

Introduction

Five Years Old and Growing: The EU Charter of Fundamental Rights as a Binding Instrument

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I. INTRODUCTION¹

A. Background of the Book

WHEN THE TREATY of Lisbon entered into force in 2009, it was generally agreed that the protection of fundamental rights at the EU level had reached a new and loftier summit. The respect for human rights more deeply inscribed as a foundational value of the EU, the Charter of Fundamental Rights elevated to formally binding status and the EU's intention to accede to the European Convention on Human Rights (ECHR) are all important changes that suggest that the EU entered a new stage in shaping its commitment to human rights protection. The binding effect of the Charter in particular raised a host of new and intriguing questions. Would this transform the EU's commitment to fundamental rights? Should it transform that commitment? How, if at all, can we balance competing rights and principles? The interaction of the social and the economic spheres offers a particular challenge. How deeply does the EU conception of fundamental rights reach into and bind national law and practice? How deeply does it affect private parties? How much flexibility has been left to the European Court of Justice in making these interpretative choices? What is the likely effect of another of the reforms achieved by the Lisbon Treaty: the commitment of the EU to accede to the ECHR?

Our first book, *The Protection of Fundamental Rights in the EU after Lisbon*, which was published in 2013 and was the result of a conference on the Charter held in Oxford in 2011, examines these themes. Meanwhile, the Charter's prominence today is undisputed. Article 2 of the Treaty on European Union (TEU) is foundational—'The Union is founded on the values

¹ We would like to especially thank Thom Wetzer, who as a research assistant at the Europa Institute of Utrecht University wrote the conference report and assisted us in preparing the publication of this book.

of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’—and the EU’s institutions are busy making good this vision across the wide sweep of EU activity. As the Court boldly put it in its landmark ruling in *Fransson* in February 2013: ‘The applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter.’ The Charter looms large over everything the EU does—and over what the Member States do too, insofar as they are ‘implementing’ EU law.

Some of the questions about the Charter’s role that we addressed in our first book have been answered, although in the main only in part and not always with compelling logic. Some have not been answered and some new ones have emerged. Meanwhile, the legislative institutions of the EU have been engaged in trying to weave the Charter into their practice, while the Court too has been active. It has, for example, dealt with search engines and created an EU ‘right to be forgotten’ via the Charter’s promise of privacy (Case C-131/12 *Google*, judgment of 13 May 2014); it has annulled the Data Retention Directive as an unduly deep and broad interference with private life (Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, judgment of 8 April 2014); it has grappled with the notion of ‘implementation’ for the purposes of subjecting Member States to the reach of the Charter (Case C-206/13 *Cruciano Siragusa*, judgment of 6 March 2014; Case C-198/13 *Hernández et al*, judgment of 10 July 2014); and it has maintained its insistence on the ‘supremacy’ of EU law over national law, even though the Charter seemed to subvert that (Case C-399/11 *Stefano Melloni*, judgment of 26 February 2013).

The active role of the Court in applying the EU Charter at least in a number of cases seems to be in sharp contrast with the Court’s recent Opinion on the Draft Accession Agreement concerning the EU’s accession to the ECHR (Opinion 2/13), according to which the Agreement is contrary to EU law. The special and autonomous legal order that the EU has created is the running theme throughout the Opinion, which the Draft Accession Agreement, according to the Court of Justice of the European Union (CJEU), threatens to jeopardise. Opinion 2/13 may question the Court’s role as a human rights court and whether fundamental rights are at the first point of the Court’s agenda. Yet, at the same time, the approach of the CJEU to the ECHR reinforces the importance of the Charter as the document that ‘enshrines the key political, social and economic rights of EU citizens and residents in EU law’.²

In this second book we discuss these and other issues in the light of the rapid development of the Charter as arguably the very centrepiece of the EU legal order, reinforced by the growing distance between the EU and the ECHR.

² S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights—A Commentary* (Oxford, Hart Publishing, 2014).

This book is the result of a follow-up conference held in Oxford in May 2014 under the auspices of the Institute of European and Comparative Law and reflects on five years of life under the Charter—five years of remarkable activity.

B. The Structure of the Book

The book consists of three parts. First, the constitutional dimension, in particular the relationship between the EU Charter, the ECHR and national constitutions, is addressed. Second, the scope of application of EU fundamental rights is considered. Third, the safeguarding of fundamental rights in Europe's internal market is covered.

In chapter one, Allan Rosas makes a number of observations on the trends in the case law of the ECJ since the Charter acquired binding force. He touches upon the important role that the Charter has gained in the Court's case law, the application of other sources of fundamental rights than the Charter, the application of the Charter at the national level and the relationship between the Charter and national constitutions. According to Rosas, the Court's case law has contributed to the construction of the constitutional structure of the EU. Furthermore, the status of the Charter as a binding part of primary EU law further underlines the existence of the EU's constitutional and 'federative' order.

In chapter two, Sionaidh Douglas-Scott turns to the relationship between the EU and the ECHR. She extensively reflects on the Court's Opinion on the Draft Accession Agreement, in which the CJEU holds that the agreement is contrary to EU law. She also argues that Opinion 2/13 is a 'robust declaration of the autonomy of EU law'. Furthermore, she observes that the Charter rather than the ECHR has become, at least in an increasing number of cases, the main document of reference to human rights for the ECJ.

In chapter three, Janneke Gerards more specifically focuses on the roles of the CJEU, the European Court of Human Rights (ECtHR) and the national courts in deciding on fundamental rights in Europe and how these roles can be coordinated. These courts seem equally capable of dealing with fundamental rights. Although courts have limited possibilities in choosing whether to address certain fundamental rights issues or not, they have a choice, which makes it possible to determine which of the courts should take the lead in deciding on fundamental rights issues. She suggests to use the specific tasks or functions of the courts—the 'raison d'être'—as a criterion to guide the courts in choosing which fundamental rights cases they should take up.

Chapter four bears the intriguing title 'Why National Courts Should Not Embrace EU Fundamental Rights'. In this chapter Jan Komárek looks at the role of the national constitutional courts in protecting fundamental rights

and comes to the conclusion that they should not decide on EU fundamental rights. The arguments he brings forward relate to the theory of law and democracy, the separation of constitutional and ordinary adjudication, and the fundamental difference between national and EU fundamental rights.

Chapter five, the last chapter of Part I, then addresses the interplay between the Charter and the national constitutions after the cases of *Åkeberg Fransson* and *Melloni*. In this chapter Clara Rauchegger argues that there are two major challenges for the protection of fundamental rights in Europe, which is first to ensure that the various fundamental rights catalogues interact in a way that guarantees a complete and coherent system of protection and, second, that the marginalisation of the national fundamental rights by the Charter should be avoided. Among other things, she calls for a greater role for Article 4(2) TEU to safeguard the national constitutional identity of the Member States and a constructive dialogue between the CJEU and the national constitutional courts.

Part II of this book focuses on the scope of application of fundamental rights, both from a more general perspective (in relation to Member States) and from a specific perspective (in relation to fundamental social rights). Chapter six, the first chapter in this part, by Xavier Groussot and Gunnar Thor Petursson addresses the question whether fundamental rights subsequent to the EU Charter are having an impact on the scope and nature of EU law and thus are bringing about a new constitutional framework. Their chapter focuses on Article 52(1) of the Charter and whether it constitutes a new analytical framework for assessing both EU and national measures in the light of the Charter. Furthermore, they look at the scope of application of the Charter and at an increasing number of cases where the Charter is not or hardly mentioned, but, according to them, should be mentioned. All these questions relate to an emerging constitutional framework in EU law.

Chapter seven specifically focuses on the implications of the *Åkerberg Fransson* case in Sweden and beyond. In this chapter Ulf Bernitz explains how the Court took a relatively broad, if not yet precisely defined, approach to the circumstances in which the Charter exercises control over national practices. He also reveals that the Court's apparent concern in *Åkerberg Fransson* to avoid connecting its interpretation of the Charter with the relevant case law of the ECtHR is not in reality the full story. In fact, Charter rules reinforce ECHR rules where EU law is in play. This is likely to prove a dynamic process. In the end, Bernitz also draws attention to the subsequent national application of the judgment and highlights the far-reaching effects on the case law of the Swedish Supreme Court.

In chapter eight, Catherine Barnard turns to the scope of application of the Charter with regard to social rights. The captivating title of the chapter, 'The Silence of the Charter', relates to three contrasting situations in the case law of the CJEU, which Barnard further elaborates upon in her chapter and which reveal the ambivalent attitude of the CJEU towards social rights.

She distinguishes between the situations where the CJEU does not but should have dealt with the Charter, situations where it does not and should not have dealt with the Charter and finally situations where it does but should not have dealt with the Charter. She refers to these situations as a vow of silence, a welcome silence and a plea for silence.

In chapter nine, the last chapter that relates to the scope of the Charter, Jaan Paju focuses on national social security systems and how the EU Charter challenges prevailing notions of territorial rights and solidarity. He argues that it is not so much the Charter in itself that informs national social security systems, but rather the internal market through which competences at the EU level are gradually expanded. In addition, it is questionable whether the Charter will lead to a substantial expansion of a right to social security.

The third and last part of this book deals with the relationship between fundamental rights and the EU single market. Various themes are discussed, such as the interaction between free movement and fundamental rights, and competition and fundamental rights. But also the interaction between EU (internal market) legislation and fundamental rights is analysed. Chapter ten, the first chapter in this part, by Stephen Weatherill is on 'protecting the internal market from fundamental rights'. Weatherill claims that the Charter's softening effects on internal market law are very limited, as internal market law itself has already long provided for sufficient safeguards for the protection of public interests and national values. He furthermore submits that the Charter should not be used to upset the existing balance between the internal market and public interests; so, for example, he opposes the use of the economic rights of the Charter as a means to strengthen the market dimension at the cost of social protection.

In chapter eleven, Sybe de Vries further embroiders on the interaction between free movement and the Charter. To provide for a deeper understanding of this relationship, two tracks are followed: first, how fundamental rights may affect the internal market freedoms in the context of free movement and EU legislation; and, second, how the internal market freedoms may affect fundamental rights in the context of free movement and EU legislation. The discussion in this chapter is first approached from a more general angle and then turns to the fields of data protection and privacy, which offer an interesting example of how fundamental rights may become entangled with EU single market law, as a case study.

In chapter twelve, Federico Fabbrini then focuses on the right to data privacy and how the CJEU in this field has taken up the role as a human rights court. Fabbrini shows how in the field of data privacy in particular, the Charter has contributed to the constitutionalisation of the CJEU. But there are also challenges for the Court, which specifically relate to the relationship between the right to data privacy and other fundamental rights like the freedom of speech, the right to information or the freedom to conduct a business.

Whereas the foregoing chapter more generally discusses data privacy and the role of the CJEU, chapter thirteen by Peter Oliver analyses the rights of economic actors in the fields of privacy and data protection. It is generally assumed that there exists an ambivalent relationship between fundamental rights and companies: companies tend to enjoy more limited fundamental rights than natural persons or non-profit entities. Meanwhile, there is a wealth of case law on the fundamental rights of economic actors, also in the fields of privacy and data protection. This case law clarifies the extent to which natural persons acting in a professional or economic capacity and legal persons enjoy more or limited protection under the rights to privacy and data protection as enshrined in Articles 7 and 8 of the Charter.

The book is concluded by two chapters on fundamental rights and competition law written by Helene Andersson and John Temple Lang, respectively. In chapter fourteen, Andersson focuses on the European Commission's practices in relation to dawn raids and the judicial review of such practices. She analyses whether the procedural safeguards surrounding the Commission's dawn raid procedures meet the Charter standards. There are an increasing number of competition cases where the Charter has been applied, particularly in relation to Article 7 on the right to privacy and Article 47 on the right to effective judicial protection. Andersson is rather critical as the EU competition system in place today does not even seem to meet the minimum standard of the ECHR, which means that a revision is required in order for the system to meet the Charter standards.

In chapter fifteen, John Temple Lang then addresses the question of how the Charter must be applied in EU state aid cases. The fact that the rights of companies and of interested parties in the field of EU state aid procedure are so limited means that there cannot be an effective remedy in the light of the Charter and particularly Article 47. Although the state aid procedure has been reformed, a process that according to Temple Lang has taken too long a time, there are still many issues that, from the perspective of the Charter, require close attention.

C. Fundamental Rights *Still* at the Heart of EU Law?

In the introduction of our first book, it was written that EU fundamental rights protection does not end with this book. The first book was just the beginning.

In this book, the quest for the position and role of fundamental rights in the EU's constitutional fabric continues. Again, the authors come up with interesting ideas about how EU law can more fully embrace fundamental rights and again they raise new and captivating questions relating to the three main themes of the book.

After five years of a legally binding Charter more well-founded conclusions can be drawn. For instance, in at least quite a few cases, the Charter has become the main document of reference for EU fundamental rights protection; it has not been used so far to undermine the existing division of competences between the EU and the Member States, and the Court, as shown by Opinion 2/13, is still very (too?) much concerned with the EU's special and autonomous legal order, which should be preserved at all costs and must not be undermined by the EU acceding to the ECHR without taking adequate account of the need to preserve the special characteristics of the EU legal order.

The EU's constitutional framework still has its limits. The five years of binding EU Charter has not changed that. But human rights feature more and more prominently in the constitutional self-understanding of the EU. For a number of fundamental rights, we see that the Court increasingly takes up the role of a human rights court, particularly in the fields of privacy and data protection. For other fundamental rights, most notably social rights, we see that the Court takes a much more restrained approach, hampered by the limited constitutional framework—the limited competences of the EU in this field—and the politically sensitive nature of social policy.

Opinion 2/13 implies that the claim of the EU as a human rights organisation may be more untenable than ever before,³ but it makes clear that the EU is now thrown back to its own human rights agenda, which will only strengthen the already dominant role of the EU Charter. The story of the Charter that began five years ago has certainly not come to an end ...

³ P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford, Oxford University Press, 2011) 495. See also S Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16 *German Law Journal* 213.