

DUAL SYSTEM OF HUMAN RIGHTS: THE EUROPEAN UNION

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Developments in the area of human rights continue to figure prominently in the evolving jurisprudence of the European Union. The Charter of Fundamental Rights and Freedoms has assumed an increasingly important role in the opinions of the Advocates General¹ and in decisions of the Court of First Instance and most recently, it was cited by the European Court of Justice (ECJ) for the first time.² In another development, the Court of First Instance has ruled that UN Security Council resolutions trump fundamental human rights guarantees.³ Finally, the European Court of Human Rights (ECHR) has deferred to an opinion of the European Court of Justice concerning an interpretation of the European Convention on Human Rights and Fundamental Freedoms despite the fact that it might have decided the case differently.

The Charter of Fundamental Rights and Freedoms, although not legally binding, is advancing, albeit in some sense covertly through citations in the opinions of the Advocates General and the courts of the European Union. In addition, the Parliament and the Commission continue to cite the Charter as inspiration for many of its actions.

When the EU was first established in 1957, its primary goal was the attainment of economic integration.⁴ Although the Treaty of Rome contains a social chapter that gives limited mention to human rights, its primary focus was to improve working conditions on a harmonized basis throughout the European community. It was not viewed as a guarantor of rights.

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1. Case C-173/99, *Broad., Entm't, Cinematographic & Theatre Union (BECTU) v. Sec'y of State for Trade & Indus.*, 2001 E.C.R. I-4881 ¶ 28 (opinion of Advocate General Tizzano).

2. *See generally* Case C-540/03, *European Parliament v. Council of the European Union*, 2006 EUR-Lex (June 27, 2006).

3. Case 306/01, *Yusuf v. Council of the European Union*, [2005] E.C.R. 3533, [2005] 3 C.M.L.R. 49 ¶ 6 (Sept. 21, 2005).

4. Elizabeth F. Defeis, *A Constitution for the European Union? A Transatlantic Perspective*, 19 TEMP. INT'L & COMP. L.J. 351, 377 (2005). Indeed, its only substantive provision pertaining to human rights was ex-Article 119, now Article 141, which guaranteed women equal pay for equal work. *Id.* at 378. Even this provision, however, was included for economic rather than human rights reasons; since some states already had such a guarantee (e.g., France), its inclusion was necessary so that those states would not be placed at an economic disadvantage.

As originally envisaged, human rights were to be protected by the individual Member States through their national constitutions and laws, and through the Strasbourg Process. However, when the ECJ announced the doctrine of supremacy of community law over national legislation in 1964, the doctrine was resisted by some states that had strong human rights provisions in their national constitutions. In response, the ECJ as early as 1969, held that fundamental rights were enshrined in the general principles of Community law.⁵ In the early 1970s the Court noted that the EU would be guided by constitutional traditions of the Member States and by the provisions of the European Convention on Human Rights and Fundamental Freedoms.⁶

In recent years the ECJ has effectively incorporated the decisions of the ECHR into its human rights jurisprudence. The Court now cites almost routinely the case law of the Strasbourg Court. This is indeed striking since citation by the ECJ to the case law of another court is unusual.⁷ However, the Court has also ruled that the EU itself could not accede to the Convention.

In July of 2000, the Charter of Fundamental Freedoms was proclaimed at the Nice Summit. However, even though the document has political force, it is not legally binding on Member States. The Charter was included as Part II of the ill-fated Constitution and its importance continues to grow together with a movement to adopt the Charter as a separate document.⁸

The Charter not only explicitly reaffirms the rights set out in the European Convention but covers a range of rights not included in the Convention such as the right to good administration and social rights of workers.⁹ It is composed of a preamble and chapters pertaining to Dignity, Freedom, Equality, Solidarity, Citizens' Rights, and Justice and incorporates fifty paragraphs enumerating extensive rights.¹⁰

5. Case C-29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419.

6. *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, App. No. 45036/98 Eur. Ct. H.R. 17 (2005), available at <http://www.echr.coe.int>; Defeis, *supra* note 4, at 371–72.

7. Francis G. Jacobs, *The European Convention on Human Rights, the EU Charter on Fundamental Rights and the European Court of Justice: The Impact of European Union accession to the European Convention on Human Rights*, in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE* 291, 291–292 (Ingolf Pernice, Juliane Kokott, & Cheryl Saunders eds., 2006).

8. Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 41.

9. Treaty Establishing a Constitution for Europe, arts. II-87, II-101, Dec. 16, 2004, 2004 O.J. (C 310) 47–50.

10. See generally Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1. These include a right to life (with the death penalty proscribed), a right to respect for one's physical and mental integrity (including a right to life), a right to respect for one's physical and mental integrity (including a ban on the sale of human body parts), a right to respect for private and family life, a right to the protection of personal data, a right to marry, a right to conscientious objection, a right to join trade unions, a right to have access to vocational and continuing training and the right to receive free compulsory education, a right to engage in work, a right for children to express their views freely and to have those views taken into consideration, rights of the elderly to lead a life of dignity and independence, a right of the disabled to benefit from measures designed to ensure their dependence, a right of access to a free placement service for employment, workers' rights to take collective action, and the right to paid maternity leave and to parental

Although a few countries (including France, Germany, Denmark, and Sweden) have accepted the Charter of Fundamental Rights, the document is not without controversy.¹¹ The U.K. ultimately accepted incorporation of the Charter into the draft Constitution with the provision that it should apply to “[m]ember States only when they are implementing Union law.”¹² Further, the draft Constitution provided that the Charter is to be interpreted consistently with constitutional provisions of Member States.¹³

The Charter has already played an important role in the European human rights arena despite the uncertainty about its legal force. This influence can be found in numerous opinions by Advocates General and judgments by the Court of First Instance. In most cases the Charter of Fundamental Rights is cited alongside the European Convention of Human Rights. Typically, citation to the Charter is followed by the disclaimer that the “Charter’s legal status is still uncertain, but its importance should not be ignored.”¹⁴

For example, in a case involving right of access to documents, Advocate General Léger stated that the Charter should not be regarded as “a mere list of purely moral principles without any consequences.”¹⁵ He noted that since the rights in the Charter are drawn from values unanimously held by Member States and consolidated by the Member States, they form the top level of protection of community values. Further, the sources listed in the Charter’s preamble contain binding legal force, which allows the Community to benefit from values that are so highly and commonly held. Léger noted that the Charter was meant to be an instrument for classifying fundamental rights and it is a “source of guidance as to the true nature of the Community rules of positive law.”¹⁶

The Court of First Instance similarly frequently cites the Charter of Fundamental Rights. For example, in a case involving the presumption of innocence the Court cited the Charter along with the ECHR for the principle that the presumption of innocence is a fundamental right. The Court stated, “it is necessary to take account of the principle of the presumption of innocence resulting in particular from Article 6(2) of the ECHR, and by Article 47 of the

leave.

11. Defeis, *supra* note 4, at 379.

12. Treaty Establishing a Constitution for Europe, *supra* note 8, art. II-111.

13. Treaty Establishing a Constitution for Europe, *supra* note 8, art. II-112. At the Intergovernmental Conference following the publication of the draft Constitution, the U.K. succeeded in having a new paragraph inserted in the text concerning the application of the Charter of Fundamental Rights. It states that “[t]he explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States.” A special Declaration was added to the draft Constitution that includes texts of the explanations in full.

14. See, e.g. Case C-173/99, *Broad., Entm’t, Cinematographic & Theatre Union (BECTU) v. Sec’y of State for Trade & Indus.*, 2001 E.C.R. I-4881 ¶ 28 (opinion of Advocate General Tizzano).

15. Case C-353/99, *Council of the European Union v. Heidi Hautala*, 2001 EUR-Lex ¶ 80 (July 10, 2001) (opinion of Advocate General Léger).

16. *Id.*

Charter of Fundamental Rights of the European Union that are protected in the Community legal order.”¹⁷ Thus, the Charter is placed in the same category as other legally binding instruments as part of the Community legal order.¹⁸ However, the Court also notes that the Charter does not have legally binding force.

While the Charter is cited frequently in the Opinions of the Advocates General and the Court of First Instance, until recently, the European Court of Justice has avoided mentioning the Charter at all. However, in June 2006, in *European Parliament v. Council of the European Union* the Court reversed this trend in the case involving a Directive on family reunification that was challenged by the Parliament.¹⁹ As is customary with such directives, the Directive cited the Charter in recognizing the right to family reunification and no discrimination based on age.²⁰ In an Opinion, Advocate General Kokott writes, “[w]hile the Charter still does not produce binding legal effects comparable to primary law, it does, as a material legal source, shed light on the fundamental rights protected by Community legal order.”²¹

The European Court of Justice in its opinion noted that the Preamble of the Directive refers to the provisions of the Charter of Fundamental Rights.²² In discussing the relevance of the Charter, the Court acknowledged that while the Charter is not a legally binding instrument its importance was recognized by the Community legislature by placing it in the Directive.²³ Furthermore, the Court noted that the “principle aim of the Charter . . . is to reaffirm rights as they result . . . from Constitutional traditions and international obligations common to Member States, the Treaty on the European Union . . . and the European Convention on Fundamental Rights and Freedoms.”²⁴

The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on December 7, 2000. While the Charter is not a legally binding instrument, the Community legislature did however, acknowledge its importance by stating, in the second

17. Case T-38/02, *Groupe Danone v. Comm’n of the European Cmty.*, 2005 ECJ CELEX LEXIS 548 ¶ 216 (Oct. 25, 2005).

18. Case C-353/99, *Council of the European Union v. Heidi Hautala*, 2001 EUR-Lex ¶ 82 (July 10, 2001) (opinion of Advocate General Léger). In other instances involving issues of criminal procedure such as the right to an effective remedy and protection from double jeopardy, the Charter is cited alongside of the Convention.

19. See generally Case C-540/03, *European Parliament v. Council of the European Union*, 2006 EUR-Lex (June 27, 2006).

20. *Id.* ¶ 32.

21. Case C-540/03, *European Parliament v. Council of the European Union*, 2006 EUR-Lex (Setp. 8, 2005) (opinion of the Advocate General Kokott).

22. *Id.* ¶ 6.

23. *Id.* ¶ 108.

24. Case C-540/03, *European Parliament v. Council of the European Union*, 2006 EUR-Lex ¶ 38 (June 27, 2006).

recital in the preamble to the Directive, that the Directive observes the principles recognized not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case—law of the Court . . . and of the European Court of Human Rights.²⁵

In its findings the Court discusses the relevant provisions of the Charter pertaining to respect for private or family life.

While incorporation of the Charter has been widely noted and enthusiastically received, it has also been subject to criticism. Just ten days before the Court issued its opinion citing the ECJ, the well respected Advocate General Sir Francis Jacobs discussed the Charter. He noted that the Charter has no legal force and, that although several Advocates General and the Court of First Instance had referred to the Charter as a non-binding authority on human rights, it had not been relied on by the ECJ as a legal source. Although he acknowledged that in many respects it was preferable that the EU has its own human rights law appropriate to its own competence and nature, he criticized the Charter as confusing and misleading.²⁶

Despite the misgivings of Sir Francis Jacobs, it seems clear that the Charter has taken on an increasingly important role in the human rights jurisprudence of the European Union and that the movement for accession is gaining momentum.²⁷

Two cases involving Human Rights decided in this past year, one by the ECJ and the other by the ECHR, will likely have a profound impact on human rights and the EU.

In a stunning decision rendered by the Court of First Instance in September 2005 in *Yusuf v. Council of the European Union and the Commission of the European Communities*, the Court affirmed the supremacy of Security Council Resolutions over obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms and, indeed, over the treaty obligations of Member States.²⁸

25. *Id.*

26. Jacobs, *supra* note 7, at 293. Jacobs was critical also of the position that the EU should accede to the European Convention. EU accession to the ECHR is intended is to fill a gap, by allowing an individual to bring a case against the EU, as well as Member States. Thus, he suggests that extending the jurisdiction of the ECJ is preferable to EU accession to the ECHR and notes that the ECJ should be given a wider role to ensure respect for the rule of law in important areas that require effective judicial review.

27. *See generally id.*

28. Case 306/01, *Yusuf v. Council of the European Union*, [2005] E.C.R. 3533, [2005] 3 C.M.L.R.

The case involved Ahmed Ali Yusuf, a Swede of Arab origin, who had been placed on a list of alleged terrorists by the U.N. Sanctions Committee.²⁹ The Security Council Resolution required that all funds and other financial resources controlled directly or indirectly by individuals associated with the Taliban, Osama bin Laden and the Al-Qaeda network be frozen.³⁰ It also published a list of alleged terrorists.³¹ In order to implement the sanctions regime, the European Council enacted regulations that in effect froze the assets of Yusuf. Yusuf claimed that the sanctions were in violation of the Treaty of Rome, which provides for disciplinary actions against states not single individuals.³² He also claimed that his fundamental rights, including his right to make use of his property, right to a fair hearing and right to an effective judicial remedy were violated.³³

The Court of First Instance held that the EC Treaty empowers the Council to impose economic and financial sanctions on third countries, when a common position adopted by the European Union under the common foreign and security policy so provide.³⁴ The Council had in the past taken restrictive measures against persons who constructively governed a part of a country and against persons or entities associated with them or provided financial support.³⁵ Indeed this type of smart sanction is aimed at individuals and is designed to reduce suffering of civilians and has been utilized by the Security Council since the 1990s.³⁶ It then ruled that the Council is competent also, under similar conditions, to impose economic and financial sanctions such as the freezing of funds on *individuals*, in connection with the fight against international terrorism.³⁷

The Court then turned to the interplay between rights guaranteed by the European Convention and possible conflict with Security Council resolution.³⁸ The Court noted that under §103 of the United Nations Charter, the obligations of the Member States of the United Nations under the Charter of the United Nations prevail over any other obligation, including the obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms and under the EC Treaty. The Court stated: “[f]rom the standpoint

49 ¶ 7 (Sept. 21, 2005).

29. *Id.* ¶ 197.

30. *Id.* ¶ 10.

31. *Id.* ¶ 9.

32. *Id.* ¶ 110.

33. Case T-306/01, *Yusuf v. Council*, [2005] E.C.R. 3533 ¶ 190.

34. *Id.* ¶ 131.

35. *Id.* ¶ 114.

36. *Id.* ¶ 113.

37. *Id.* ¶ 119.

38. *See generally* Case 306/01, *Yusuf v. Council of the European Union*, [2005] E.C.R. 3533, [2005] 3 C.M.L.R. 49 (Sept. 21, 2005).

of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty.³⁹ This paramouncy extends to decisions of the Security Council.

The Court further noted that although the European Union itself is not a member of the United Nations, the Community is bound by the obligations flowing from the Charter of the United Nations, in the same way as are its Member States.⁴⁰ First, the Community may not infringe the obligations imposed on its Member States by virtue of the UN Charter or impede their performance.⁴¹ Second, the Community is required to adopt all the provisions necessary to allow its Member States to fulfill those obligations.⁴²

The Court observed that the Community regulations were enacted to put into effect at the Community level decisions of the Security Council.⁴³ Any review of the internal lawfulness of the regulation would therefore involve the Court in examining, indirectly, the lawfulness of the decisions in question.⁴⁴ The Court stated, “[i]t must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court’s judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.”⁴⁵

Nevertheless, the Court did reserve for itself one area of review of Security Council decisions. The Court would examine the contested regulation and, indirectly, the Security Council resolutions in the light of the higher rules of general international law falling within the scope of *jus cogens*—a peremptory norm of public international law from which neither the Member States nor the bodies of the United Nations may derogate.⁴⁶ It then considered claimed violations of human rights including deprivation of property, right of personal defense and right of effective judicial review in light of rules of *jus cogens* and found no violation of *jus cogens*.⁴⁷

39. *Id.* ¶ 231.

40. *Id.* ¶ 210.

41. *Id.* ¶ 254.

42. *Id.*

43. Case T-306/01, *Yusuf v. Council*, [2005] E.C.R. 3533 ¶ 256.

44. *Id.* ¶ 7.

45. *Id.* ¶ 276.

46. *Id.* ¶ 7.

47. *Id.* ¶ 8.

Several other cases involving the contested regulations were subsequently decided by the Court of First Instance. The Court, using reasoning similar to the *Yusuf* case upheld the Council regulations. Appeals to the European Court of Justice are pending and it will be interesting to see whether the Court adopts the reasoning or limits it.

The final Case to be discussed is a judgment not of the ECJ but of the ECHR. The Case is *Bosphorus v. Ireland* which involved the impoundment of an airplane pursuant to EC regulations that were enacted to implement the Sanctions regime of the Security Council with respect to the former Yugoslavia.⁴⁸

Previously, the Regulation had been challenged⁴⁹ and through an Article 177 referral by Ireland to the ECJ, the ECJ determined that the Regulations applied and that the impoundment did not violate fundamental human rights including the right to quiet enjoyment of property as set forth in the Convention.⁵⁰

When the impoundment was challenged in the ECHR as violating Protocol No. 1 to the Convention, the ECHR very carefully surveyed the human rights system for protection of human rights in the European Union and reviewed both the opinion of the AG and the decision of the Court itself.⁵¹ It found that system to be equivalent to the Convention system both substantively and procedurally.⁵² By equivalent protection, the Court stated that it means comparable rather than identical system of protection.⁵³ The Court noted that any requirement that the organizations system of protection be identical could run counter to the interests of international cooperation⁵⁴—an interest which it described as a legitimate interest of considerable weight.⁵⁵ Although not identical to the Convention, the EU protections were comparable or equivalent to the Convention system and the Court, in effect deferred to the decision of the ECJ without further scrutiny.⁵⁶

Clearly, human rights protection within the EU continues to evolve. However, with a dual system for human rights protection, difficult questions and challenges will remain both for the European Court of Justice and the European Court of Human Rights.

48. *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, App. No. 45036/98 Eur. Ct. H.R. 3-4 (2005), available at <http://www.echr.coe.int>.

49. *Id.* at 29.

50. *Id.* at 10-11.

51. *See generally id.*

52. *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, App. No. 45036/98 Eur. Ct. H.R. 30 (2005), available at <http://www.echr.coe.int>.

53. *Id.* at 44.

54. *Id.*

55. *Id.* at 43.

56. *See generally id.*