The Charter of Fundamental Rights: an unnecessary complication or an essential 'EU Bill of Rights'?

Introduction

In addressing this topic it is tempting to focus on the merits of the Charter and ask the normative question of the merits (or otherwise) of the Charter in its own right. To do so, however, avoids the arguably more difficult question as to its 'essentiality'. To be considered essential (or necessary) the Charter must, irrespective of its merits otherwise, fulfil a need in the field of EU law or human rights protection.

The first (and main) part of the following discussion therefore considers some concerns that might be levied against the EU in this regard and which the Charter prima facie may be apt to address. In each case the extent to which the Charter has met these concerns is evaluated, before the discussion turns to the validity of the charge that the Charter is a 'complication'.

It is important to note at the outset that this discussion proceeds on the understanding that the Charter does not create any rights at EU law, or in any way extend the competencies of the Union: it is at most, as Craig states, a "creative distillation" of the rights the CJEU had already been drawing upon[1]. The Charter's status as a reaffirmation of rights as they result (in particular) from the constitutional traditions and international obligations of the Member States is expressly recognised in its preamble, and repeated in the case law of the Court[2], and is not considered any further here.

I Problems and Solutions

It is certainly beyond the scope of this essay to offer a comprehensive summary of all, or even all persuasive, criticisms and concerns levelled at the EU. Nor is this the place to consider substantively what human rights the EU *should* recognise for, as discussed above, it is not the role of the Charter to create rights, and that is therefore an issue it is at the outset doomed to leave untouched. Instead this section identifies three problems which Charter as a declaratory rights document could feasibly address: the status, clarity and visibility of these rights.

[1] Craig P. & de Burca G, *EU Law* 4th Ed. OUP 2008 p.413.

[2] Case C-540/03 *Parliament and Council (Family Reunification)* [2006] E.C.R. I-5767 at [38].

The status of human rights in the EU

EU law undoubtedly accords particular weight to 'fundamental rights'[3]. This phrase, however, has a meaning in the context of the Union quite different to its normal usage in human rights discourse. Fundamental rights in the EU context include, in addition to the rights now enshrined in the Charter, those principles of free movement which the Union, as primarily an economic entity, was built.

It is this 'elevation' of principles of free movement to the same level of discourse as human rights which leads Coppel and O'Neill to argue the CJEU devalues the notion of fundamental rights[4]. By failing to distinguish between these distinct meanings of 'fundamental rights' they argue the CJEU does not accord to fundamental *human* rights the necessary 'trump-card' status definitive of human rights[5], and thereby undermines their status.

A charter of fundamental human rights appears the ideal place for this concern to be remedied: indeed, it is arguable that for a charter of such rights to have real value it must as a matter of necessity accord these rights special status as distinct from the corpus of other rights found in the law. Yet while Article 6(1) TEU provides that the Charter has the same legal value as the Treaties, and the Charter's preamble states that the Union is 'founded on the indivisible, universal values of human dignity, freedom, equality and solidarity', neither the Charter nor the TEU spells out the way in which these fundamental rights interact with the other such rights found in the Union's primary law. The declaratory nature of the Charter is insufficient in this regard, for prior to its introduction the status of human rights was recognised in the Court's case–law in similarly broad terms[6]. The Charter arguably therefore fails to fulfil a critical role as a Bill of Rights assigning *special* status to the rights enumerated.

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[3] See for example C-260/89 *ERT* at [4]; Denamn, D. 'The Charter of Fundamental Rights' E.H.R.L.R. 349,350.

[4] Coppel, J and O'Neill, A (1992) 'The European Court of Justice: Taking Rights Seriously?' 29 CMLR 669,692. Kyriakou terms this the 'marketisation' of fundamental rights: Kyriakou, T, 'The impact of the EU Charter of Fundamental Rights on the EU system of protection of rights: much ado about nothing?' [2001] 5 Web JCLI, available at http://webjcli.ncl.ac.uk/2001/issue5/kyriakou5.html

[5] Coppel and O'Neill here adopt Dworkin's conception of human rights as 'trumps'. It is beyond the scope of this essay to critique or endorse this conception: it is sufficient to note that the concern remains under alternative approaches to human rights, albeit perhaps rephrased as a concern as to the appropriate hierarchy of rights.

[6] See e.g. Cases 44/79 *Hauer* [1979] E.C.R. 3727 at [15]; 29/69 Stauder v Ulm [1969] ECR 419 at [7]; C-260/89 *ERT* at [4]; and ibid Denamnn.2 above, at 350.

Clarity

Weiler identifies the Charter as providing increased clarity as to the rights it contains[7]. Clarity as to the scope and operation of human rights is certainly desirable, and arguably necessary as a matter of legal certainty, it cannot be provided by a statement of rights at a level of generality as that found in the Charter. A central difficultly in human rights jurisprudence is the distillation from broad principles to application in individual cases – hence the majority of the jurisprudence of the Strasbourg Court. The reality is that the interpretation of the scope of human rights can differ widely between jurisdictions and cultures[8], and their operation inevitably rests heavily on the context of a given case. The clarity provided by declaratory documents is cosmetically appealing but contains no magic in and of itself to address these difficult issues.

Visibility

Perhaps the most common role given to the Charter is to increase the visibility of human rights, a function expressly identified in its preamble[9]. Somewhat less apparent, however, is the need for such increased visibility prior to its introduction.

Prior to the Charter there was not, of course, a mass outcry from the people of Europe that their rights were insufficiently publicised. Indeed, prior to the Charter the focus on human rights protection in Europe lay not with the EU but with the European Convention on Human Rights. Was there therefore a necessity for increased visibility of human rights as a matter of EU law? To the extent that the Charter replicates the rights enshrined in the ECHR it is hard to see that there was: those rights were perfectly visible therein. Beyond that, it must be noted that the charge is not that prior to the Charter the rights were not *knowable*, such as to violate the rule of law, but rather that they were not *well-enough* known. Such a problem of perception is hard to quantify and, it is submitted, hard to properly conceive as a problem properly in *need* of a solution.

[7] Weiler, J (2000) 'Does the European Union truly need a Charter of rights?' 6 *ELJ (*editorial).

[8] See for example the discussion in Douglas-Scott, S 'The European Union and human rights after the Treaty of Lisbon' [2011] H.R.l. Rev. 645,678.

[9] And see for example Weiler, ibid n. 7 above.

II The Charter as a 'complication'

If, then, it is hard to see the creation of the Charter as a matter of necessity, the question arises as to whether it should be considered a complication. As outlined above, the Charter does not create any rights or extend the competencies of the Union, and so far as it therefore does not change the legal landscape in any way it is hard to conceive of as a complication as a matter of law. Indeed, this view is supported by the approach taken at Union level to the apparent 'opt-out' for the UK and Poland contained in Article 1(1) of Protocol 30. While prima facie this appears an attempt by these States to avoid any such complications that might arise from the Charter, as AG Trstenjak made clear in *M & others v Refugee Applications Commissioner*[10], this article does not properly provide an opt-out. Rather, it reiterates the above position as to the effect of the Charter on the Union's powers, making it explicitly clear for the benefit of the UK and Poland that the Charter does *not* have any such complicating (legal) effect.

It remains possible, however, that the Charter may be considered a complication not as a matter of law, but of politics and perception. Despite provisions to the contrary of the Charter and TEU, its proposed adoption gave rise to concerns on the part of Member States that it would nonetheless extend the competencies of the EU, as evidenced *inter alia* by the UK and Poland's purported opt-out. The Charter is perceived by some as a necessary step toward an EU Constitution[11] and, consequently, a 'federation' of Europe, and as such raises issues beyond the scope of its own content and legal status.

Finally, it is arguable that despite the Treaty provisions to the contrary, the Court's case law since entry into force of the Charter evidences a continuing possibility for expansion of the meaning of 'implementation' of Union law and, thus, expansion of the field in which the fundamental rights are applicable[12]. Whatever the validity of this concern, however, it is not one which can be properly placed at the door of the Charter, for it was ever thus[13]. Rather, it can only be unsurprising that the adoption of the Charter, a declaratory document, has not changed the CJEU's approach to interpretation and application of Union law in this regard.

[10] Case C-411/10.
[11] See e.g. the discussion in Lenearts K & de Smijter E (2001) CMLR 273.

[12] E.g Case C-393/10 *O'Brien*, Opinion of Ag Kokott; Case C-34/09 *Ruiz Zambrano*, Opinion of AG Sharpston.

[13] Ibid Coppel & O'Neill n.4 above.

Conclusion

It follows from the above discussion that it is hard to consider the Charter as a truly essential or necessary development in field of EU human rights protection. As a matter of logic it is, at least in the strictest sense, therefore unnecessary. Further, and perhaps more damningly, there are real concerns in EU human rights law which the Charter does not address and, as a declaratory document, never could[14].

In addition, it is argued above that the adoption of the Charter gave rise to concerns of a political and perceptual nature. It does not follow, however, that the Charter's reception must therefore be a negative one. While not *essential*, it undoubtedly does give increased visibility to the fundamental rights recognised by the EU. And the political views its adoption elicited should not be disregarded as solely an irritating complication to an otherwise harmless document, for the debate in itself is of value in illuminating the views of the Member States and their citizens to broader questions such as the reach of the EU and scope of its competencies.

While not essential, then, and complicating in some respects, it is the view of the author that the Charter helps more than it hinders. It was never destined to solve the bigger problems of EU human rights law, and its ability or otherwise to do so should not serve as a benchmark of its worth.

[14] See for example Weiler, ibid n.5 above, as to the lack of monitoring and practical enforcement of human rights; and the discussion in ibid Kyriakou, above n.4.