THE EU CHARTER OF FUNDAMENTAL RIGHTS

A Commentary

Edited by

Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward

CH BECK • HART • NOMOS

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THE EU CHARTER OF FUNDAMENTAL RIGHTS

The Charter of Fundamental Rights of the European Union enshrines the key political, social and economic rights of EU citizens and residents in EU law. In its present form it was approved in 2000 by the European Parliament, the Council of Ministers and the European Commission. However its legal status remained uncertain until the entry into force of the Treaty of Lisbon in December 2009. The Charter obliges the EU to act and legislate consistently with the Charter, and enables the EU's courts to strike down EU legislation which contravenes it. The Charter applies to EU Member States when they are implementing EU law but does not extend the competences of the EU beyond the competences given to it in the treaties.

This Commentary on the Charter, the first in English, written by experts from several EU Member States, provides an authoritative but succinct statement of how the Charter impacts upon EU, domestic and international law. Following the conventional article-by-article approach, each Commentator offers an expert view of how each article is either already being interpreted in the courts, or is likely to be interpreted. Each commentary is referenced to the case law and is augmented with extensive references to further reading. Six cross-cutting introductory chapters explain the Charter's institutional anchorage, its relationship to the Fundamental Rights Agency, its interaction with other parts of international human rights law, the enforcement mechanisms, extraterritorial scope, and the all-important 'Explanations'.

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Foreword

by
Vassilios Skouris, President of the Court of Justice of the European Union

The protection of fundamental rights in the European Union, as we know it today, is the result of an evolutionary process that lasted over five decades. In that respect, one cannot but emphatically point out the pioneering role of the ECJ. Early in the development of its jurisprudence, the ECJ sensed that the doctrines of supremacy and direct effect of Community law, as developed in the early landmark cases, could not hold their ground without being coupled with a system of judicial review of violations of fundamental rights. Notwithstanding the fact that the Treaties contained neither a Bill of Rights, nor even a legal basis for legislative initiatives in that field, the ECJ proceeded prudently by first asserting that fundamental human rights are enshrined in the general principles of Community law and protected by the Court and later on stating as sources of inspiration the common constitutional traditions of Member States and the international treaties to which they are signatories. Parallel to the evolution of the Court's case-law on human rights, legislative developments moved towards the same direction, albeit at a slower pace. The Charter of Fundaments Rights of the European Union was the defining moment of this process not only because of its evident symbolic and substantial importance but also because of the unprecedented transparent political processes that led to its establishment.

As a consequence, the fundamental rights of Europeans are better guaranteed now than ever before. Through a combination of EU and Council of Europe instruments, on the one hand, and national constitutions, on the other, the harmonious coexistence of these parallel systems of protection over several decades has made Europe a world leader in the application and enforcement of fundamental rights. This is a stunning achievement, and one that is not to be overlooked in the light of fresh challenges, such as the accession of the European Union to the ECHR.

The Charter of Fundamental Rights undoubtedly brings transparency to fundamental rights protection. Prior to its promulgation, legal advisors were obliged to research the vast *corpus* of Court of Justice case law in order to determine whether a right they might be seeking to enforce existed as a fundamental principle guaranteed by the EU legal system, before they could even commence the task of assessing whether or not it might have been breached. Worse still, European citizens had no easily accessible instrument to which to turn, to inform them of the content of European Union fundamental rights, the guarantee of which they were entitled to expect. Both of these significant shortcomings have been cured by the advent of the Charter.

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This important book takes the process of bringing transparency to EU fundamental rights protection even further. As one of the first comprehensive commentaries on the Charter written in the English language, it will reach broad audiences both within and beyond the borders of Europe, and help facilitate the Charter's implementation to a degree that has perhaps, to date, not yet been achieved. Its comprehensive article by article analysis explains simply and clearly how and when the Charter applies, while at the same time preserving the depth and integrity of the principles the Charter reflects. In addition to this, a series of essays by intellectual leaders in EU fundamental right scholarship including the Vice-President and Senior members of the Court of Justice adds a further dimension to the study.

It is an invaluable resource for practitioners, academics, and indeed anyone who wishes to learn more about the enforcement and protection of fundamental rights in the European Union. I warmly recommend it.

Luxembourg, February 2014

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Editors' Preface

Fundamental human rights. The phrase resonates in so many ways—historically, politically, socially, rhetorically and legally. The notion of inalienable rights, which inhere in human beings merely by reason of their humanity, and apply regardless of nationality, race, religion, sex, gender, sexual orientation, age, disability and other categories, is a crucial part of Europe's history, and its emergence from its dark past of the early twentieth century. While originally the Council of Europe was the institutional context for the development of human rights in Europe, the EU became involved in human rights from at least the 1970s onwards. This initial development, however, was in the context of the CJEU's jurisprudence, rather than in a single human rights instrument such as the Council of Europe's Convention on Human Rights and Fundamental Freedoms, or European Social Charter. It was not until the late 1990s that the idea of a fundamental rights instrument for the EU was realised in practice.

The Charter of Fundamental Rights of the European Union, which enshrines certain civil, political, social, economic and cultural rights in EU law, was given full legal effect by the entry into force of the Treaty of Lisbon on 1 December 2009. This brief description belies a long and convoluted journey which began with a decision of the European Council in 1999 to draw up a Charter of Fundamental Rights and resulted quite quickly in the publication of a first draft in 2000. By December 2000, the Charter had been enshrined in the Treaty of Nice. But between 2001 and 2004 the Charter became enmeshed in the ultimately unsuccessful effort to introduce an EU Constitutional Treaty, and by the end of 2004, with votes in the Netherlands and France having gone against the Constitutional Treaty, it appeared that the Charter would remain forever in legal limbo. Remarkably, it was revived by the Treaty of Lisbon, which at the same time provided for the accession of the EU to the European Convention on Human Rights.

The rhetorical power of human rights is undeniable. But in this book, our focus is on their legal status. The idea that human beings have rights that are legally enforceable against institutions of public power (typically, institutions of government in a state) is one of the most powerful aspects of human rights. Human rights thus embody important constitutional principles, including the separation of powers and the independence of the judiciary. As the EU has taken on greater public authority, particularly in areas where its actions affect matters that profoundly relate to human beings (such as their freedoms, dignity and equality), the need for subjecting the EU's decision-making to human rights review has become ever more pressing. Whatever doubts may have existed about the importance or legal status of the Charter during the early years of its gestation and infancy, there can be no doubt that it now plays this important role. Having come of age, the Charter now takes its place among the catalogue of international human rights instruments.

Each of the general editors of this volume has long been concerned with understanding the Charter and we have all written, spoken and taught about it; in Angela's case she has advised clients extensively about it and appeared as counsel in leading fundamental rights cases. In 2003, when the shape of the Charter was known but its ultimate fate remained unclear, two of us, Tammy and Jeff, writing in the Introduction to our book *Economic and Social Rights under the EU Charter of Fundamental Rights* (Oxford, Hart, 2003)

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wondered whether 'the inclusion of economic and social rights in the Charter would signal a change of status of these values within the EU's legal order?' Only months later, Steve and Angela, writing in the Introduction to our book *The EU Charter of Fundamental Rights: Politics, Law and Policy* (Oxford, Hart, 2004) expressed the opinion that 'the Charter seems set to play an increasingly pivotal role in the development of the complex legal and constitutional order of the European Union'. It turns out we were both right and wrong. Right because the Charter has assumed huge significance within the EU legal order, wrong perhaps in anticipating that the status of social rights would change quite so fundamentally. But as many of the commentaries in this book demonstrate, there have been significant changes, even in the field of social rights.

What this Commentary demonstrates most emphatically, and to our great delight, is the depth of scholarship that has developed around the Charter. When we began this project we had hoped to assemble an expert team to help us; what became apparent very quickly was that we were able to attract many of the best and most interesting scholars currently at work in European law and human rights. It is with a suitable sense of awe that we now stand back and admire their craftsmanship and skill, and at the same time extend to them our sincerest and most heartfelt thanks. The Charter is a major part of the landscape of EU law, and our contributing authors have provided a sparkling examination of it.

The book has more than 50 contributing authors, which means that our list of thank yous and acknowledgements is inevitably a long one. First and foremost we thank our authors, who without exception accepted our invitation to contribute without hesitation, and who have brought an infectious enthusiasm to the project. We cannot single out authors for individual praise, but we thank Elspeth Guild for putting at our disposal her firm's office in London, where our first editorial planning meeting took place. We also thank President Skouris of the CJEU, who eagerly accepted our invitation to write the Foreword, and who has been an enthusiastic supporter of the project since its inception. We have leant heavily on our publisher, whose staff has been exemplary in their professionalism and skill; Rachel Turner, Mel Hamill, Tom Adams, Charlotte Austin and Hannah McAdams at Hart Publishing, as well as Christopher Long who copy edited the book, have all made signal and vital contributions. And without our editor Richard Hart embracing our vision for the project from the very beginning, we would never have realised it. Thank you. As this book hits the bookshelves, Richard and his partner Jane Parker will be leaving Hart Publishing; we wish them well in whatever they choose to do in future. We are very happy to have had the opportunity to work with them, and we offer this book as a farewell to two dedicated legal publishers.

Finally, and with sincere apologies to anyone whose contribution we may have inadvertently overlooked, we thank our families and colleagues for their forbearance and support during the long and occasionally stressful process of hatching this gargantuan book.

Tamara Hervey, Jeff Kenner, Steve Peers and Angela Ward

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