unifying source of rights for the European Union.

One additional, recent institutional development within the European Union will increase and facilitate this process of “federalization” of fundamental rights law: the creation of the European Union Agency for Fundamental Rights in 2007.³⁷ Built upon the European Monitoring Center for Racism and Xenophobia,³⁸ which it replaced, this Vienna-based agency is responsible for monitoring and reporting on all aspects of EU-wide concerns under article 6(2) of the Treaty on European Union, discussed above, and the Charter of Fundamental Rights.³⁹ In addition to its responsibility to provide transparency in human rights to Member States and the public, which it does through data gathering, publication, and periodic reports, the agency is empowered to provide opinions to Member States on the implementation of EU law.⁴⁰ Its power does not, however, extend to regulatory or quasi-judicial decision-making, nor may it render opinions on the legality of EU legislation.⁴¹ These powers remain with the relevant existing bodies, including the ECJ.

37. Regulation 168/2007/EC of the European Council of 15 February 2007 establishing a European Agency for Fundamental Rights, O.J. L-53, p. 1 (22 Feb. 2007).

38. The European Monitoring Center for Racism and Xenophobia was established by Regulation 1035/97/EC of the European Council of 2 June 1997 establishing a European Monitoring Center on Racism and Xenophobia, O.J. L-151, p. 1 (10 June 1997), *amended by* Regulation 1652/2003/EC of the European Council of 18 June 2003 amending Regulation 1035/97/EC, O.J. L-245, p. 33 (29 Sept. 2003).

39. Regulation 168/2007/EC, *supra* n. 37, at Preamble ¶¶ 2, 9 and chapter 1, art. 3(2).

40. *Id.*, chapter 1, art. 4(1).

41. *Id.*, chapter 1, art. 4(2).

Treaty on European Union Article 6 (*ex Article F*)

(Prior to amendment by the Treaty of Lisbon)

1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Treaty of Nice, Declaration 23

The Conference took note of the following declarations annexed to this Final Act:
DECLARATIONS ADOPTED BY THE CONFERENCE

23. Declaration on the future of the Union

1. Important reforms have been decided in Nice. The Conference welcomes the successful conclusion of the Conference of Representatives of the Governments of the Member States and commits the Member States to pursue the early ratification of the Treaty of Nice.
2. It agrees that the conclusion of the Conference of Representatives of the Governments of the Member States opens the way for enlargement of the European Union and underlines that, with ratification of the Treaty of Nice, the European Union will have completed the institutional changes necessary for the accession of new Member States.
3. Having thus opened the way to enlargement, the Conference calls for a deeper and wider debate about the future of the European Union. In 2001, the Swedish and Belgian Presidencies, in cooperation with the Commission and involving the European Parliament, will encourage wide-ranging discussions with all interested parties: representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc. The candidate States will be associated with this process in ways to be defined.
4. Following a report to be drawn up for the European Council in Göteborg in June 2001, the European Council, at its meeting in Laeken/Brussels in De-

ember 2001, will agree on a declaration containing appropriate initiatives for the continuation of this process.

5. The process should address, inter alia, the following questions:

- how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity;
- the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice, in accordance with the conclusions of the European Council in Cologne;
- a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning;
- the role of national parliaments in the European architecture.

6. Addressing the abovementioned issues, the Conference recognizes the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States.

7. After these preparatory steps, the Conference agrees that a new Conference of the Representatives of the Governments of the Member States will be convened in 2004, to address the abovementioned items with a view to making corresponding changes to the Treaties.

8. The Conference of Member States shall not constitute any form of obstacle or pre-condition to the enlargement process. Moreover, those candidate States which have concluded accession negotiations with the Union will be invited to participate in the Conference. Those candidate States which have not concluded their accession negotiations will be invited as observers.

Protocol [30] to the Treaty of Lisbon

ON THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION TO POLAND AND TO THE UNITED KINGDOM

[By agreement reached on 29 October 2009, this Protocol is to be applied to the Czech Republic as well, with formal amendment of the Protocol to include references to the Czech Republic expected to take place in 2010.]

THE HIGH CONTRACTING PARTIES,

WHEREAS in Article 6 of the Treaty on European Union, the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union;

WHEREAS the Charter is to be applied in strict accordance with the provisions of the aforementioned Article 6 and Title VII of the Charter itself;

WHEREAS the aforementioned Article 6 requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that Article;

WHEREAS the Charter contains both rights and principles;

WHEREAS the Charter contains both provisions which are civil and political in character and those which are economic and social in character;

WHEREAS the Charter reaffirms the rights, freedoms and principles recognized in the Union and makes those rights more visible, but does not create new rights or principles;

RECALLING the obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally;

NOTING the wish of Poland and the United Kingdom to clarify certain aspects of the application of the Charter;

DESIROUS therefore of clarifying the application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justiciability within Poland and within the United Kingdom;

REAFFIRMING that references in this Protocol to the operation of specific provisions of the Charter are strictly without prejudice to the operation of other provisions of the Charter;

REAFFIRMING that this Protocol is without prejudice to the application of the Charter to other Member States;

REAFFIRMING that this Protocol is without prejudice to other obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognized in the law or practices of Poland or of the United Kingdom.

Major Treaty Steps in the Development of European Human Rights

1. Universal Declaration of Human Rights, Dec. 10, 1948, U.N.G.A. Res. 217 (III 1948), which is a United Nations document that states several key principles of human rights. This is considered a foundational document of human rights law world-wide, and states customary international law, accepted by the global community of nations.
2. European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which creates a broad human rights regime for all countries in the Council of Europe. At all times, the Council of Europe has included every member of the European Economic Community, the European Community, or the European Union, as well as other European countries.
3. European Social Charter, E.T.S. 35 (1961), *revised* E.T.S. 163 (1996).
4. Treaty on European Union (“Treaty of Maastricht”), *signed* 7 February 1992, *entered into force* 1 November 1993, O.J. C-191, p. 1 (29 July 1992), especially article 6, which explicitly incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms into European Union law.
5. Charter of Fundamental Rights and Liberties.
6. Treaty of Lisbon (“the Reform Treaty”), *signed* 13 December 2007, O.J. C-306, p. 1 (17 Dec. 2007), *entered into force* 1 December 2009.

Major Treaty Steps in the Process of European Unification

1. Treaty Establishing the European Coal and Steel Community (ECSC) (“Treaty of Paris”), *signed* 18 April 1951, *entered into force* 24 July 1952, *expired* 23 July 2002.
2. Treaty Establishing the European Economic Community (EEC) (“Treaty of Rome”), *signed* 25 March 1957, *entered into force* 1 January 1958. This

was renamed by the Maastricht Treaty (#6 below) as the Treaty Establishing the European Community. It was once again revised and renamed by the Treaty of Lisbon (#10 below) as the Treaty on the Functioning of the European Union.

3. Treaty Establishing the European Atomic Energy Community (Euratom), *signed* 25 March 1957, *entered into force* 1 January 1958.
4. The Merger Treaty (“Treaty Establishing a Single Council and a Single Commission of The European Communities”), *signed* 8 April 1965, *entered into force* 1 July 1967, O.J. 152 (13 July 1967).
5. The Single European Act, *signed* 28 February 1986, *entered into force* 1 July 1987, O.J. L-169, p. 1 (29 June 1987).
6. Treaty on European Union (“Treaty of Maastricht”), *signed* 7 February 1992, *entered into force* 1 November 1993, O.J. C-191, p. 1 (29 July 1992). The revised and consolidated version produced pursuant to the Treaty of Lisbon is available at O.J. C-115, p. 13 (9 May 2008).
7. Treaty of Amsterdam, *signed* 2 October 1997, *entered into force* 1 May 1999, O.J. C-340, p. 1 (10 November 1997).
8. Treaty of Nice, *signed* 26 February 2001, *entered into force* 1 February 2003, O.J. C-80, p. 1 (10 March 2001).
9. Treaty Establishing a Constitution for Europe, *signed* 29 October 2004, O.J. C-310, p. 1 (16 December 2004). This treaty was rejected by French and Dutch voters in 2005 referenda, and the ratification process has been halted.
10. Treaty of Lisbon (“the Reform Treaty”), *signed* 13 December 2007, O.J. C-306, p. 1 (17 Dec. 2007), *entered into force* 1 December 2009.

Enlargement of the Core European Treaty Membership

(This defines where the Charter of Fundamental Rights applies and is likely to apply in the foreseeable future.)

1952-1958: European Coal and Steel Community founded.

- France
- Germany
- Italy
- Belgium
- The Netherlands
- Luxembourg

1958: EEC (later to become the EC) and Euratom founded. Same six countries are members.

1962: Algeria gains independence from France and leaves the ECSC, EEC, and Euratom by reason of this act.

1973: Denmark, Ireland, and the United Kingdom join the EC. Nine members.

1981: Greece joins the EC. Ten members.

1985: Greenland, which had achieved home rule from Denmark in 1979, leaves the EC.

1986: Portugal and Spain join the EC. Twelve members.

1987: The Single European Act enters into force.

1990: East Germany and West Germany unify, increasing the territory of the EC without increasing the membership.

1993: The Maastricht Treaty establishes the European Union, with twelve members.

1995: Austria, Finland, and Sweden join the European Union. Fifteen members.

2004: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia join the European Union. Twenty-five members.

2007: Bulgaria and Romania join the European Union. Twenty-seven members.

Entry negotiations are under way with Croatia (commenced October 2005) and Turkey (commenced October 2005), and an application for membership from the former Yugoslav Republic of Macedonia was accepted by the EU in December 2005. Other likely candidates for membership would include the Balkan countries of Bosnia & Herzegovina, Serbia, Montenegro and Albania. Concerns about the number of member countries and the effects of continued enlargement continue to affect politics among the original and early members of the EU. They were a factor in the French and Dutch rejections of the draft European constitution in 2005 and, as such, were a factor in the decision to pursue a non-constitutional route in the Treaty of Lisbon. Because of these concerns, EU leaders have agreed that any future enlargement of the Union will take these considerations into account. It should be noted, however, that entry conditions for existing candidates have already been negotiated.

Authors and Editors

- Raffaele Bifulco** is a law professor on the faculty of the University of Parthenope (*Università di Napoli-Parthonope*) in Naples, Italy.
- Giuditta Brunelli** is a law professor on the faculty of the University of Ferrara (*Università degli Studi di Ferrara*) in Ferrara, Italy.
- Marta Cartabia** is a law professor on the faculty of the University of Milan—Bicocca (*Università degli Studi di Milan—Bicocca*) in Milan, Italy.
- Alfonso Celotto** is a law professor on the faculty of the Third University of Rome (*Università degli Studi Roma Tre*) in Rome, Italy.
- Marilisa D’Amico** is a law professor on the faculty of the University of Milan (*Università degli Studi di Milano*) in Milan, Italy.
- Gianmario Demuro** is a law professor on the faculty of the University of Cagliari (*Università degli Studi di Cagliari*) in Cagliari, Sardinia, Italy.
- Filippo Donati** is a law professor on the faculty of the University of Florence (*Università degli Studi di Firenze*) in Florence, Italy.
- Andrea Giorgis** is a law professor on the faculty of the University of Turin (*Università degli Studi di Torino*) in Turin, Italy.
- Tania Groppi** is a law professor on the faculty of the University of Siena (*Università degli Studi di Siena*) in Siena, Italy.
- Pier Francesco Lotito** is a law professor on the faculty of the University of Florence (*Università degli Studi di Firenze*) in Florence, Italy.
- Alberto Lucarelli** is a law professor on the faculty of the University of Naples Federico II (*Università degli Studi di Napoli Federico II*) in Naples, Italy.
- William B.T. Mock** is a law professor and former associate academic dean on the faculty of The John Marshall Law School in Chicago, Illinois, USA.
- Marco Olivetti** is a law professor on the faculty of the University of Foggia (*Università degli Studi di Foggia*) in Foggia, Italy.

Editorial Notes

This volume is a revised English-language version of an award-winning scholarly volume that appeared in Italy as R. Bifulco, M. Cartabia, & A. Celotto, eds., *L'Europa dei Diritti: Commento alla Carta dei diritti fondamentali dell'Unione Europea* (Società editrice il Mulino, Bologna 2001). That work, which also contained additional materials relating the Charter of Fundamental Rights to Italian law, provided the core materials from which this American edition comes. Since *Diritti* was published, several developments have made it obvious that the scholarship contained therein should be brought to the American market—most notably the vitality of the Charter through the stalled “European Constitution” process, and its formal reintroduction into EU law through the Treaty of Lisbon, also known as the Reform Treaty, which became effective in December 2009. As a volume on European law, this work provides serious insights into the Charter, which is proving to have continuing and growing importance in European law. As a volume of comparative law, this work makes a contribution that is important both for its depth of coverage of an important subject—fundamental rights—and for the fact that it introduces many significant Italian constitutional and comparative scholars to their American counterparts.

In order to receive as much benefit as possible from this volume of transatlantic collaboration, there are a few editorial details that readers should know:

1. Throughout this work, American English is used rather than British English. Where it has been necessary to make minor orthographic changes when quoting sources—as in changing “labour” to “labor” or in changing “recognise” to “recognize”—these changes have been made without annotation.
2. In addition to the Charter of Fundamental Rights, the authors refer to many treaties, laws, and regulations. In order to assist readers through these often-detailed discussions, all references to specific articles of the Charter are designated throughout this work by use of an upper-case let-

ter (“Article ____”), whereas references to specific provisions of other documents use lower-case letters (“article ____” or “section ____”), except when the usual rules of grammar dictate otherwise.

3. Certain fundamental documents and institutions are commonly referred to by acronyms throughout this book. Primary among these are the following: the European Court of Justice (“ECJ”); the European Convention on Human Rights (“ECHR”), more completely known as the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Treaty on the Functioning of the European Union (“TFEU”), formerly known as the Treaty Establishing the European Community (“TEC”), formerly known as the Treaty of Rome; the Treaty on European Union (“TEU”), also known as the Treaty of Maastricht; and the Universal Declaration of Human Rights (“UDHR”).
4. Every effort has been made to guarantee the accuracy of all quotations in this volume. All citations to and quotations from treaties and other international documents for which English is the official language, or one of the official languages, are accurate as of early February 2008. For all other documents, readers should be aware that they are dealing with materials in translation (and sometimes in multiple translation), and that these quotations can at best carry only a strong approximation of the meaning of the original text. Anyone wishing to utilize such materials for their own research is strongly encouraged to return to the original materials for more nuanced understanding.
5. Citations in this work are numerous. Indeed, the Table of Authorities at the end of this volume runs to dozens of pages. For the most part, these citations are traditional in format, guiding readers to print sources that use familiar indexing systems. However, the editors are very aware that many readers will, as a matter of convenience, look for many of the cited materials on-line. To simplify this task, here is a list of some web addresses that readers should find useful in locating some of the most frequently cited materials and organizations. Almost all will, of course, require some level of additional navigation to access particular information. Unless otherwise indicated, all web addresses are current as of November 2009.
 - Charter of Fundamental Rights home page (from the European Parliament): http://www.europarl.europa.eu/charter/default_en.htm
 - Council of Europe search page: <http://www.coe.int/t/e/general/search.asp>
 - European Court of Justice cases: http://curia.europa.eu/jcms/jcms/j_6/

- European Union Agency for Fundamental Rights home page: <http://www.fra.europa.eu/fra/index.php>
- European Union law search page: <http://eur-lex.europa.eu/en/index.htm>
- International Court of Justice cases: <http://www.icj-cij.org/docket/index.php>

No human work is perfect. As the editors are undeniably human, we acknowledge our errors and omissions and look forward to our readers' advice when such errors and omissions are found. In the same vein, all opinions expressed are the authors'.

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