

# A BILL OF RIGHTS FOR THE EUROPEAN UNION

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The inclusion of the Charter of Fundamental Rights<sup>1</sup> in the Draft Treaty Establishing a Constitution for Europe<sup>2</sup> has a curious history that in some ways is similar to the history of the Bill of Rights of the United States Constitution. The Draft Constitution for the European Union, signed on October 29, 2004 in Brussels by the member states, was the product of a Convention that commenced its work on February 28, 2002 and completed its drafting process on July 10, 2003. The first European Convention drafted the Charter of Fundamental Rights proclaimed at Nice in 2000. The mandate of the second Convention was to simplify the constituent treaties, to increase the democratic legitimacy, transparency and efficiency of the European Union institutions, and to consider the unification of the treaties into a basic treaty, including the Charter of Fundamental Rights. While incorporation of the Charter will have little immediate substantive impact, it is an important symbolic step for the European Union.<sup>3</sup>

Neither the United States Constitution as originally adopted, nor the Treaty on European Union (also referred to as the Treaty of Rome)<sup>4</sup> establishing the European Economic Community and the subsequent constituent treaties contain what can be considered a Bill of Rights. This omission in these documents can be attributed to similar causes relating to the perceived limited power or competence of the central authority.

The United States Constitution was intended to set forth a plan of governance for the new nation in which the central government was to act pursuant to specific enumerated powers set out in the Constitution. Human

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1. CHARTER OF FUNDAMENTAL RIGHTS OF THE UNION, Dec. 16, 2004, 2004 O.J. (C 310) [hereinafter THE CHARTER].

2. DRAFT TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, July 18, 2003, 2003 O.J. (C 169) 9 [hereinafter DRAFT TREATY ESTABLISHING CONSTITUTION]. Although the Draft Treaty establishing a Constitution for Europe is technically a treaty, the term Draft Constitution for the European Union or Draft Constitution will be used throughout to refer to this document.

3. *See generally* PETER NORMAN, THE ACCIDENTAL CONSTITUTION (EuroComment 2003).

4. Consolidated Version of the Treaty on European Union, Dec. 24, 2002, 2002 O.J. (C 325) 96 [hereinafter ROME TREATY].

rights were hardly considered during the debates at the Constitutional Convention in Philadelphia although human rights provisions were featured prominently in all of the state constitutions then in effect. In the Federalist Papers, Alexander Hamilton argued that a Bill of Rights would not only be unnecessary but also dangerous.<sup>5</sup> He argued that a Bill of Rights would refer to power not granted to the Federal Government and on this very ground it could be asserted that the Federal Government had more powers than had specifically been granted in the Constitution. The omission of a Bill of Rights proved to be one of the most formidable stumbling blocks for the ratification of the Constitution and it became the unifying force of the anti-Federalists who were opposed to a strong central government and wished to defeat the Constitution. Faced with this development, the supporters of the Constitution pledged that if the Constitution were adopted, the adoption of a Bill of Rights would be the first order of business for the new Congress. If the pledge were not kept, a new constitutional convention would be convened that could once again reargue the issue of redistribution of powers between the states and the national government.

We now know the argument that the federal government of the United States is one of limited enumerated powers did not stand the test of time. Through the expansion of the Commerce Clause and the Necessary and Proper Clause,<sup>6</sup> the activities of the national government have expanded into areas unanticipated by the framers at the Philadelphia Convention, such as education and social welfare. It is only recently that the Supreme Court has once again begun to question the limits of federal power.

What are the similarities between the experiences of the European Union and the United States with respect to human rights? When the European Union was first established in 1957, its primary goal was the attainment of economic integration,<sup>7</sup> albeit with political overtones. Moreover, its competence to act was limited to specific areas designed to further economic integration. Since it was necessary to harmonize the work force throughout the community, the Treaty of Rome did contain a social chapter, which gives limited mention to human rights and addresses worker's rights. Nevertheless its primary focus was to improve working conditions on a harmonized basis throughout the European community.

The Treaty of Rome was not viewed as a guarantor of rights and indeed, its only substantive provision pertaining to rights was former Article 119 now

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5. THE FEDERALIST NO. 84 (Alexander Hamilton).

6. U.S. CONST. art. I, § 8.

7. Elizabeth F. Defeis, *The Treaty of Amsterdam: The Next Step Towards Gender Equality?*, 23 B.C. INT'L & COMP. L. REV. 1 (1999).

Article 141, which guaranteed equal pay for equal work to women.<sup>8</sup> However, even this provision was put in for economic rather than human rights concerns. Since some states already had such a guarantee (i.e. France), the guarantee was necessary so that such 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 respective national constitutions and laws;<sup>9</sup> indeed each of the original members of the European Union had strong rights protections in their national Constitution or national law. In addition each of the member states were also party to the European Convention for the Protection of Human Rights and Fundamental Freedoms and rights would be protected through the Strasbourg process.<sup>10</sup>

However, when the European Court of Justice ("ECJ") announced the doctrine of supremacy of community law over national legislation in 1964,<sup>11</sup> the doctrine was resisted by some states that had strong human rights provisions in their national constitutions. These states argued that as long as the Community lacked specific human rights guarantees, Community legislation must be viewed through the lens of national constitutional guarantees. In response, the European Court of Justice increasingly stated that the Union would be guided by constitutional traditions of the member states and by the provisions of European Convention on Human Rights and Fundamental Freedoms.<sup>12</sup> In addition, subsequent treaties, primarily designed to strengthen a single internal market and foster monetary integration, acknowledged the goal of promoting democracy on the basis of fundamental rights.

Although the European Court of Justice early recognized human rights as a fundamental aspect of community law, its approach to human rights lacked a coherent policy. For example, although it ruled that the content of human rights protections derived from the constitutional traditions of member states and later

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8. ROME TREATY art. 141.

9. Case 29/69, *Stauder v. City of Ulm.*, 1969 E.C.R. 419, 427, C.M.L.R. 112 (1970).

10. Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome, Nov. 4, 1950, 213 U.N.T.S. 222. See also Peter Leuprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 313 (1998). The European Court of Human Rights sits in Strasbourg, and individuals, as well as Member States, may take complaints of human rights violations directly before the court. *Id.* at 316. Jurisdiction over Member States is compulsory. *Id.* at 326. All Member States of the EU and most potential members, such as Russia and Macedonia, have ratified the Convention. *Id.* at 327. The European Court of Human Rights is separate and apart from the European Court of Justice (ECJ) and the other mechanisms of the EU, such as the Commission and the Council. *Id.* at 316.

11. Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585, C.M.L.R. 425 (1964).

12. Jean-Marie Henckaerts, *The Protection of Human Rights in the European Union: Overview and Bibliography*, 22 INT'L J. LEGAL INFO. 228, 231 (1994).

to international agreements to which states are party,<sup>13</sup> it did not initially apply the provisions of the European Convention on Human Rights to cases before it, nor did it refer to the decisions of the European Court of Human Rights in its opinions. Although it had referred to decisions of the European Court of Human Rights, it had also ruled that without an amendment to the EEC Treaty, the EU could not itself become a party to the European Convention on Human Rights.<sup>14</sup> The Draft Constitution for the European Union now provides that the Union will enjoy legal personality and is mandated to accede to the European Convention on Fundamental Rights and Freedom.<sup>15</sup>

As the Union directives and regulations emanating from Brussels become more complex and comprehensive in scope, so the momentum for a charter of rights for the European Union has developed. In July of 2000, the Charter of Fundamental Rights of the EU was proclaimed at the Nice Summit.<sup>16</sup> However, even though the document has political force, it is not legally binding on member states. Under pressure from the Parliament and various non-governmental organizations, the impetus to include the Charter as a binding document gained momentum. One representative who worked on the new European constitution remarked, "It was a Bill of Rights that created American identity . . . it will be the same with Europeans." Thus, consistent with its mandate, and with relatively little discussion at the Convention itself, a Charter of Fundamental Rights is included in the Draft Constitution for the European Union."<sup>17</sup>

The Charter contains seven chapters:

- 1) Dignity;
- 2) Freedoms;
- 3) Equality;
- 4) Solidarity;
- 5) Citizens' Rights;
- 6) Justice;
- 7) General Provisions.

The Equality Chapter prohibits "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion

13. Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491, 2 C.M.L.R. 338 (1974).

14. Opinion 2/94, *Re Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1996 E.C.R. I-1759, 2 C.M.L.R. 265, 291 (1996). *See also* Case C-249/96, *Grant v. South-West Trains Ltd.*, 1998 E.C.R. I-621, 1 C.M.L.R. 993 (1998).

15. DRAFT TREATY ESTABLISHING CONSTITUTION art. 6. *See also Re Accession by the Community*, 1996 E.C.R. at 265 (discussing that the ECJ ruled that absent Amendment to the treaty, the European Union lacked competence to accede to the Convention).

16. NORMAN, *supra* note 3, at 19.

17. Draft Treaty establishing Constitution art. II-1-52.

or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.”<sup>18</sup>

The Draft Constitution’s Charter of Fundamental Rights of the Union incorporates fifty paragraphs enumerating extensive rights including a “right to life” (with the death penalty proscribed); 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”; the “freedom to hold opinions”; a right “to form and 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 persons with disabilities to benefit from measures designed to ensure their independence”; the “right of access to a free placement service” for employment; the right of workers’ and employers to take “collective action”; and the “right to paid maternity leave and to parental leave.”<sup>19</sup> “Sexual equality is to be ensured in all areas, but so is the government’s ability to allow ‘advantages in favor of the under-represented sex.’”<sup>20</sup>

Although a few countries, including France, Germany, Denmark and Sweden, have accepted the Charter of Fundamental Rights, the document is not without controversy. Some member states have been very vocal with their apprehension. For example, initially Great Britain was reluctant to accept the Charter as an integral part of the Constitution in part because it might be used to overturn recently enacted labor legislation.<sup>21</sup> Great Britain then proposed that the Charter not be a legally binding document but a declaration of the rights of European citizens.<sup>22</sup> However, the U.K. ultimately accepted incorporation of the Charter with the additional assurances<sup>23</sup> that its provisions would apply to member states only when they are implementing Union law. Further, in a bow to state autonomy, the Charter is to be interpreted consistent with constitutional provisions of member states. In addition, at the meeting of member states in 2004, the U.K. succeeded in having a new paragraph inserted into the text

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18. *Id.* at art. II-21.

19. *Id.* arts. II-2–II-52; see also Edward Rothstein, *Europe’s Constitution: All Hail the Bureaucracy*, N.Y. TIMES, July 5, 2003, at B9.

20. See Rothstein, *supra* note 19.

21. Press Release, Scottish Parliament, European Committee Questions ‘Diluted’ EU Charter of Fundamental Rights (Feb. 7, 2001), available at <http://www.scottish.parliament.uk/nmCentre/news/news-comm-01/ceu01-001.htm>.

22. *Id.*

23. NORMAN, *supra* note 3, at 89.

concerning the application of the Charter of Fundamental Rights. It states that the “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 the Member States.”<sup>24</sup> These explanations were drawn up during the Charter drafting process in 2000 and were enlarged and modified during the Convention. They were intended to provide some guidance concerning which rights are merely aspirational and which are intended to be binding and to provide some parameters for certain rights. A special Declaration has been added to the treaty which includes texts of the Explanations in full.<sup>25</sup> However, it is not at all clear how the ECJ will treat the Declaration.

Now more than fifty years after the adoption of the Treaty of Rome, it seems clear that the time has come for a Bill of Rights for the European Union. Certainly, the experience of the United States can provide guidance. While originally thought of as unnecessary and possibly even dangerous, the United States Bill of Rights has proven to be pivotal in protecting rights and keeping the government on course. Clearly, the incorporation of the Charter of Fundamental Rights in the Draft Constitution will have important long term effects, particularly as the Union moves into areas not contemplated in the Treaty of Rome.

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24. THE CHARTER art. II-112, § 7.

25. See U.K. FOREIGN & COMMONWEALTH OFFICE, WHITE PAPER ON THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE (Sept. 2004), available at [http://www.fco.gov.uk/Files/kfile/White%20Paper\\_Treaty%20establishing%20a%20Constitution%20for%20Europe.pdf](http://www.fco.gov.uk/Files/kfile/White%20Paper_Treaty%20establishing%20a%20Constitution%20for%20Europe.pdf).