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**A Tale of Two European Charters of Rights:
Comparing the European Convention on Human Rights and the EU Charter of
Fundamental Rights**

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Introduction

In this very short address, I would like to explore lessons from Europe, with a particular focus on the two dominant models of human rights protection. Part of my mission today is to redirect attention in the debate in Australia away from the focus on the European Convention on Human Rights and in particular UK model of human rights protection. Indeed, it is understandable that this model has been the principal target for proponents and opponents, not least since it is now in force in both the ACT and Victoria. The other human rights charter, largely overlooked in this part of the world, is the EU Charter of Fundamental Rights (2000), which is not to be confused with the older and well known European Convention on Human Rights (ECHR).¹ It is the EU's distinctive contribution, rather than the ECHR, that I will focus on today. It is this experience, with its *political* character of the Charter and its orientation to the legislature rather than the courts, which is pertinent to the themes considered here today.

European Convention on Human Rights (1950): A Court-Centred Model

Most of the lessons drawn from Europe seem to be grounded in the Council of Europe's Convention on Human Rights (ECHR). Since 1949, the Council of Europe (COE) has been at the forefront of human rights protection in Europe. The COE's ECHR, signed in 1950, with its institutions, namely the European Court of Human Rights (ECtHR) and Commission, based in Strasbourg, constitute one of the most mature and celebrated systems of human rights. This international organisation, which has 46 member state signatories including Russia, is distinct from the EU, though all members of the EU are signatories.

¹ The Charter is conveniently issue in mini book format, and to celebrate the Schuman Declaration and Europe Day, 9 May 2003, one million copies of a mini book the size of a matchbox, containing all 54 articles of the Charter of Fundamental Rights of the European Union, has been produced by the European Commission.

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At the outset it is important to note that the ECHR was not conceived as a model of rights addressed to citizens – it was a document which bound States as Contracting Parties to uphold a catalogue of civil and political rights. The COE created system for permitting the rights to be justiciable through its creation of the ECtHR, which in due course permitted the right of individual petition to the ECtHR. In some jurisdictions, the rights contained in the ECHR could have direct and overriding application in domestic law without further incorporation. This so-called monist model may be contrasted with the dualist models, which characterise the in UK and Australia, where international law only takes effect through domestic legislative incorporation. But this hierarchy of norms is more complex in some jurisdictions, such as Germany, which has a qualified acceptance of the supremacy of public international law, and indeed EU law, provided it complies with the fundamental constitutional guarantees in the federal Constitution or Basic Law relating to the fundamental and overriding right to human dignity. [Note: the Basic Law, turns 60 years old on the 23 May 2009, and we will be celebrating that milestone with a conference (with UNE and Law Council of Australia and German embassy, here on the campus: *60 years Deutsches Grundgesetz –The German Constitution turns 60: Human and basic rights through the eyes of Germany and Australia*, 22-23 May 2009 at University House, Australian National University, Canberra]. Refer to Economist.

The incorporation of the ECHR into a domestic Act of the UK Parliament in changed everything in the UK, and from 2000, a new approach was required. The Act created a new principle of statutory construction which the courts are under a duty, not merely a power, to interpret legislation in a manner which is consistent with the protected rights ‘as far as possible’. If such an interpretation was impossible, the court makes a declaration of incompatibility, which is addressed to the other arms of government – the Executive and Parliament – thus exposing the incompatibility and the need for remedy. There is no mechanism for compelling remedial action, which upheld the principle of Parliamentary supremacy, and denied courts the power to strike down legislation deemed to be incompatible with the rights protected in the ECHR.

A view expressed by some scholars, including foremost legal theorist Professor Tom Campbell, is that this type of ‘court-centred’ model is both undesirable and illegitimate. As with models which constitutionally entrench human rights, the HRA

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can be criticised from this perspective for conferring too much power in the hands of an unelected judiciary. On this view, human rights should be conceived as political norms, rather than legal norms. This view does not reject the value of human rights, but rather takes the view that Charters should speak to legislatures and the executive rather than the courts. On this view Charters are normative resources to guide the political process.

Indeed, there are many ways in which the UK HRA model promotes this legislature centred model, through inter alia the use of Parliamentary Committees to scrutinise legislation for human rights compliance. Indeed, from our rather limited experience in Australia, we might be cautious about the gains obtained by a court centred model: as Hilary Charlesworth noted recently in another forum, local courts have tended to adopt a fairly narrow reading of the human right legislation. This occurs for a number of reasons – the judges may be sensitive to the accusation that they being saddled with an activist role and that they lack democratic legitimacy to undertake this role. It is clear, notwithstanding the training received from experts before the HRA came into force through the National Judicial College of Australia, the ACT courts rarely make use of the rich jurisprudence and commentary available to its full potential – put simply, they often lack the expertise to do justice to the task, notwithstanding the work done by the Human Rights Commissioner in her role as intervenor! Another reasons is that the various exceptions or qualifications to the rights in the HRA tend to be given a fairly wide interpretation, with courts noting in passing that the HRA, while relevant, adds little more protection than the existing common law.

EU Charter of Fundamental Rights: A Legislative Centred Model

In the time that remains, I would like to turn our attention away from the ECHR to the other European Charter, the EU Charter of Fundamental Rights (2000). It should be noted at the outset that the EU's rationale or *raison etre*, is not, and has never been, the promotion of human rights. Its fundamental freedoms, entrenched in the Treaty of Rome in 1957, were economic freedoms: free movement of goods, workers and capital. Indeed, the Treaties silence on the issue of fundamental rights posed a dilemma in the 1970s for the constitutional courts, particularly the German constitutional court that the supremacy doctrine of EU law would be inconsistent with its commitment to fundamental human rights. Addressing this disquiet, the ECJ

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embarked on a profound and significant initiative of implied rights into the fabric of the treaty through its doctrine of fundamental rights.

In many ways, the EU Charter provides an example of a 'legislature centred' or *legiscentric* model of human rights. The EU Charter was developed as a solemn political declaration between the Member States, and adopted in Nice in 2000. It was significantly signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000.

The European Union Charter of Fundamental Rights sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, *economic and social rights* of European citizens and all persons resident in the EU.

These rights are divided into six sections:

- Dignity
- Freedoms
- Equality
- Solidarity
- Citizens' rights
- Justice

They are based, in part, on the fundamental rights and freedoms recognised by the European Convention on Human Rights, but also the *acquis communautaire* of the EU which includes the EU Member States constitutional traditions of, the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers and other international conventions to which the European Union or its Member States are parties. The importance thing about this Charter is it is directed to all organs of government, and cover a wider range of rights – it is a document which reflects the distinctive heritage and concerns of the peoples of Europe, was produced through extensive consultation with experts and citizens, and is not an off the shelf solution borrowed from another country or indeed, plagiarizes an international treaty!

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The substance of this Charter was incorporated into the ill fated Draft Constitutional Treaty, but this was rejected by referenda in France and the Netherlands in 2005. The Treaty of Lisbon, signed in December 2007, the Reform Treaty, incorporates the Charter into EU law (giving the Charter the same standing as provisions of the TEU). Two members of the EU are yet to ratify: Ireland and Czech Republic. Though Ireland's referendum rejected Lisbon, there will be shortly another one to determine its fate.

The Lisbon article referring to the Charter reads as follows:

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the *same legal value* as the Treaties.

The United Kingdom and Poland have signed the treaty but attached a protocol, that clarified perhaps redundantly that the Charter does not extend the EU mandate or jurisdiction in this field of human rights protection.

Do the two models yield any differences in relating to the level of attention given by Parliaments? One would assume that the non-binding political EU model, as it is today, would be less effective in protecting rights. However, I am not so sure that this is the case. My comparison of counterterrorism measures relating to suppression of terrorist financing suggests that the EU, rather than COE, has achieved higher levels of the human rights compliance – this is a paradox since the EU lacks a general mandate to advance human rights instruments, unlike the COE.

The EU Directive in its preamble, it states that the Terrorism Directive respects fundamental rights protected by the Charter of Fundamental Rights of the EU and should not be interpreted and implemented in a manner inconsistent with the ECHR (Preamble, para 48). There is some evidence that this is not just human rights 'window-dressing'. For example, the Directive, reflecting the critical role of legal professional privilege with the right to a fair trial, provides that there must be exemptions from these reporting measures for legal counsellors to protect professional secrecy unless there is some sort of involvement of the lawyer in the money laundering or terrorist financing (Preamble Para 20). That said, the issue of

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seizing and confiscating property raises significant question for the right to property and the right to a fair trial (the use of reverse onus provisions and so forth).

It is a paradox that the EU, lacking an explicit legal mandate to protect human rights, prioritises the pre-eminence of human rights protection in its measures to combat terrorism. By contrast, there is no mention of the ECHR in the COE Money Laundering Convention *at all!* One would have predicted that the position would be reversed. Unlike the EU Directive, the COE Convention does not refer in its preamble or text to the importance of the protection of human rights (or the ECHR specifically), notwithstanding the coercive potential of these confiscation powers. As noted above, this human rights deficit in the COE Convention presents itself as a striking paradox, bearing in mind the central role that COE plays in the human rights field through the ECHR and the relatively slim constitutional foundation of the EU in the field of human rights. The COE Convention's blindness to human rights (compared with the EU) is likely to be the result of the functional separation of human rights from criminal justice policy with the COE.

Conclusion

The trajectory is however firmly toward the recognition that the EU Charter has legal force (and not just political force) in the EU: indeed, the Treaty of Lisbon paves the way for the EU to sign the ECHR, which the European Court of Justice had held that it lacked competence to do so in 1996.² Protocol 14 also allows the European Union to accede to the Convention, an issue which is also dependent on the ratification of the Lisbon Treaty. The protocol has been signed by every Council of Europe member state. Currently only Russia has not yet ratified the protocol. It will only come into force only when it has been ratified by all Council of Europe member states. I am not convinced that this would be a desirable step forward.

The significance of the legal recognition of the Charter in the EU legal order remains to be seen. At this point, the Charter and the ECHR already have been used by the Court of Justice, to guide the interpretation of EU laws through its development of an implied rights doctrine. Lisbon only recognises the legitimacy of this interpretative

² [1996] ECR I-1759.

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principle. It may also come to play a more prominent role in the drafting the legal measures. The legal question is whether the Court of Justice will take the view that the Charter of Fundamental Rights is now entrenched as a higher source of overriding law, and thus invalidate EU laws which breach these rights. The German constitutional court may have some difficulty accepting this trumping by the Charter of the German Constitution (*Grundgesetz*). So this is a very exciting and dynamic time for the future of human rights in the European context post Lisbon.

I hope these thoughts have exposed another dimension of the European experience, which may helpfully inform debates in Australia.