

TEMPTED BY RIGHTS: THE EUROPEAN UNION AND ITS NEW CHARTER OF FUNDAMENTAL RIGHTS

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In June 1999, the Cologne European Council resolved that "at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a charter and thereby made more evident."¹ This charter, the Council continued, "should contain the fundamental rights and freedoms as well as the basic procedural rights guaranteed by the *European Convention for the Human Rights and Fundamental Freedoms*² and derived from the constitutional traditions common to the Member States, as general principles of Community law."³ The charter should "also include the fundamental rights that pertain only to the Union's citizens," and also those "economic and social rights" to be found in Article 136 of the *Community Treaty*.⁴

There is an immediate past history to this resolution. Article F2 of the *Maastricht Treaty on European Union* attempted to legitimate the proclaimed "new stage in the process of creating an ever closer union among the peoples of Europe" with the assertion that the "Union shall respect fundamental rights, as guaranteed by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ... [and] ... as they result from the constitutional traditions common to the member

states."⁵ Such rights would be respected "as general principles of Community law."⁶ The fact that Article F2 was entirely non-justiciable, however, rather detracted from its impact.⁷

Debate about the status of Article F2 was further intensified in the context of the European Court of Justice's Opinion [ECJ] that the Council did not have the authority to accede to the *European Convention*.⁸ Spotting the potential hazards which attached to the idea of incorporating the *Convention* into an established body of 'general' principles of law, the Court affirmed that whilst "[r]espect for human rights is therefore a precondition of the lawfulness of Community acts," as indeed Article F2 implied, accession to the *Convention* entailed "the entry of the Community into a distinct international institutional system."⁹ Only a *Union Treaty* amendment, the Court concluded, could facilitate an act of such "constitutional significance."¹⁰

The Court's ruling, however, only seemed to intensify the Union's longing for rights. The *Amsterdam Treaty* proclaimed a redrafted Article F (now 6)¹¹, the first section of which added that "[t]he Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law,

¹ Presidency Conclusions, para. 45, Annex IV. The Conclusions can be found at

<<http://www.europa.eu.int/en/record/cologne.html>>

² *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur. T.S. 5, 213 U.N.T.S. 221 [hereinafter the *European Convention*].

³ *Ibid.*

⁴ *Ibid.* at para. 46. This paper refers to various European treaties. It will be useful to briefly explain the content of those treaties and how they relate to each other. *Treaty on European Union*, signed at Maastricht and commonly known as the *Maastricht Treaty*, inheres the existing *European Community Treaty*, commonly known as the *Rome Treaty*, together with two new "pillars," on Justice and Home Affairs, and Common Foreign and Security Policy. The *Union* and *Community* treaties were consolidated further following the Amsterdam Council in 1997. The consolidated version is commonly known as the *Amsterdam Treaty*. The consolidated *Amsterdam Treaty*, including the *Union* and *Community* treaties can, be found at *EC Consolidated Version of the Treaty on European Union*, (1997) O.J.C. 340/145.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ See D. Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30 C.M.L. Rev. 17 at 20-1, 62-3 and 66-9, commenting at the time on the conceptual absurdity of trying to proclaim non-justiciable 'fundamental' rights.

⁸ Opinion 2/94 [1996] ECR I-1759. For a discussion of the implications of Opinion 2.94, see D. McGoldrick, "The European Union after Amsterdam: An Organisation with General Human Rights Competence?" in D. O'Keeffe & P. Twomey, eds., *Legal Issues of the Amsterdam Treaty* (Oxford: Hart Publications, 1999) 249 at 255-6.

⁹ Opinion 2/94, *supra* note 8 at 1787.

¹⁰ *Ibid.* at 1789.

¹¹ The *Amsterdam Treaty* renumbered all Articles of the *Union* and *Community* Treaties.

principles which are common to the Member States."¹² The yearning for some kind of discernible Union public philosophy was further evidenced by the new Article 13 of the *Community Treaty* which pronounced that the Council "may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."¹³

The charter that was finally adopted, with declaratory force, at the Nice Council in December 2000, contains fifty-four rights presented in seven "chapters."¹⁴ We will take a closer look at certain aspects of the *Union Charter* in the final part of this article. But first we will consider two particular and suggestive contexts; that of the Community's own rather fraught experience of 'rights' jurisprudence, and that of the *Canadian Charter of Rights and Freedoms*.¹⁵

BEEN HERE, DONE THAT?

The European Community was tempted by rights from its very inception. Articles 9–36 and 48–56 of the *Rome Treaty*, relating to the free movement of goods and person, services and capital, were couched in terms of rights. Indeed, Article 48 expressly referred to a "right" of free movement for workers. Of course, it was a 'right' that was hedged by various "limitations justified on grounds of public policy, public security or public health," and cases such as *Van Duyn*,¹⁶ and more recently *Rutili*¹⁷ and *Konstantinidis*,¹⁸ have graphically described the extent to which the 'right', as a gift of the member-states, falls somewhere short of being 'fundamental'.

The argument that a 'right' of free movement can only really make sense if it is couched as a 'human',

rather than merely an 'economic' right has been voiced for some time.¹⁹ Time and again, case law relating to the free movement of persons or services has revealed the difficulty in demarcating rights. In *Grogan*, it was plainly apparent that market 'rights' could not be distinguished from the infinitely more difficult 'human' variety.²⁰ Similarly, the definition of who actually qualifies as a 'worker', or a member of a worker's 'family', and is thus in possession of a 'right' to free movement, has proved to be a jurisprudential minefield.²¹

Unsurprisingly, the kind of problems encountered in the clash between 'market' and 'human' rights have been encountered in the equally vexed areas of social, legal and civil rights. Various agonies have been experienced in trying to make sense of mooted fundamental rights to "fair labour conditions," to fish, or to hear the reasons for decisions made by administrative bodies.²² All kinds of rights have been tossed around as 'fundamental': some as fundamental human rights, some as fundamental social rights, some as fundamental legal rights.²³ But precisely what 'fundamental' actually means is anybody's guess.

Some of the most compelling examples of the inherent conceptual confusion which attaches to such

¹² The new Article 7 carries a collateral threat, for if the Council should "determine the existence of a serious and persistent breach by a Member State of the principles mentioned in Article 6.1," then it can, acting by qualified majority, "decide to suspend certain rights deriving from this Treaty to the Member State in question." For a discussion of Articles 6 and 7, see I. Ward, "Europe and the Principles of Article 6" (2000) 11 *Kings College L.J.* 105.

¹³ For commentaries on Article 13, see T. Hervey, "Putting Europe's House in Order: Racism, Race Discrimination and Xenophobia after the Treaty of Amsterdam" in O'Keeffe & Twomey, *supra* note 8 at 329; and C. Barnard, "Article 13: Through the Looking Glass of Union Citizenship 2" in O'Keeffe and Twomey, *supra* note 8 at 375.

¹⁴ Full text of the charter can be found online: Council of European Union, <<http://db.consilium.eu.int>> (last modified: 27 April 2001) [hereinafter the *Union Charter*].

¹⁵ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Canadian Charter*].

¹⁶ *Van Duyn v. Home Office*, 41/74 [1974] ECR 1337.

¹⁷ *Rutili v. Minister for the Interior*, 36/75 [1975] ECR 1219.

¹⁸ *Konstantinidis*, C-168/91, [1993] ECR I-1191.

¹⁹ For the suggestion that free movement rights should be seen to be human rights, see R. Dallen, "An Overview of European Community Protection of Human Rights, with some special reference to the UK" (1990) 27 *C.M.L. Rev.* 761 at 777–9, and more recently, C. Lyons, "The Politics of Alterity and Exclusion in the European Union" in P. Fitzpatrick & J. Bergeron, eds., *Europe's Other: European Law Between Modernity and Postmodernity* (London: Ashgate, 1998) 157 at 160–3.

²⁰ *Grogan*, C-159/90 [1991] ECR I-4685. For a critical commentary, see D. Phelan, "Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union" (1992) 55 *Mod. L. Rev.* 670 at 684.

²¹ See e.g. *Netherlands v. Reed*, [1986] ECR 1296; *Diatta v. Land Berlin*, 267/83 [1985] ECR 567. For interesting discussions of this kind of problem, see L. Ackers, "Women, Citizenship and European Community Law: The Gender Implications of the Free Movement Provisions" (1994) *J. Soc. Welfare & Fam. L.* 391; and T. Hervey, "Migrant Workers and their Families in the European Union: The Pervasive Market Ideology of the Community law" in J. Shaw & G. More, eds., *New Legal Dynamics of European Union* (Oxford: Oxford University Press, 1995) 91.

²² The latter idea was considered by the ECJ in *UNCETEF v. Heylens*, 222/86 [1987] ECR4097. For a commentary on *Heylens* and similar cases which venture the idea that certain legal rights might be better understood to be human rights, see J. Schwarze, "Tendencies Towards a Common Administrative Law in Europe" (1991) 16 *Eur. L. Rev.* 3. For a discussion of a "right to fair labour conditions" see H. Schermers, "Is there a Fundamental Right to Strike?" (1989) 9 *Y.B. Eur. L.* 1225. For the thought that there might be a 'human right' to fish, see R. Churchill & N. Foster, "Double Standards in Human Rights?: The Treatment of Spanish Fishermen by the European Community" (1987) 12 *Eur. L. Rev.* 430.

²³ See G. deBurca, "Fundamental Human Rights and the Reach of EC Law" (1993) 13 *Oxford J. Leg. Stud.* 283 at 316.

attempts to rationalise 'fundamental' or 'human' from other kinds of social or legal rights relate to gender equality. For example, it has been argued that formal equality rights, being derived from *Community Treaty* articles, such as 141 (formerly 119), are in essence economic rights, dependent upon policies of market-levelling for their legitimacy. Such rights fail to take into account deeper questions of substantive inequality, and actually enhance these inequalities, casting outside the parameters of European law an overwhelming majority of women who are not deemed to be doing 'work' as it is defined by the ECJ.²⁴

Given the innate, and seemingly irreducible problems thrown up by trying to work out just what a free movement 'right' is, or a 'right' to equal treatment, it is perhaps unsurprising that the ECJ's more immediate attempt to work out what 'human rights' might be has been riven with inconsistency and ambiguity. In the heady days of 1970, the ECJ seemed happy to accept the proposition that 'fundamental' rights could be found in the "philosophical, political and legal substratum common to the member states."²⁵ But by the late 1980s the plot had thickened. In *Wachauf*, in 1989, the ECJ was careful to deny the thought that any 'fundamental' rights might be 'absolute'. Community rights, it affirmed, are always balanced by their "social function" and the overriding "objectives" of market.²⁶

As we shall see, the need to limit 'fundamental' rights with other 'objectives' of the Union finds explicit reference in the new *Union Charter*. Moreover, as we shall also see, there is a comparable statement in section 1 of the *Canadian Charter*. Fundamental rights are always limited by juridical perceptions of the proper relation between individual and political community.

The ECJ has clearly preferred an idea of rights that attaches to the liberal ideal of the rational economic actor, an attraction which is endemic to the liberal legal paradigm.²⁷ A political community that establishes

'rights' necessarily affirms for itself the authority to establish who benefits from these rights, and under what circumstances. Rights are granted to idealised 'subjects,' in the case of the European Community, to rational economic actors. The list of those who fall outside this category is considerable. It includes most people who are not employed, or at least do not do 'work' as this is recognised by the ECJ, and thus includes a vastly disproportionate number of women and members of ethnic minorities, as well as a considerable number of those who have entered the community as migrant workers, or who seek to enter the Community as asylum seekers.²⁸ In other words, it excludes precisely those most in need of protection against discrimination, disadvantage and inequality.

Unsurprisingly, there has been much critical commentary on the Community's approach to 'rights'.²⁹ Some have tried valiantly to make sense out of the Community's rights-talk. In an influential article, K. Lenaerts suggested that there might be a "concentric circles" model of rights, with "fundamental" rights in the inner circle, and then "general principles," citizenship rights and "aspirational" rights occupying the outer reaches.³⁰ Once again, however, much depends upon trying to distinguish cleanly between the inner and outer rings of 'rights'.

Ultimately someone, somewhere (and this means some judge in some court) has to decide for him or herself what is a 'right' in European law and what is not, and when alternative rights are vying with each other, which matters more, and to whom and why? Working out what rights are is a tricky business, and the history of the ECJ's attempts to do so does not suggest any particular affinity with either the concept or its practical resolution.

Europe, however, is captivated by rights-talk. One of the more immediate reasons for this enthusiasm is the perceived need to address the Union's "crisis of legitimacy."³¹ It is the attempt to resolve, or at least ameliorate, this 'crisis' which led to Article 6 of the *Union Treaty*, as well as the much-vaunted, and much-criticised, invocation of political citizenship in Article 8

²⁴ Amongst a considerable literature, see G. More, "Equal Treatment of the Sexes in European Community Law: What Does Equal Mean?" (1993) 1 *Feminist Leg. Stud.* 45 at 64-74; K. Scheiwe, "EC Law's Unequal Treatment of the Family: The Case Law of the European Court of Justice on Rules Prohibiting Discrimination on Grounds of Sex and Nationality" (1994) 3 *Soc. & Leg. Stud.* 243 at 248-51, 255, 261; and H. Fenwick & T. Hervey, "Sex Equality in the Single Market: New Directions for the European Court of Justice" (1995) 32 *C. M. L. Rev.* 443 at 443, 449.

²⁵ *International Handelsgesellschaft v. Einfuhr - uno Vorraatsstelle Getreide*, 11/70 [1970] ECR 1125 at 1135.

²⁶ *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, 5/88 [1989] ECR 2609.

²⁷ For an influential critique of the ECJ's instrumental application of 'rights,' see J. Coppel & A. O'Neill, "The European Court of Justice: Taking Rights Seriously?" (1992) 12 *Oxford J. Leg. Stud.*

227.

²⁸ See J. Weiler, "Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique" (1992) 3 *Eur. J. Int'l L.* 65.

²⁹ See, for example, P. Twomey, "The European Union: three Pillars without a Human Rights Foundation" in O'Keefe and Twomey, *supra* note 8 at 121.

³⁰ "Fundamental Rights to be included in a Community Catalogue" (1991) 16 *Eur. L. Rev.* 367.

³¹ See G. de Burca, "The Quest for Legitimacy in the European Union" (1996) 59 *Mod. L. Rev.* 349.

(now 17–19) of the *Community Treaty*.³² The crisis of legitimacy is attached to deeper cultural questions of identity. Moreover, by articulating an overtly political aspiration during the 1990s, to complete some form of deeper political 'union,' the 'new' Europe has dramatically raised the stakes. If there is going to be a political 'union,' complete with a charter of 'fundamental' rights, then the need to address the legitimacy deficit becomes ever more pressing.

J. Weiler has placed the issue of legitimacy at the heart of his critique of European legal and political integration, charting a critical disjuncture between legal and political rights the result of which is a dual "deficit," of democracy and legitimacy.³³ As the decades have progressed, these deficits have led to a fundamental "crisis of ideals."³⁴ Weiler's solution lies in a revitalised conception of *demos*, the carving out of a wider public space within which individual participation in political discourse can be nurtured, together with a reinvigorated public philosophy of human and civil 'rights'.³⁵

The idea of some kind of alternative 'dialogic' democracy has become increasingly popular.³⁶ One of its more fervent exponents is J. Habermas, who advocates a rejuvenated European "liberal political culture" founded on "constitutional principles of human rights and democracy."³⁷ Such a "culture" will hold Europe together "if democratic citizenship can deliver in terms not only of liberal and political rights, but of social and cultural rights as well."³⁸ The agreed solution appears to be more rights. L. Siedentop addresses the absence of "democratic legitimacy" in Europe by reinvesting, not merely an alternative form of "democratic society," but also a rejuvenated conception of right, one which reinforces a "connection between moral equality" and juridical

"right."³⁹ Likewise, N. MacCormick stridently affirms the need for a revitalized conception of "civic" rights.⁴⁰

The solution to the various crises of 'legitimacy' and 'governance' and 'ideals' does not, then, appear to lie in a radical rethinking of European public philosophy. Yet, there are dissenting voices. It has been argued that the 'crisis' of European 'legitimacy' is rooted in a continuing affinity with the "mythic" charms of liberal legalism.⁴¹ Carol Lyons has recently dismissed the constitutional "friperies" of the Union treaties and its "language of rights window-dressing."⁴² It is this over-reliance which has left the 'new' Europe critically bereft of a "moral dimension" to its putative public philosophy.⁴³

Rights-talk may indeed dominate current European debate, and a charter of 'rights' may be inevitable. But the critique of rights is not without voice, and the advent of the *Union Charter* makes it increasingly likely that the voice will get louder still. As we shall see in the next part of this article, the experience of the *Canadian Charter* has served to underline the inadequacies of "rights window-dressing," placing the critique of liberal legalism in ever sharper light. The advent of a *Union Charter* is just as likely to underline the same inadequacies in the overt and oppressive legalism of the 'new' Europe.

ANOTHER TIME, ANOTHER PLACE

In 1982, Canada adopted a *Charter of Rights and Freedoms*, incorporating it in Part 1 of its *Constitution Act*.⁴⁴ It provides for an interesting comparison with the *Union Charter*: first, because a number of its more controversial sections, most particularly those which seek to define its constitutional status, bear a striking resemblance to equivalent Articles in the European Charter, and second, because the critique of rights which has attached to the *Canadian Charter* will be just as apposite for the Union's.

Perhaps the most controversial of the *Canadian Charter's* thirty-four sections are sections 1 and 33. Section 1 states that the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified

³² For discussion of the citizenship provisions and their limitations, see N. Reich, "A European Constitution for Citizens: Reflections on the Rethinking of Union and Community Law" (1997) 3 *Eur. L. J.* 131; and J. Shaw, "The Interpretation of European Union Citizenship" (1998) 61 *Mod. L. Rev.* 293.

³³ J. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and other Essays on European Integration* (Cambridge: Cambridge University Press, 1999) at 259.

³⁴ *Ibid.*

³⁵ *Ibid.* at 77–84, 102–29, 258–60, 279–82.

³⁶ See eg. J. Shaw, "Process and Constitutional Discourse in the European Union" 27 (2000) *J.L. & Soc.* 4; A. Verhoeven, "Europe Beyond Westphalia: Can Postnational Thinking Cure Europe's Democracy Deficit" (1998) 5 *Maastricht J. Eur. & Comp. L.* 369.

³⁷ "The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship" (1996) 9 *Ratio Juris* 125 at 133–7.

³⁸ *Ibid.* at 134.

³⁹ *Democracy in Europe* (London: Penguin, 2000) at 1, 59–60, 204–5, 212–14.

⁴⁰ *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) at 131–3, 143–55, 185–9.

⁴¹ See L. Hansen & M. Williams, "The Myths of Europe: Legitimacy, Community and the Crisis of the EU" (1999) 37 *J. C. M. Stud.* 233.

⁴² Lyons, *supra* note 19 at 157.

⁴³ *Ibid.* at 171.

⁴⁴ See *supra* note 15.

in a free and democratic society." It has been suggested that Section 1 balances nineteenth century liberalism with twentieth century communitarianism.⁴⁵ It has certainly been interpreted by the Canadian Supreme Court as an instruction to maintain a "proper balance between the interests of society and the rights of individuals" and therefore "does not require, in addition to the legislative authority, a system of prior authorization."⁴⁶

Section 33 of the *Canadian Charter* has been similarly controversial, granting the authority to "Parliament or the legislature of a province" to "expressly declare in an Act of Parliament or of the legislature" that "the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." This provision was controversially used by the Quebec government⁴⁷ as a means of reversing a Supreme Court decision, based on section 2, which had struck down provincial legislation prohibiting the use of any language other than French on commercial signs.⁴⁸

Sections 1 and 33 have a special resonance for the *Union Charter*. Section 1 speaks the language of proportionality, whilst Section 33 speaks that of subsidiarity. Moreover, as we shall see in the final part of this article, Articles 51 and 52 of the prospective *Union Charter* attempt to provide very similar constitutional determinants. Article 52 seeks to balance all the rights in the *Charter* against the "necessary" and genuine "objectives" of the Union. Article 51 states that the various "provisions" of the *Union Charter* are to be understood "with due regard to the principle of subsidiarity." Indeed, the defining feature of the new *Union Charter* is a pervasive anxiety not to impinge upon the perceived sensitivities of the member states.

Between sections 1 and 33, the *Canadian Charter* contains a number of particularised rights and principles. It is here that the problems of the determinancy and substantive meaning have been most readily evident, and once again these are just the kind of problems which are likely to afflict the putative *Union Charter*. Section 15's "Equality Rights" provide a very good example, and in the context of the *Union Charter*'s comparable chapter of

"equality" rights, a very salutary one. The Canadian Supreme Court, like the ECJ, has encountered the intensely political nature of these difficulties. In *Andrews*, it sought to effect "substantive and ameliorative" equality over and against formal equality;⁴⁹ a strategy which bears comparison with the Community's rather more hesitant attempts to make sense of "equal treatment" provisions.⁵⁰

Unsurprisingly, the *Canadian Charter* has attracted both applause and opprobrium, revealing in the process what one commentator has termed a "clash of constitutionalisms."⁵¹ The more positive, such as Justice Rosalie Abella, champion the *Canadian Charter* for its ability to generate a more popular interest in rights-talk, and in so doing foster a greater sense of citizen participation in political discourse.⁵² R. Penner takes the same line, applauding the ability of the *Canadian Charter* to act as an instrument for "engaged constitutional politics" and for the promotion of a "culture of liberty."⁵³

Others are rather less impressed, if for different reasons. Some, such as D. Beatty, regret the decline in juristic zeal, detecting a waning of interest on the Supreme Court bench. Constrained by the political injunction articulated in section 1, *Charter* 'rights' have become little more than "standards" of "rationality" and "proportionality."⁵⁴ Most regrettable perhaps are the interpretive constraints that the Supreme Court has adopted when seeking to effect a balance between individual and community. Thus, section 15 equality rights have been more commonly invoked by men against affirmative action programmes, than by women against structural discrimination,⁵⁵ whilst the "right to life, liberty and security of the person" in section 7, compromised by the caveat "except in accordance with the principles of fundamental justice," has been unable to assist those who have claimed the right to decide when and how to end their lives.⁵⁶

⁴⁵ For a discussion of section 1 and its attempt to balance alternative ideologies, see R. Penner, "The Canadian Experience with the Charter of Rights: Are there Lessons for the United Kingdom?" (1996) *Pub. L.* 104 at 108-11; and E. Alexander, "The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms" (1990) 40 *U.T.L.J.* 31-7.

⁴⁶ *Comite paritaire v. Potash*, [1994] 2 S.C.R. 406 at 409.

⁴⁷ *An Act to Amend the Charter of the French Language*, S.Q. 1988, c. 54, s. 10.

⁴⁸ See *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712; and Penner, *supra* note 45 at 109-110.

⁴⁹ *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143 at 178.

⁵⁰ See references *supra* note 24.

⁵¹ For an overview of reactions to the Charter, see T. Bateman, "Rights Application Doctrine and the Clash of Constitutionalisms in Canada" (1998) 31 *Can. J. Pol. Sci.* 3.

⁵² R. Silberman Abella, "A Generation of Human Rights: Looking Back to the Future" (1998) 36 *Osgoode Hall L.J.* 595 at 601-2.

⁵³ *Supra* note 45 at 112-21, 123-5.

⁵⁴ D. Beatty, "The Canadian Charter of Rights: Lessons and Laments" (1997) 60 *Mod. L. Rev.* 481. For a similar conclusion, see J. Kelly, "The Charter of Rights and Freedoms and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997" (1999) 37 *Osgoode Hall L. J.* 625, concluding at 628 that the Supreme Court has settled into a "moderately activist" role.

⁵⁵ For commentaries, see T. Ison, "A Constitutional Bill of Rights - The Canadian Experience" (1997) 60 *Mod. L. Rev.* 499 at 499-500.

⁵⁶ See e.g. *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519.

The *Union Charter*, as we shall see, articulates very similar rights to those found in sections 7 and 15 of the *Canadian Charter*, and the problems faced will be just the same. The kind of rights articulated in section 7 are notoriously difficult to define, as cases involving abortion 'rights' vividly affirm. In the notorious *Daigle* case,⁵⁷ provincial and federal Canadian courts came to very different conclusions as to what the "right to life, liberty and security of the person" might mean under the *Quebec Charter of Human Rights and Freedoms*.⁵⁸ And whilst the Supreme Court's ultimate support for a woman's desire to have an abortion against the wishes of the putative father may have been lauded as progressive, the entire saga only reinforced the impression that the autonomy of the "autonomous self," an image so beloved of liberal jurisprudence, was something decided by the court and not the self.⁵⁹ The consonance between cases such as *Daigle* and *Grogan* is immediate.⁶⁰

For some charter critics, the problems encountered in trying to balance 'public' and 'private' interests, and in trying to ascertain the meaning of concepts such as 'liberty' or 'equality' or even 'life' are endemic to liberal legalism. This is sufficient reason to abandon 'rights-talk' altogether. Rights-talk, it is suggested, creates an illusion of legitimacy which not only masks deeper, structural injustices abroad in modern society, but which also deflects alternative strategies which might seek to redress these injustices.⁶¹

Such an attitude is common amongst critical scholars and must be placed within a wider critique of liberal legalism.⁶² In this vein, A. Hutchinson describes a Canada still waiting for the fulfillment of the promise of the *Canadian Charter*, trapped in a "demi-world of exquisite perdition."⁶³ The state of suspended animation is a conscious strategy designed to preclude genuine social reform, the "triumph of legal liberalism," as it is encapsulated most obviously in sections 1 and 33, representing the defeat of "social democracy."⁶⁴

According to these critics, the *Canadian Charter* is a deeply ideological instrument designed to perpetuate the power of certain vested economic interests, most obviously corporations. By defining such entities as 'private', liberal legal jurisprudence protects corporations from the rigours of documents such as the *Canadian Charter*. Section 32 specifically limits the application of the *Canadian Charter* to "the Parliament and government of Canada." And, accordingly, in cases such as *Dolphin Delivery*, the Supreme Court has happily subscribed to the idea that constitutional 'duties' cannot be owed by one 'private' party to another, no matter how public the power of that private party.⁶⁵

According to *Charter* critics, it is absurd to rationalise these parties as 'private' actors. Such bodies wield considerable power not only within markets, but within society itself, and it makes no sense to try to fit them within the fiction of a public-private distinction. Constitutional rights should attach immediately to citizens. The arguments surrounding the supposed virtues and vices of 'horizontal effect' enjoy an immediate resonance with those that surround the ECJ's refusal to develop a principle of 'horizontal effect' in Community law, and are revisited once again in the prospective *Union Charter*. Article 51 specifically addresses the "provisions" of the *Union Charter* to "institutions" and "bodies" of the Union. Though they claim to be 'fundamental', *Union Charter* rights are clearly not intended to be universal. As we shall see, there will be certain types of rights owed by certain types of bodies in certain types of situations.

A related critique concentrates on the litigation strategies of corporations. The resonance between the Canadian case *R. v. Big M Drug Mart*⁶⁶ and the Sunday trading cases in Community law⁶⁷ is as strong as that between *Daigle* and *Grogan*, and once again, there is a precise equivalent of the right to "freedom of conscience and religion" in Article 11 of the *Union Charter*.⁶⁸

⁵⁷ *Tremblay v. Daigle*, [1989] 2 S.C.R. 530.

⁵⁸ R.S.Q. c. C-12.

⁵⁹ See A. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) at 110-21.

⁶⁰ *Grogan*, *supra* note 20. For a commentary see Phelan, *supra* note 20.

⁶¹ See eg. D. Herman, "Beyond the Rights Debate" (1993) 2 Soc. & Leg. Stud. 25 at 32; and D. Herman, "The Good, the Bad, and the Smugly: Perspectives on the Canadian Charter of Rights and Freedoms" (1994) 14 Oxford J. Leg. Stud. 589.

⁶² For classic examples of such critiques of rights, see J. Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 Yale L. J. 1; and M. Tushnet, "An Essay on Rights" (1984) 62 Texas L. Rev. 1363.

⁶³ *Supra* note 59 at 4-5.

⁶⁴ *Ibid.* at 19-24.

⁶⁵ *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573. For commentaries, see Hutchinson, *supra* note 59 at 128-52; P. Hogg, "The *Dolphin Delivery* Case: The Application of the *Charter* to Private Action" (1987) 51 Sask. L. Rev. 273; and D. Beatty, "Constitutional Conceits: The Coercive Authority of the Courts" (1987) 37 U.T.L.J. 83.

⁶⁶ [1985] 1 S.C.R. 295.

⁶⁷ See e.g. *Torfaen, Borough Council v. B & Q plc* C-145/88 [1989] ECR 3851; *Shrewsbury*, [1990] 3 CMLR 535; *Council of the City of Stoke-on-Trent and Norwich City Council v. B & Q plc*, C-169/91 [1992] ECR I-6635.

⁶⁸ For commentaries on the Sunday Trading litigation and its political aspects, see R. Rawlings, "The Eurolaw Game: Some Deductions from a Saga" (1993) 20 J. L. & Society 309; and C. Barnard, "Sunday Trading: A Drama in Five Acts" (1994) 57 Mod. L. Rev. 449.

The potential hazards which attach to the fictions of liberal legalism have been noted by certain Canadian Supreme Court judges. In *Edwards Books*, Chief Justice Dickson warned that the *Canadian Charter* should not "become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the conditions of less advantaged persons."⁶⁹ Similarly, in *Thomson Newspapers*, Justice LaForest recognised the potential injustice of protecting "oppressive" private organisations from the rigours of the *Canadian Charter*.⁷⁰ But, however laudable may be their intent, such observations are a ready admission that the *Canadian Charter* is founded on a number of barely tenable legalistic fictions. Moreover, it is doubtful whether any ECJ judge would be quite so willing to concede the fragility of these fictions, and seek to ameliorate them by taking a creative and progressive approach. It is certainly not the kind approach, nor the kind of rhetoric, which commonly emanates from the European Court. Social and political injustices require social and political solutions. They should not, and cannot, be left to judicial whimsy.

THE SHAPE OF THINGS TO COME?

Both the Canadian experience, and that of the Community, suggests that dealing with rights can be a tricky business. The *Union Charter* will undoubtedly bring with it a number of constitutional, as well as conceptual, interpretive and substantive problems. It cannot do otherwise. Before looking at some of these potential hazards contained within the prospective *Union Charter* articles, it is important to first consider some of the overarching political and constitutional questions.

The political question is the democratic question. As we have seen, advocates of rights invariably champion the participatory democratic potential of rights-talk.⁷¹ Much critical commentary on the present state of Europe focuses on the absence of political debate.⁷² A charter might address these problems. It is generally recognised, by both champions and critics, that the advent of a charter in Canada did much to promote public debate, and still continues to do so.⁷³ As such, the *Canadian Charter* enhances both legitimacy and democracy. Unfortunately, the drafting of the *Union Charter* has been typically European: the plaything of institutionalised interest groups, essentially bureaucratic, barely noticed by the overwhelming majority of Europeans. Although processes of deliberation have been nominally outwith

the executive processes of the intergovernmental councils, in reality the democratic benefits of a charter seem to be largely lost already.

The second set of problems are constitutional, and potentially vast. The central question of justiciability is of immense importance, and overshadows all further discussion. After intense lobbying by the British government, the Council relegated the status of the *Union Charter* to that of a mere "Declaration." What this will mean in reality remains to be seen. But it is clearly intended, for the moment at least, that the *Union Charter* will not be directly justiciable. It will certainly be persuasive to some degree, but how persuasive is anybody's guess.

At the same time, of course, this present status is not set in stone. Charters of rights never are. Status can change in time, and almost certainly will change in time. The most pertinent example here is clearly the *Social Charter*, introduced in declaratory form in 1989,⁷⁴ radically recast and incorporated into the Treaty framework in 1992 in the form of a Protocol, and then formally incorporated into the heart of the *Treaty* at Amsterdam.⁷⁵ It is quite possible that the same process awaits the *Union Charter of Fundamental Rights*. It is also quite possible that many of its rights, even if not immediately justiciable, will find their way into Union law through the creative drafting of various directives in the intervening years. This, again, was the experience of many of the 'rights' written into the original *Social Charter*.⁷⁶

The questions of justiciability and competence are approached in the final chapter of the *Union Charter*, "General Provisions," the tenor of which clearly seeks to define limits to the *Charter*, but the existence of which militates precisely the other way. The "General Provisions" tend to protest too much. Articles 51, 52 and 53, in particular, are clearly intended to provide some kind of constitutional definition for the *Charter*, and it must be questioned why a declaratory charter should need quite so much definition. There is tangible anxiety about these three Articles, a sense that constitutional markers must be in place, not just for the present, but also perhaps for the future; markers, moreover, which might serve to guide any errant ECJ or national judges who are tempted

⁶⁹ *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713 at 779.

⁷⁰ *Thomson Newspapers v. Canada*, [1990] 1 S.C.R. 425 at 510.

⁷¹ See commentary and notes, *supra* notes 31-35.

⁷² See Seidentop, *supra* note 39.

⁷³ See Penner, *supra* note 45 at 104.

⁷⁴ See Commission of the European Communities, *Social Europe 1/90*, (EC Commission 1990).

⁷⁵ For the incorporated Protocol, see the *Consolidated Version of the Treaty on European Union*, *supra* note 4 at 239.

⁷⁶ For a commentary on the passage of Community social policy from charter to treaty, see C. Barnard, "EC 'Social' Policy" in P. Craig & G. de Burca, eds., *The Evolution of EU Law* (Oxford: Oxford University Press, 1999) 479.

to seek recourse in *Charter* 'rights' whilst trying to make sense of existing Community and Union rights.

Article 51.1 states that "[t]he provisions of this Charter are addressed to 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 rights, observe the principles and promote the application thereof in accordance with their respective powers."

There are a number of points to note here. First, Article 51.1 is clearly intended to preclude any notion of horizontality. *Union Charter* rights, like those in the *Canadian Charter* and in the constitutional 'common law' of the Community, are intended for "institutions and bodies." The public-private distinction, so beloved of liberal jurisprudence, is writ large. Nominal liability will be severely restricted. The Union will not be awash with rights-claimants. The "due regard to the principle of subsidiarity," and the limitation of the *Union Charter* to Member States "only" when "implementing Union law" further enhances the sense that the *Charter* is not intended to infringe national sensitivities, any more than it is intended genuinely to empower citizens.

The prospective Article 51.2 adds that "[t]his Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties." But there is an intriguing double bind here. For if the *Union Charter* is indeed declaratory, then it carries no coercive force. Yet Article 51.2 clearly intends to limit the competence of the Community and Union. It is the kind of double bind which tends to plague supposedly declaratory statements of right. It is also the kind of double bind which tends to leave courts of law in the awkward situation of pondering whether they have the capacity to rule upon whether they have capacity to rule. Article 51 is an anxious Article, and an incoherent Article.

Article 52 is a "limitations" Article, immediately resonant of section 1 of the *Canadian Charter*, and just as likely to be just as controversial. The first part of the Article states that "[a]ny limitation on the exercise of rights and freedoms recognised by this Charter must be provided for by the law and respect the essence of those rights and freedoms." It then continues, "[s]ubject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others." Again, there is the necessary ambiguity regarding the supposed coercive power of Article 52.1 in a supposedly declaratory charter. Who is going to decide what are "necessary" limitations? Even though the *Union Charter* is declaratory, it is

clearly intended to be read in conjunction with "general interests" elsewhere defined in the Community and Union, and these are likely to be justiciable. The jurisprudential sense of Article 52 is far from clear.

The political sense, however, is rather clearer. The *Union Charter*, it seems, like the *Canadian Charter*, is written in the spirit of liberal communitarianism, desperate to balance individual interests with those of the wider community — only in the 'new' Europe, the wider interests tend to be those of that most revered of liberal fictions, the rational economic actor. European Community human rights, as we have noted, have tended to be balanced against the wider "objectives" of the *Treaty*, meaning the exclusively economic objectives contained in Article 2 of the *Community Treaty*.⁷⁷ The 'fundamental' rights of the Union will be balanced against the same "objectives," cast in the reflected light of the same mythical actor.

Article 52.2 states that *Charter* rights "which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties." The same problems recur. Is this intended to be coercive, either directly or indirectly, when read in conjunction with the equivalent rights "based" in the existing treaties? Once again, Article 52.2 is clearly intended to reinforce existing Union and Community rights. But, at the same time, it also implies that the *Union Charter* contains a number of rights which are not merely restatements of existing rights.

Article 53 states that "[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised" in various international agreements, "including" the *European Convention*, or "by the Member States' constitutions." Interpreted by whom? Clearly intended to reassure member states, and their courts, that the *Charter* does not impinge upon their existing human rights provisions, Article 53 once again smacks of an excessive anxiety.

So much for the 'constitutional' provisions of the *Union Charter*. The third critical issue is that of the interpretive and substantive meaning of the prospective "fundamental rights." As we have already seen, it is here that the rights critique tends to bite hardest.⁷⁸ A mere glance at the prospective Union rights illustrates precisely the kinds of problems which the ECJ or any other court is likely to encounter if called upon to give meaning to these rights, either in time as part of a fully enforceable

⁷⁷ See text accompanying notes 26-27, *supra*.

⁷⁸ See commentary and notes, *supra* notes 30-31.

incorporated charter, or for now as a mere declaration of existing rights.

But before addressing some of the particular Articles, it is worth noting the wonderfully vague aspirations contained in the Preamble. For if the *Union Charter* is to become fully justiciable at some time, rather than becoming merely a haunting and disconcerting juridical presence, these statements must be intended to help resolve interpretive and substantive uncertainties, and to guide the future evolution of the *Charter*. Preambles are supposed to define the overarching public philosophy of constitutional charters. So what can we make of the second paragraph of the *Union Charter's* Preamble, which suggests that the "Union is founded on the indivisible, universal principles of the dignity of men and women, freedom, equality and solidarity; it is based on the principle of democracy and the rule of law"? Presumably these principles are rather different from those that are defined by the "diversity of cultures and traditions of the peoples of Europe" lauded in the third paragraph.

Unfortunately, these are the kind of aimless rhetorical aspirations that give liberal legalism such a bad name. They are as meaningless as they are useless. The final paragraph's observation, which cannot be given any possible meaning outwith the vexed issue of justiciability, proclaims that "[t]he Union therefore recognises the rights and freedoms set out hereafter." Such claims are essentially vacuous, even in jurisdictions in which asserted rights are supposed to be directly enforceable. In the European Union, a jurisdiction in which its charter of rights is something short of directly enforceable, the depth of that vacuity is all the greater.

The various imponderables articulated in the second paragraph of the Preamble pervade the actual prospective *Charter* rights. If, in due course, any court is forced to give these alleged 'rights' meaning then the potential pitfalls are all too familiar. The classic jurisprudential hard-case scenarios loom large. Article 1 seeks to assure that "human dignity" will "be respected and protected." Does this include a right to die? Article 2 confirms that "[e]veryone has the right to life." Does this include a foetus? If a member-state court is forced to wrestle with a case such as *Daigle*, or if the ECJ is revisited with a variant of *Grogan*, will it be able to resist the temptation to consider the relevance of Article 2 of the *Charter*? And should it? The Union seems keen to assert a principled position on the issue, even if it is far from clear what that position really is.

The second and third chapters of the *Union Charter* are immersed in the language of "freedom" and "equality." There are all kinds of freedoms, including the

classical liberal rights to "liberty" (Article 6) and to "respect" for "private and family life" and the "home" (Article 7). Again, if a court is ever forced to consider what "private" means or "family" or "home," then it will find itself immersed in the kind of irreducible interpretive indeterminacies which are endemic to such alleged 'rights.' The ECJ has already shown itself to be decidedly uncertain as to what "family" means in the context of Community law. If it applied the same determination to the meaning in the context of Union 'fundamental rights', then the ideal family would be a market fiction. If it decided to adopt a broader cultural definition, then there would be alternative definitions of 'family' applicable in different parts of European law.⁷⁹

Determinative problems are pervasive. Article 10 pronounces a "right to freedom of thought, conscience and religion." Any religion, no matter how peculiar? Article 11 determines a "right to freedom of expression." Any expression, no matter how offensive? Article 21 revisits the sentiments of Article 13 of the *Community Treaty*, stating that various forms of formal discrimination "shall be prohibited." Though progressive in tone, the tenor of the prohibition underlines once more, not just the problem of determinacy, but also that of enforceability. What precisely is "discrimination," where will it matter, and who will prohibit it?

As for what "equal" means, existing Community law relating to "equal treatment" provisions readily testifies to the interpretive and substantive problems which might await.⁸⁰ Article 20 states that "[e]veryone is equal before the law." Which law would this be? Domestic law? European law? Article 20 might seem progressive in tone. But a progressive tone does not conform to the idea of equality that has been developed in the jurisprudence of the European Court. As we have already noted, equality in the Community means equality for those who work, or are deemed to work; not for anyone else.⁸¹

CONCLUDING THOUGHTS

The potential substantive and interpretative hazards are as vast as the constitution. And they will not be reduced by the assertion that the *Union Charter* is merely declaratory; nor should they be. A 'declaratory' charter will still serve to deflect attention away from alternative, more progressive strategies for social and political reform. It will still exist in the same kind of

⁷⁹ For a discussion of the emerging problems in this area, see C. McGlynn, "Ideologies of Motherhood in European Community Sex Equality Law" (2000) 6 Eur. L. J. 29.

⁸⁰ See commentary and notes, *supra* note 24.

⁸¹ For commentary on this definition of "work," see Scheiwe, *supra* note 24.

jurisprudential twilight as the *European Convention*. It will still tempt judges and academic commentators alike. It will just frustrate everyone a little bit more, making the longing for justiciable rights ever more desperate. And if, or more likely when, the *Union Charter* is incorporated in some form into the European 'constitution', then the fat and the fire will truly meet.

Much will depend, of course, upon the attitude of individual judges in the ECJ, something which experience suggests should be a sobering thought.⁸² The Canadian Supreme Court has been recognised as tending towards a more creative judicial role, most pronounced perhaps in the early years.⁸³ In *Hunter v. Southam*, Chief Justice Dickson defined a constitution as an instrument "drafted with an eye to the future," its "function" being to "provide a continuing framework for the legitimate exercise of governmental power and when joined by a bill or a charter of rights, for the unremitting protection of individual rights and liberties."⁸⁴ It must, moreover, "be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers." The judiciary, he concluded, "is the guardian of the Constitution, and must, in interpreting its provisions, bear these considerations in mind."⁸⁵

In other words, 'rights' change. They are not objective, and they are not themselves enough. Yet, experience militates against the idea of crusading European judges embracing the opportunity to refine the public philosophy of the European 'constitution' or to reach out beyond the confines of articulated rights, in order to effect deep progressive social reform. Whilst it has happily invented various legal doctrines, such as 'supremacy' and 'direct effect', the ECJ has shown itself to be decidedly uncomfortable when asked to make grand statements about the shape of an emergent European public philosophy.⁸⁶ It has been thrown into catatonic

incoherence when asked to prosecute a consistent narrative of fundamental human rights.⁸⁷

These questions, of substantive and interpretive consistency, and of constitutionality, as well as those of theoretical coherence and political expedience, will remain unresolved. As Chief Justice Dickson's observations imply,⁸⁸ the competence of charters, like the meaning of the rights they contain, remains irreducibly indeterminate. The *Union Charter*, regardless of its precise juridical status, introduces another dimension to European human rights law. And it is a dimension that will defy determination. The rights and wrongs of rights is a debate without end. This, of course, may be a virtue. It can be a mechanism for enhancing democratic debate. But it is likely to be less of a virtue in Europe than it is in Canada, for the European *Union Charter* has been carefully drafted precisely so that it is not going to matter that much.

The merits and demerits of such charters are as contestable as the related virtues and vices of 'human rights' themselves. There is little doubting the extent to which Europe is tempted by rights. Rights lie at the very heart of the liberal legalism which defines modern European political thought, and so the affinity should not be surprising. And it is here that the essential paradox of the 'new Europe' emerges once again. As an intense, indeed extreme, expression of modernism, this 'Europe' takes classical concepts of modern political thought to their limits, and perhaps 'beyond.' It has already gestured 'beyond' sovereignty, and indeed, beyond received ideas of democracy. Now, perhaps, the *Union Charter* is taking Europe 'beyond' rights.⁸⁹

The peculiar status of the *Union Charter* and its 'rights' should cause everyone to rethink the conceptual parameters of 'rights-talk'. The intellectual impetus, as we noted earlier, is already emerging, the sanctity of liberal legalism already called into question. Building on familiar post-modernist writings, C. Douzinas has suggested that a revitalized transnational jurisprudence must champion an essential *humanitas* against the constraining notion of human 'rights', concerning itself rather more with the 'human' and rather less with the 'rights.'⁹⁰ A similar approach has been taken by S. Toope

⁸² Canadian feminist scholars repeatedly stress the importance of specific judicial attitudes in determining the meaning of concepts such as 'equality,' and moreover the instrumental importance of dissenting judgments — a conclusion that sits awkwardly with the ECJ's refusal to publish dissents. See K. Mahoney, "Canadian Approaches to Equality Rights and Gender Equity in the Courts" in R. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 437 at 449–56.

⁸³ See C. Manfredi, "The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms" (1992) 40 *Am. J. Comp. L.* 213.

⁸⁴ *Hunter et. al. v. Southam Inc.* (1985), 11 D.L.R. (4th) 641 at 649.

⁸⁵ *Ibid.*

⁸⁶ For a discussion of the difficulties encountered in trying to reconcile the process of legal integration with the need to nurture an emergent European public philosophy, see I. Ward, "International Order, Political Community, and the Search for a

European Public Philosophy" (1999) 22 *Fordham Int. L. J.* 930.

⁸⁷ For an uncompromising critique, see Coppel & O'Neill, *supra* note 27.

⁸⁸ *Supra* note 84.

⁸⁹ For a discussion of this possibility, see I. Ward, "Beyond Constitutionalism: The Search for a European Political Imagination" *Eur. L. J.* [forthcoming in 2001].

⁹⁰ *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publications, 2000) at 1–4, 17–19, 121–31.

who, speaking from within the Canadian experience, emphasises the need for an understanding of human 'rights' which resists the tendency to assume universal values. Human rights, he concludes presciently, is not really about legal rights at all. It is about a developed understanding of the human.⁹¹

Modernist theories of 'human rights' tend to the particular, and the age of 'particular' jurisprudences, as W. Twining has recently affirmed, is past. The jurisprudence of the future will be one that "emphasises the complexities and elusiveness of reality, the difficulties of grasping it, and the value of imagination and multiple perspectives in facing these difficulties."⁹² This is the challenge facing jurisprudence today, and it is the challenge which faces European law, the challenge of articulating alternative expressions of progressive public philosophy. It is not a challenge which will be assuaged by a charter of so-called 'fundamental' rights. And yet Europe remains dazzled, unable to resist the allure of even more rights. The temptation has proved to be irresistible. The *Charter* awaits. □

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⁹¹ See S. Toope, "Cultural Diversity and Human Rights" (1997) 42 McGill L.J. 169.

⁹² W. Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000) at 3-4, 47-9, 137-40, 212-13, 221-3, 243.