

**Review of Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014)**

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This is not just the latest commentary on the EU Charter of Fundamental Rights (the Charter)<sup>1</sup> but *the definitive commentary*, at least until it is overtaken by developments in the European courts and requires an update. Authored by the leading commentators on the various rights including several members of the Court of Justice of the European Union (CJEU) and edited by Peers, Hervey, Kenner and Ward – all authorities on the Charter – this collection brings together the key concepts, debates, intricacies and unresolved questions concerning the Charter of Fundamental Rights. The net result is a handbook for practitioners wishing to use the Charter in legal argumentation and a conceptual springboard for scholars teaching and researching on matters of EU law.

The book is divided into three parts: Part I is a commentary on the individual articles of the Charter which, with a chapter apiece on the 50 substantive-rights articles and the four functional articles of the Charter, unsurprisingly runs to over 1,500 pages; Part II contains some reflections on the Charter such as the place of the Charter in the EU constitutional edifice and in the broader international human rights law context; and Part III comprises a single, rather dense chapter on the agreement on the accession of the EU to the European Convention on Human Rights (ECHR).<sup>2</sup>

Part I is the part readers will go to for direction and guidance on individual substantive rights in the Charter. Helpfully, all the chapters here follow the same structure. Thus, by way of prefatory material, the text of the article and its accompanying explanation are set out, along with a select bibliography. Next, the field of application of the article is described by outlining the areas of EU law and policy that might engage the article. The following two sections provide useful content and context by linking the article under discussion to other, related articles in the Charter and in European and international human rights law. There follows an analysis section, which revisits some issues of substance and scope already flagged, but now in greater detail, and a final evaluation. For the purposes of this review and given the size of the book, attention is limited to those articles that directly relate to one of the fastest growing, and most sensitive, areas of EU law and policy, namely asylum and immigration. Thus, the chapters on the prohibition of torture, the right to asylum and the right to protection against removal, expulsion and extradition are reviewed.

For readers who principally associate EU law with the Common Market, the relevance of Article 4 of the Charter on the prohibition of torture and inhuman or degrading treatment or punishment to EU law may not be immediately apparent. However, Nowak and Charbord's chapter opens by linking Article 4 to several areas within Justice and Home Affairs (JHA) and Common Foreign and Security Policy. Article 4 is contextualised within the rich heritage of international and regional human rights prohibitions of torture, not least the jurisprudence of the European Court of Human Rights under Article 3 ECHR. Nowak and Charbord skilfully set out all of the main definitional and legal issues: the meaning of torture and inhuman or degrading treatment or punishment, the absolute nature of the prohibition, the implicit *non-refoulement* guarantee. Of particular interest, given the on-going crisis in the Mediterranean, is the authors' analysis of the obligations on JHA agencies such as Frontex, and their stark warning that 'whether the mandate is explicit or not, EU agents may find themselves in situations where they could directly engage in acts of torture or ill-treatment'.<sup>3</sup>

In the Chapter on the right to asylum, den Heijer expertly grapples with one of the key debates in refugee law in general and Article 18 of the Charter in particular, namely, whether the right to asylum is a free-standing right with legal content separate and distinct from the right of *non-refoulement*. He

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<sup>1</sup> [2012] OJ C326/02.

<sup>2</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (as amended).

<sup>3</sup> Manfred Nowak and Anne Charbord, 'Article 4 – Prohibition of Torture and Inhuman or Degrading Treatment or Punishment' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights, A Commentary* (Hart Publishing 2014) 89.

also delves into a debate at the other end, namely, ‘as to what the final station – or, indeed, the very purpose – of asylum is’,<sup>4</sup> and whether the final station is indeed one of the Office of the United Nations High Commissioner for Refugees’ three durable solutions: local integration, resettlement or repatriation. In addition to his clarity on the theoretical issues, den Heijer also has an impressive command of detail, evident in his meticulous account of the antecedents of Article 18 and his discussion of the confusing nomenclature used to talk about the right to asylum (‘asylum’, ‘refugee’, ‘international protection’). For a detailed overview of Article 18, den Heijer’s chapter is flawless. However, from an Irish perspective, his assessment, based on the explanation on Article 18, that ‘the right to asylum is only addressed [to Ireland] in so far as [it] partake[s] in the common policy on asylum’<sup>5</sup> is somewhat uncritical, especially in view of some of the soundings from the case-law on the Charter’s scope. But, of course, the book is directed at a general European audience.

Guild<sup>6</sup> is the author of the chapter on Article 19 and she has the unenviable task of making coherent sense of two essentially disparate provisions: the prohibition on collective expulsions in Article 19(1) and the prohibition on *refoulement* in the context of torture or inhuman or degrading treatment or punishment in Article 19(2). Guild effortlessly traces the separate antecedents of these two provisions, noting their application both to third country nationals and to EU citizens exercising free movement rights, notwithstanding the Aznar Protocol,<sup>7</sup> which excludes EU citizens from the scope of the Common European Asylum System. She examines the key cases of the European Court of Human Rights on the collective expulsion of aliens from *Conka*<sup>8</sup> to *Hirsi*<sup>9</sup> and introduces the reader to the voluminous jurisprudence of the court on the issue of *non-refoulement*. Guild concludes by noting that some aspects of secondary asylum legislation, notably the Asylum Procedures Directive,<sup>10</sup> may have to be interpreted ‘up’ in order to comply with Article 19(2) and, as Nowak and Charbord did, by flagging the fact that the responsibility of Frontex is engaged by Article 19.

In addition to dealing with all the substantive rights articles in the Charter, Part I of the book also contains a chapter on each of the four functional articles of the Charter: field of application (ie scope), interpretation, level of protection and abuse of rights. For the general reader, the first of these is likely to be the most pertinent. In this regard, Ward’s chapter on Article 51 tackles the main points of contestation on the field of application of the Charter with reference to the leading cases: whether, for the purpose of Member State liability, ‘implementing’ EU law (as per the Charter) is co-terminus with acting ‘in the scope of’ EU law (as per the explanations); whether the Charter’s ‘principles’, as distinct from ‘rights’, are justiciable; whether the Charter replaces or coexists alongside the ‘general principles’. After a *tour de force* exposition of the law, Ward concludes somewhat optimistically that the legal questions pertaining to the application of Article 51 are ‘fairly clear cut’.<sup>11</sup>

Part II of the book picks up on some of the theoretical issues raised in Part I, offering reflections on key debates about the role and place of the Charter in EU law and in broader public international law. For example, in the chapter on the extraterritorial application of the Charter, Moreno-Lax and Costello address the issue of the Charter’s scope *ratione loci*, arguing that the Charter should not be limited by a territorial understanding of jurisdiction.<sup>12</sup> This is an increasingly important issue as Member States and EU agencies are called on to implement EU law and policy outside the external borders of the EU, for example, in the international waters of the Mediterranean. In setting out their stall, Moreno-Lax and Costello deftly navigate the complex issue of jurisdiction as it presents in public international law, international human rights law and now in EU law. Finally, Part III of the book provides the reader with a detailed account of the latest developments in the long road to accession by the EU to the European Convention on Human rights.

<sup>4</sup> Maarten den Heijer, ‘Article 18 – Right to Asylum’, *ibid* 536.

<sup>5</sup> *ibid* 520.

<sup>6</sup> Elspeth Guild, ‘Article 19 – Protection in the Event of Removal, Expulsion or Extradition’, *ibid* 543.

<sup>7</sup> Protocol (No 24) On Asylum for Nationals of Member States of the European Union [2008] OJ C115/305.

<sup>8</sup> *Conka v Belgium* ECHR 2002-I 79.

<sup>9</sup> *Hirsi Jamaa & Others v Italy* (2012) 55 EHRR 21.

<sup>10</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60.

<sup>11</sup> Angela Ward, ‘Article 51 – Field of Application’, in Peers, Hervey, Kenner and Ward (n3) 1449.

<sup>12</sup> Violeta Moreno-Lax and Cathryn Costello, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model’, *ibid* 1657.

In all, this commentary on the EU Charter of Fundamental Rights is a testament to how far the EU has travelled since Member States threatened to revolt against the supremacy of EU law for fundamental rights reasons. However, it also highlights how far the EU and Member States have yet to go to fully engage with the responsibilities delineated in the Charter. It is a must-read for anyone – judges in the Member States and at the CJEU, lawyers, legislators and policy makers in the EU institutions and in the Member States, academics specialising in EU law and/or human rights and students – with an interest in the continuing story of fundamental rights in the EU.

