The Charter settles the confusing development of fundamental rights protection in the EU thereby making it more effective. **Discuss in relation to both actions of member states and the EU.**

The judicial creativity in the former years of the EEC created a schism and theoretical split in the normative core of the Community. What was initially an economic institution went on to assert itself as a polity of legal supremacy and a human rights guarantor. Developing decades of case law, the EU Charter of Fundamental Rights codifies existing general principles and recognises new protections[1] which apply to member states and EU law-making institutions. While there is prima facie merit in deeming the Charter, with its now binding status[2], an efficient mechanism to make rights 'visible and explicit'[3]; this essay argues that the Charter, and the rights therein, are 'lost in complexity'[4], and, in certain areas, have exacerbated confusion. The modernised ambit of the Charter and the ideal of ECHR accession are certainly attractive; but this attraction is marred by the legal and procedural difficulties within them. The Charter does little, therefore, to remedy the confusion of fundamental rights development and its efficiency generally. Indeed, is it realistic to expect otherwise in a legal environment where fundamental rights were mere afterthought[5].

Development and Confusion

In a political landscape which had already fostered the Council of Europe and the ECHR, it is no surprise that the court 'denied itself any competence to protect fundamental rights'[6] in Stork[7]. However, in 1969, the Stauder case explored whether a Commission decision 'contained nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the court'[8]. Inspiration for this was derived from the 'common constitutional traditions of the Member States' which was affirmed in the Internationale Handelgesellschaft case[9]. This approach was extended in Nold[10] which took into account international treaties and cases like Hauer[11] and Rutili[12] which affirmed Nold but made explicit reference to the ECHR[13].

[1] A. Rosas, 'When is the EU Charter of Fundamental Rights Applicable at National Level?', pg. 1272.
[2] The Charter was initially promulgated in Nice as a non-binding declaration. In December 2009, it was given primary law status in the Treaty of Lisbon rendering it legally binding.
[3] K. Starmer QC, 'Roosevelt's legacy: human rights after Brexit', pg. 3.
[4] See generally: Van der Heyning, *Fundamental Rights in the EU: Lost in Complexity?*.
[5] See generally: A. Williams, *The Ethos of Europe*; and S. Douglas-Scott, 'The Problem of Justice in the EU'.
[6] H. Holmström, 'Development of the Protection of Fundamental Rights within the European Union – an improved human rights agenda?', pg. 10.
[7] Case 1/58, *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community* ECLI:EU:C:1959:4.
[8] Case 29/69, *Erich Stauder v City of Ulm – Sozialamt* [1969] ECR 419.
[9] Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstetle fur Getriede und Futtermittel* [1970] ECR 1125.
[10] Case 7/73, *J Nold, Kohlen-Und Baustoffgrosshandlung v Commission of the European Communities* [1974] ECR I-00491.
[11] Case 44/79, *Liselotte Hauer v Land Rheinlan-Pfalz* [1979] ECR 03727
[12] Case 36/75, *Roland Rutili v Ministre de l'intérieur* [1975] ECR 1219.
[13] *Hauer*, para 15: '...after recalling the case law of the court, refers on the ne hand to the rights guaranteed by the constitutions of the Member States and on the other hand to the European Convention for the Protection of Human Rights and Fundamental Freedoms'.

The confusion pertains to the 'inspiration' of constitutional traditions common to the member states. The use of 'common' implies a common denominator approach or a minimalist standard. A minimalist approach arguably 'refuses to take human rights seriously'[14]. However, a maximum standard has also been advocated which is normatively directed[15]; but even this is subject to standard communitarian critique[16]. Both approaches have subsequently been rejected in Hauer[17] and what became was an autonomous 'Union standard' in an effort to retain interpretive liberty[18]. This liberty has seen the ECJ recognise a number of fundamental rights as general principles pre-Charter[19] ; however, a case-by-case recognition of fundamental rights has created legal confusion and uncertainty. Specifically, no comprehensive, theoretically-grounded set of fundamental rights existed.

In short, due to the 'ad hoc, confusing incremental' development of fundamental rights and the lack of a 'conceptual underpinning', the superficial attraction of the Charter is clearly codification and its status as an identifier[20]. However, this essay submits otherwise.

EU Accession: Simplification or Burden?

The ECHR has always sustained as a 'special source of inspiration' and significance for the CJEU[21]; the latter recognising that their own general principles were present in the Convention[22]. In attempt to remedy the confusion concerning the scope and boundaries of the relationship between Luxembourg and Strasbourg, the Treaty of Lisbon amends Article 6 to expressly declare that the 'Union shall accede to the' ECHR.

Firstly: the jurisprudential harmony between the ECHR and the ECJ. Article 52(3) of the Charter provides that, for those rights borrowed from the Convention, rights are to be given the 'meaning and scope' as those rights 'laid down by the said Convention'. J.McB. v L.E. further established that any relevant ECtHR case law ought to be followed[23]. However, one concern is that this Article 52(3) contains the caveat of 'this provision shall not prevent Union law providing more extensive

[14] R. Schutze, *An Introduction to European Law*, pg. 95.
[15] See LFM. Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union'.
[16] See J.Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights' in N. Neuwahl and A.Rosas *The European Union and Human Rights* pg. 61: 'A maximalist approach to human rights would result in a minimalist approach to [Union] government'.
[17] See *Hauer* para. 32: a fundamental right only needs to be protected in 'several member states'.
[18] See R. Lawson, 'Confusion and Conflict? Diverging Interpretations of the Europe Convention on Human Rights in Strasbourg and Luxembourg' in R. Lawson and M. de Blois *The Dynamics of the Protection of the Rights in Europe* pg. 234-250.
[19]For freedom of expression see: Case C-288/89 *Stitching Collective Antennvoorziening Gouda* [1991] ECR I4007. For equality before the law see: Case C-15/95 *EARL* [1997] ECR I-01961; and C-292/97 *Karlsson* [2000] ECR I-02737. And for 'good administration' see: Case T-167/94, *Nölle v Council of the European Union and Commission of the European Communities* [1995] ECR II-02589.
[20] S. Douglas-Scott, ' The European Union and Human Right after the Treaty of Lisbon', pg. 649.
[21] See M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously'.
[22] For example, cases: 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651 at [18]; C-424/99 *Commission v Austria* [2001] ECR I-9285 at [45] – [47] on access to justice; and C-185/97 *Coote v Granada Hospitality* [1998] ECR I-5199, [21] – [23] on discrimination.
[23] Case C-400/10 PPU *JMcB v LE* [2010] ECR 000.

protection', treating the ECHR as a 'floor' rather than a 'ceiling'. Divergence in interpretation is clearly a risk as has been evident in earlier case law[24]. Watson has argued forcefully that 'accession is not offering cumulative protection but is actually divisive'[25] as the Charter renders fundamental rights terrain 'a matter for two courts'[26]. In terms of confusion, the Charter may have clarified and solidified its relationship with the ECHR, as present in the earlier case law; but to deem fundamental rights protection efficient is false. The delivery of Opinion 2/13 which halted accession due to its incompatibility with Article 6(2) TEU confirms this.

Secondly: the preservation of EU legal autonomy. Formal accession potentially adds complications and jeopardises efficiency with regard to the legal order. The legal history of the EU demonstrates the court's emphasis on autonomy and that external international agreements 'must therefore neither disturb EU competences nor the interpretive monopoly of the CJEU in the interpretation of EU law'[27]. Opinion 1/91[28], Opinion 1/00[29] and, more recently, the cases of Kadi[30] all clearly highlight this. The Treaty of Lisbon further introduced a series of provisions to require the compatibility of accession with EU autonomy[31]. In light of this, if the ECtHR were to assess issues of EU, legal autonomy and the aforementioned Opinions are clearly threatened.

However, it is also correct that domestic remedies must be exhausted, and scrutinised by national courts, before a matter reaches Strasbourg[32]. Strasbourg furthermore does not rule on validity but compatibility.

However, a more towering concern exists: would the CJEU even be able to review the validity of EU law, by the time a challenge reached the ECtHR? Douglas-Scott postulates that the 'interpretative monopoly' held under Foto Frost[33] and Article 19(1) is at risk since most EU litigation is brought into national courts (and not direct action to the EU courts)[34]. If action is 'determined and finalised' in the national courts without the CJEU's input, this precludes an internal review before the ECtHR's external one, thus limiting the EU's autonomy.

Finally, accession is procedurally burdensome and inefficient. Accession to the ECHR would render the EU a party but natural questions arise pertaining to the potential addressee of challenges. A 'co-respondent' mechanism has been suggested which would permit a joint participation of the EU and

[24] For example, *compare the approach of the ECJ in ERT with the ECtHR in Lentia v Austria*. Case C-260/89 *ERT* [1991] ECR I-2925; Application Nos. 13914/88 *Informationverein Lentia v Austria,* 24 Nov 1993.
[25] C. Watson, 'Fundamental Freedoms versus Fundamental Rights – The Folly of the EU's Denial over its Economic Core', pg. 52.
[26] J. Polakiewicz, *Fundamental Rights in Europe: A Matter for Two Courts*.
[27] S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', pg. 662.
[28] *Opinion 1/91* [1991] ECR 1-6079.
[29] *Opinion 1/00* [2002] ECR 1-3493.
[30] Joined cases C-402 and 415/05 P *Kadi & Al Barakaat International Foundation v Council & Commission* [2008] ECR I-6351.
[31] See Article 6(2) and Articles 1, 2 and 3 of Protocol No. 8.
[32] See Article 34 of the ECHR.
[33] Case 314/85 *Foto Frost* [1987] ECR 1129. Article 19(1): 'The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
[34] S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', pg. 663.

the relevant member states. With EU law implemented by member states, it is logical to suggest it ought to be challenged against member states. However, in cases where there is no member state discretion (e.g. regulation) it would be logical to proceed against an EU institution. This process is complexed in the case of treaties which can only be amended by the signatories themselves. This complexity and inefficiency of this procedure has already been highlighted by NGOs such as Amnesty International[35] who level that this procedure is legally overwhelming for individual applicants and could cause delays if the incorrect party is proceeded against. What is more is the question of public costs to fund this enterprise and the many representatives who would be required.

Implementation and Article 51(2) – Member States

With regards to the member states, the Charter has arguably done little to abate the complexity of the case law and render fundamental rights more effective. The Charter's binding status is not only on EU institutions but also on member states when 'implementing Union law' under Article 51(1). From the outset, it can be argued the terms 'implementing' and 'EU law' are nebulous; however, in EU law scholarship, three kinds of member state-EU relationship have been discerned over time from the pre-Charter case law which are said to trigger the application of general principles[36]: when member states are the 'hands and feet'[37] and implement and apply EU measures as agents of the EU; when member states derogate from EU law; when the enjoyment of EU rights depends on member state measures. This pre-Charter case law refers to fundamental rights in their guise as general principles; the case of Åkerberg Fransson[38], however, has confirmed that this case law has survived the Charter.

However, while these categories appear discrete and clear, case law suggests that the categorisation is an oversimplification. Hancox argues that there is authority for further fields of application[39], put as 'some other connecting factor exists between the national measures at stake and EU law'[40] or when 'some substantive rule of EC law is applicable to the situation'[41]. While this is neatly encapsulated, it is equally nebulous; a pure legal coincidence of subject-matter could be sufficient to trigger fundamental rights application[42] if national measures only need to be 'connected in part'[43] as in Fransson. These vague terms leave member states, and EU citizens, with great legal uncertainty. Even when we attempt to flesh out these terms, we are often precluded by the ECJ's failure to 'fully explain its conclusions'[44]. Post-Charter, the ramifications have left 'perplexing inconsistencies in the

[35] For example: *Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE)*.
[36] E. Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: *Åkerberg Fransson*', pg. 1418.
[37] LFM. Besselink, 'The Member States, the national constitutions and the scope of the Charter', pg. 78.
[38] Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2012.
[39] E. Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: *Åkerberg Fransson*', pg. 1421, citing Case C-555/07 *Seda Kucukdevici* [2010] ECR I-365.
[40] A. Prechal, 'Competence creep and general principles of law', pg.8.
[41] Case C-427/06,
[42] Editorial comments, 'The scope of application of the general principles of Union law: an ever expanding Union?'
[43] Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, EU:C:2012. Judgement, para 24.
[44] E. Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: *Åkerberg Fransson*', pg. 1421 citing Case C-71/02 *Herbert Karner* [2004] EC I-3025.

case law'[45], evident particularly in the *Kucukdeveci*[46] species of case law where no explanation is given for the lack of application of the Charter[47]. While, with committed academic rigour, scholars may neatly explain the connecting warrant, plugging the various legal lacunae, this is unacceptable and arguably inaccessible to the average EU citizen. In a sphere of law which is so intimate and 'fundamental' to EU citizens, member states, their lawyers and their citizens ought to be able to understand their position without academic guesswork.

Another issue for member states is the nature of the rights themselves. What aimed to codify and simplify fundamental rights terrain, the Charter instead introduces an unhelpful distinction between 'rights' and 'principles' in its preamble, Article 51(1) and expands thereupon in Article 52(5). Provisions that contain principles cannot 'be turned into direct and judicially enforceable claims for positive action' and instead constitute interpretative tools which only bear judicial congnisability when construing acts and ruling on their validity. While Article 52(5) aimed to abate legal uncertainty, discerning rights from principles can be challenging.

Firstly, the Explanations do not assist with the distinction and in fact exacerbate matters by referencing that some Articles contain both rights and principles (e.g. 23, 33 and 34). Secondly, even if an Article expressly refers to the term 'right' (e.g. rights of the elderly in Article 25 CFR), it is clear in some cases from the language and level of generality present that 'we are in the presence of a principle'[48] (many other social rights take the same guise) [49]. It has been argued that distinguishing rights from principles is a multi-levelled approach, assessing a variety of factors including the precision of the objective, how instantaneously operational the right is and so forth[50]. However, this is arguably quite an ineffective and laborious task; not least because this task precedes the challenges of 'implementation' discussed above. It, again, mars the 'indivisible' status of human rights the Charter set out to achieve and blurs the transparency with which we ought to be able to recognise our fundamental rights.

Concluding Notes

One can certainly understand that something can be confusing but efficient; however, this paper has attempted to demonstrate the Charter's failure both to pacify confusion and, further, bolster efficiency. For the EU, a procedurally messy, and still unrealised, accession to the ECHR has illustrated that concerns of power and supremacy still traverse human rights terrain. For member states, as *Fransson* has confirmed, the old case law has survived the Charter, importing with that the inherent confusion of the ECJ's piecemeal approach. Decades on, it remains unacceptable that the contours of 'implementation' are still contested and in fact blurred further by the Charter's conflicting terminology. With a looming Brexit, cessation means that the Charter's effects will be

[45] *Idem,* pg.1422.
[46] Case C-555/07, *Seda Kucukdeveci*[2010] ECR I-365.
[47] See for example: Case C-147/08, *Roemer* [2011] ECR I-3591 where non-discrimination is addressed with the general principle rather than Article 21(1) CFR. See also: Case C-282/10 *Maribel Dominguez*, judgement of 24 Jan. 2012 where reliance for the right to annual paid leave was not upon a general principle or Article 31(2) CFR but on a legal analysis of Article 7 of Directive 2003/88.
[48] S. Peers, T. Hervey and J.Kenner, *The EU Charter of Fundamental Rights: A Commentary*, pg. 1508.
[49] Other examples include: Article 26, integration of persons with disabilities; Article 35, health care; Article 36, access to services of general economic interests.
[50] S. Peers, T. Hervey and J.Kenner,*The EU Charter of Fundamental Rights: A Commentary*, pg. 1507.

residual at best[51]; indeed, why should it be more when it hardly represented 'a sea of change'[52] and we (the UK) already possess the firepower of domestic protection and ECHR regulation. Judicial creativity dangerously tampered with the foundation of what was chiefly economic legal architecture. Indeed, could competing hierarchies and conceptual duality *ever* render fundamental rights clear and efficient?[53] Recent cases, such as *Laval*[54] and *Viking*[55], underline the ECJ's economic priorities[56]; unless there is more commitment to normative harmony (or even singularity), fundamental rights will remain an 'afterthought'.

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[51] See rapporteurs J. Murkens and S.Trotter, 'The implications of Brexit for fundamental rights protection in the UK': an LSE Commission on the Future of Britain in Europe.
[52] A.G. Sharpston at [51] in *Opinion* ECLI:EU:2012:648 for Case C-396/11 *Radu* ECLI:EU:C:2013:39.
[53]See generally: H. Westermark, 'The Balance between Fundamental Freedoms and Fundamental Rights in the European Community'.
[54] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet, Svenska Byggnadsarbetareforbundets avdelning 1, Byggettan and Svenska Elektrikerforbunde* ECR 2007 I-11767.
[55] Case C-43 8/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Line Eesti* ECR 2007 1-10779.
[56] See C. Watson, 'Fundamental freedoms versus fundamental rights – the folly of the EU's denial over its economic core', pg.50.

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