THE TREATY OF LISBON AND HUMAN RIGHTS

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On December 1, 2009, the Treaty of Lisbon,¹ also called the Treaty on the Functioning of the European Union, entered into force. The Treaty amended the Treaty on European Union² (Maastricht; 1992) and the Treaty establishing the European Community³ (Rome; 1957) and was initially known as the Reform Treaty. The Lisbon Treaty incorporates many of the provisions proposed in the Treaty Establishing a Draft Constitution of the European Union (Draft Constitution)⁴ which was signed by each of the Member States of the European Union (E.U.) in 2004, but the Constitution was rejected in 2005 by referenda in France and the Netherlands.⁵ The Draft Constitution was, in effect, withdrawn leading to a "period of reflection" for the E.U. Although the Lisbon Treaty incorporates many of the changes that were proposed in the Draft Constitution, most of the Member States decided that a referendum was not necessary for ratification. Indeed, it was feared that if the Treaty was submitted for referendum in some states it would be defeated. In order to distance the Lisbon Treaty from the failed Draft Constitution, the Treaty does not incorporate a number of the proposals or hallmarks of a Constitution that were included in the Draft Constitution. These include, for example, the adoption of an anthem or a flag for the Union and indeed the constitutional label itself.⁶

The major changes effected by the Treaty are the creation of a President of the European Council and a High Representative of the Union for Foreign Affairs. It abolishes the pillar system and, in a nod to more democratic procedures, provides for an increased role for the European

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Parliament, the only body elected directly by the people of each Member State.\(^7\)

With respect to human rights, the Treaty has effected profound changes. The Charter of Fundamental Rights of the European Union (Charter)\(^8\) with its expansive, innovative provisions is now legally binding throughout the E.U. In addition, the Treaty provides that the E.U. will accede to the European Convention on Human Rights and Fundamental Freedoms (ECHRFF).\(^9\) Thus, after more than half a century since the establishment of the E.U. and through prodding from the Parliament, Member States and NGOs, a Charter of Rights applicable to the E.U. itself is now in place.\(^10\)

When the E.U. was established in 1957 through the Treaty of Rome, its focus was on economic integration, not on human rights protection. As a result of their common heritage of political ideals, freedom and the rule of law, E.U. Member States, along with several other European states, had earlier adopted the ECHRFF and had provided for an elaborate enforcement mechanism for the protection of human rights through what is known as the Strasbourg process.\(^11\)

Although the Treaty of Rome contains a social chapter which deals with human rights, to some extent, and guarantees workers' rights, its primary goal was to improve working conditions and standards of living on a harmonized basis throughout the E.U. However, the Treaty does espouse the principle of gender equality, at least concerning equal pay for men and women in employment. For many years the European Commission, the European Parliament of the E.U. and numerous NGOs had urged the E.U.


\(^8\) Charter of Fundamental Rights of the European Union, Dec. 18, 2000, O.J. (C 364) 1 [hereinafter Charter].


\(^11\) Convention, *supra* note 9, art. 19. The European Court of Human Rights sits in Strasbourg, and individuals, as well as Member States, may make complaints of human rights violations directly before the Court. Jurisdiction over Member States is compulsory. All Member States of the E.U. and most potential members, such as Russia and Macedonia, have ratified the Convention. The European Court of Human Rights is separate and apart from the European Court of Justice and the other mechanisms of the E.U., such as the Commission and the Council. See Peter Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 313 (1998).
to accede to the ECHRFF. In 1996 the Council of the E.U. requested the European Court of Justice (ECJ) to render an advisory opinion on Community accession to the ECHRFF. The Court’s answer was a resounding negative. The ECJ ruled that because of the autonomous nature of the E.U.'s legal system and the possible subordination of the ECJ to the European Court of Human Rights (ECHR), the E.U. could not accede to the European Convention. Thus, in the absence of any treaty provision, accession by the Community to the ECHRFF was beyond its power.

Despite the fact that the Treaty of Amsterdam was under consideration when the Court rendered its opinion, the Treaty of Amsterdam contained no provision for accession to the European Convention on Human Rights when it was adopted in 1999. In addition, it did not include a Charter of Rights. Instead, a body, designated a convention, was convened in Brussels in 1999 to prepare a European Union Fundamental Rights Charter. The group consisted of government representatives of Member States, national parliaments, representatives of the E.U. Parliament and the E.U. Commission, observers from the ECJ and the Council of Europe. This was in fact the third attempt to prepare such a text.

The adoption of the Charter was deemed necessary for the future of the E.U. for several reasons. In the years since it was created in 1957, the E.U. had evolved from a purely economic entity to an institution that was political, cultural, social, and economic in nature. One comprehensive legal document protecting the citizens’ fundamental rights was thus desirable for the integrated political system that was evolving.

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[T]o enable the Union to become a party to the European Convention on Human Rights so as to establish close co-operation with the Council of Europe, whilst ensuring that appropriate action is taken to avoid possible conflicts or overlapping between the Court of Justice of the European Communities and the European Court of Human Rights).
16. Kruger, supra note 10, at xvii (“The major previous attempts were made in 1979 when the European Commission proposed the accession of the European Communities to the European Convention on Human Rights and in 1989 when the European Parliament formulated a comprehensive catalogue of fundamental rights.”).
17. See Kruger, supra note 10, at xviii.
Further, although the European Convention on Human Rights was in many respects a Bill of Rights for Europe, it focused exclusively on civil and political rights and did not include the widely accepted social and economic rights. A new instrument that encompassed fifty years of developments in human rights law was necessary to, as stated in the Preamble to the Charter, "[s]trengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments . . ."\(^8\)

Finally, a human rights instrument that had more binding effect on the institutions of the E.U. itself was necessary. The E.U. was not a signatory to the European Convention on Human Rights and was not subject to jurisdiction in the ECHR, and thus was not itself bound by its provisions.\(^9\)

The Charter took less than a year to draft and was adopted at the Nice Summit in December 2000. The Charter, when proclaimed, was a declaration with political force, but not legal force. Nevertheless, the Charter soon became a powerful influence on the development of European human rights law. It was cited in directives and in opinions of the Advocate General,\(^20\) of the Court of First Instance\(^21\) and the ECJ.\(^22\) The ECJ has used the Charter as a guide to general principles of Community law which it is directed to apply. It has cited the Charter and noted that while the Charter is not legally binding, 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 ECHRFF.\(^23\) In addition, the European Parliament has routinely cited the

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18. Charter, supra note 8, at preamble.

19. Kruger, supra note 10 at xviii, xxiii ("Since the European Communities are not parties to the European Convention on Human Rights, Europeans have at present no possibility of bringing complaints against the European Union institutions directly before the European Court of Human Rights.").


22. See, e.g., Case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equal. and Law Reform, ¶ 4, 2008 E.C.R. I-6241; Case C-275/06, Productores de Musica de España (Promusicae) v. Telefonica de España, 2008 E.C.R. 271, ¶ 1, 64.

Charter as a rights standard against which legislative acts must be measured.\textsuperscript{24}

Indeed in many ways, the Charter is similar to the Universal Declaration of Human Rights (UDHR)\textsuperscript{25} that was adopted by the United Nations General Assembly in 1948. At the time that the UDHR was adopted, like the Charter, it was not a legally binding document, but was considered a standard towards which all nations would aspire. Nevertheless, the UDHR gave impetus to the adoption of legally binding documents including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, as well as the European Convention on Human Rights and now has a legal force of its own.

Although the Charter was an integral part of the text of the rejected Draft Constitution, the Treaty of Lisbon simply provides, in a single article, that the Charter is legally binding.\textsuperscript{26} To meet the objections of Poland, the Czech Republic and the United Kingdom, these states were permitted to opt out from provisions of the Treaty relating to the Charter.\textsuperscript{27} Indeed, adoption of the Treaty was delayed until objections from the Czech Republic, who feared that inclusion of the Charter would result in the return of certain lands to Germany, could be resolved.\textsuperscript{28}

To meet the objections of the Member States who argued that the Charter would unduly enlarge the power of the Union, the Charter specifically states that it does not enlarge in any way the powers of the E.U. Thus, section 1 of Article 51 of the Charter provides:

\begin{quote}
The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers . . . \textsuperscript{29}
\end{quote}

\begin{footnotes}
\textsuperscript{24} E.g., European Parliament Rules of Procedure, 2009 O.J. (L 315/51) rule 36.
\textsuperscript{26} Treaty of Lisbon, supra note 1, art. 6(1).
\textsuperscript{29} Charter, supra note 8, art. 51.
\end{footnotes}
This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.30

However, it is unclear how the ECJ will now interpret the Charter. The ECJ in the past has taken a proactive role with respect to human rights issues and indeed was responsible in large part for integrating human rights into the fabric of E.U. law despite the absence of specific treaty provision or authorization.31


In an effort to prevent a clash and harmonize with the ECHR, the Charter in Article 52 states that those rights in the Charter that contain rights which correspond to rights guaranteed in the ECHR, shall have the same meaning and scope.

One could characterize the rights enshrined in the Charter as follows: civil and political rights, largely similar to those contained in the ECHR and the International Covenant on Civil and Political Rights; social, economic, and cultural rights, largely similar to those contained in the European Social Charter of 1960, the Revised European Social Charter of 1996 and the International Covenant on Economic, Social and Cultural Rights; and finally rights specifically reserved for citizens of the E.U. Due to the nature of the rights protected (e.g. free movement of persons), these protections do not extend to all persons, but only to those who are citizens of the E.U. Member States.

The Charter has been characterized as "merely crystallizing and clarifying the catalogue of rights developed in the Court's case law."32 While it does not establish any new power for the Community or the E.U., it does contain numerous innovations. For example, there are provisions on biotechnology such as the prohibition on human cloning and a right to good administration.33 There is also a commitment to abstract concepts, such as the dignity of the individual. Indeed the first article of the Charter provides:

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30. Id.
31. See Philip Alston & J.H.H. Weiler, An "Ever Closer Union" in Need of a Human Rights Policy, 9 E.J.I.L. 658, 709 (1998). A noted scholar of the European Union, Philip Alston has stated, "the ECJ deserves immense credit for pioneering the protection of fundamental human rights within the legal order of the Community when the Treaties themselves were silent on this matter."
33. Charter, supra note 8, art. 3(2), 41.
"Human dignity is inviolable. It must be respected and protected."\textsuperscript{34} Human dignity as a protected right is virtually unknown in the United States. However, dignity is protected in several of the European Constitutions, including the German Constitution. In 2004 the ECJ upheld a German ban on a video game that simulated homicide. The ban had been imposed by the German authorities because it was argued that the game violates the principle of dignity enshrined in the German Constitution. The ECJ held that the ban did not violate the freedom to provide services or the free movement of goods guaranteed by E.U. law and that the ban was proportionate.\textsuperscript{35} While dignity is a moral and ethical concept, at least in U.S. jurisprudence, it would be vague as a right giving rise to a legal remedy. The Charter also contains a more neutrally-worded right to marriage which excludes the reference in the European Convention to "men and women."\textsuperscript{36}

The Court will also be called upon to construe the basic equality and non-discrimination provisions of the Charter. Article 20 is the basic equality clause which states simply, "[e]veryone is equal before the law."\textsuperscript{37} However, the non-discrimination provisions contained in Article 21 are likely to present many challenges of construction to the ECJ and indeed to the Member States who will be called upon to construe the Charter. Article 21 provides:

1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2) Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.\textsuperscript{38}

The Lisbon Treaty also provides that the E.U. itself accede to the ECHRFF. Thus, the Charter must be viewed in conjunction with the

\textsuperscript{34} Charter, supra note 8, art. 1.
\textsuperscript{36} Charter, supra note 8, art. 9.
\textsuperscript{37} Charter, supra note 8, art. 20.
\textsuperscript{38} Charter, supra note 8, art. 21.
European Convention and the decisions of the ECHR. The preamble to the Charter "reaffirms" the rights set forth in the ECHR. It states in part:

This Charter reaffirms, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

The ECJ has, since 1991, often stated that the Convention has "special significance" in fundamental rights cases. However, the ECJ has never specifically affirmed that the European Convention binds the Union or that its provisions are incorporated into Union law. It has cited the European Convention’s provisions as early as 1991; however, the ECJ has consistently ruled that the content of fundamental rights must be determined by E.U. law. Thus, there is potential conflict between the rulings of the ECJ and the ECHR. Further, the adoption of the Charter as a legally binding instrument exacerbates the possibility of inconsistent rulings with respect to protected human rights. In order to avoid a clash between the two, the Charter provides that rights contained in both the Charter and the Convention shall have the same meaning and scope.

Both courts have increasingly engaged in a dialogue concerning human rights. It is a dialogue "characterized by a spirit of what has been called 'good neighborliness,' in recognition of the need for both courts to work together and to avoid a 'prestige battle' between them." In 2005, the

40. Id.
44. See Roza Pati, Rights and their Limits: The Constitution for Europe in International and Comparative Legal Perspective, 23 BERKELEY J. INT’L L. 223, 268-69 (discussing the different wording used and different limitations set forth in the two documents). See also Kruger, supra note 10, at xx.
45. Charter, supra note 8, art. 52(3).
President of the ECHR stated: "A major goal [in devising the European human rights protection system of the twenty-first century] should be to reinforce a harmonious and efficient interplay between the two systems . . ."\textsuperscript{47}

Thus, new challenges are facing the E.U. in the area of human rights. With the adoption of the Lisbon Treaty, the Charter is legally binding and the Court will be called upon to construe a catalogue of rights, which are groundbreaking and in some ways abstract. Although with the adoption of the Lisbon Treaty the E.U. will accede to the ECHRFF, it will presumably insist on the jurisdictional right to interpret the European Convention itself. The question of possible conflicts between the ECHR and the ECJ remain and must be resolved. Indeed, the E.U. seems to be moving into a new age of rights which is likely to have implications beyond the E.U. itself.

\textsuperscript{47} See Egbert Myjer, \textit{Can the EU Join the ECHR—General Conditions and Practical Arrangements, in The Future of the European Judicial System in a Comparative Perspective} 308 (Ingolf Pernice, Juliane Korkott & Cheryl Saunders, eds., 2006) (quoting Luzius Wildhaber, President, Eur. Ct. H.R., Address to the Group of Wise Persons Established to Consider the Continued Effectiveness of the ECHR System (Oct. 18, 2005)).