

INTERNATIONAL REGIMES FOR THE PROTECTION OF HUMAN RIGHTS: ANALYTICAL IMPLICATIONS OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

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Abstract:

This article taps into the experience of creating regional human rights regimes in three different regions in order to extract certain commonalities that help create an analytical framework that is valid across the board. It then positions the EU Charter of Fundamental Rights into the so-constructed framework in order to examine the extent to which the two are compatible with each other. While the Charter clearly lends itself to analysis through reference to the framework's four main dimensions – historical context, regional ethics, strong commitment to implementation and jus commune – it also introduces two additional ones. These stem from the particular context within which the Charter was created and are related to its purpose of legitimising the EU integration project and giving it a written constitutional form. Although the Charter presents itself as a peculiar case among the analysed regional human rights regimes, the article argues that on the most fundamental level its kinship with the family of international human rights instruments is uncontested.

INTRODUCTION

The present article is an attempt to construct and operationalise a tentative analytical framework conceptualising the establishment of regional human rights regimes. For this purpose, it first draws upon the experience of three regions and the regimes they have established in order to extract the framework's dimensions. Subsequently, the article takes up the case of the EU¹⁰ Charter of Fundamental Rights and searches for the possible analytical implications of its creation. Both levels, the regional and the sub-regional (i.e. the EU) are treated as locations in which sources of explanations for the observed phenomena, the creation of human

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¹⁰ Hereinafter referred to as the European Union, or the Union, regardless of the period.

rights regimes, can be found (Buzan 1995:199). In this sense, they are distinguished ontologically as being different units of analysis. The main purpose of the article is to establish whether they should also be distinguished along the second of Moul's (1973:495) principles, epistemologically, as introducing different variables in explaining the particular outcome.

Conceptually, the article bases itself on regime theory in international relations, broadened by the specificity introduced by the subject-matter of human rights regimes, and on the two contrasting positions regarding the reasons and motives of states to create them. The purpose of the theoretical discussion is to come up with relevant analytical dimensions that help construct a conceptual framework for the analysis of regional human rights regimes. Although they exhibit a number of differences in terms of the type of rights they codify and the implementation mechanisms they contain, the article claims that they can be explained through reference to fundamental characteristics shared among them.

Structurally, the article is divided in two parts. At the outset, the presentation is focused on the tenets of regime theory and the two resulting perspectives on the creation of human rights regimes. It is argued that the latter widen the scope of regime theory by introducing the notion of normative motivation drawing on a purportedly universalisable sense of justice besides the idea of self-interest. Subsequently, human rights regimes span this widened scope of regime theory as they are the outcome of varied calculations. It is thus possible to observe a combination of interest and ideology in any of them and this forms the fundamental background to their analysis. Through reference to three regional human rights regimes, the article defines four conceptual dimensions of such analysis: historical context, regional ethics, strong commitment to implementation and *jus commune*.

In the second part, the article takes up the case of the EU Charter of Fundamental Rights in order to ascertain whether the so constructed analytical framework is adequate for its analysis or whether the Charter presents it with irreconcilable conceptual tensions. Although the Charter lends itself to discussion through reference to the four analytical dimensions, it also introduces two additional ones – legitimacy and constitutionalism. Because of the specificity of the European Union, any consideration of the Charter that does not incorporate the latter is necessarily incomplete. In view of this, the answer to the question posed in the second part of the article is negative.

REGIME THEORY AND REGIONAL HUMAN RIGHTS INSTRUMENTS

In international relations (IR), states often resort to regulating their cooperation in the form of specific regimes, which postulate the expected behaviour in given areas and ensure, with more or less rigour, that the norms they contain are complied with. The abundance of such regimes codifying the regulation of various sites where states' interests meet and interact, ranging from the regulation of waterways navigation, through trade, monetary and environmental policies, to nuclear weapons non-proliferation, has given rise to a strand within IR thought dealing exclusively with their formation, functioning and place within the wider theoretical foundations of the discipline. Through its focus of study and the host of relevant insights generated thereof, regime theory has “made considerable progress in its own right” within the field of international relations (Buzan 1993:328).

REGIME THEORY

Regime theory is the outcome of the analytical endeavour to articulate a concept that captures and explains the multiple patterns of interaction observed among states in their relations (Keohane and Nye 1977, Krasner 1983a, Keohane 1989a, Rittberger 1995, Hasenclever *et al.* 1996). One of the widest definitions of regimes sees them as “patterned behaviour” (Puchala and Hopkins 1983:26), thus encompassing an enormous set of phenomena in interstate interaction. Limiting those to the explicit agreement among governments within a given policy area, Keohane (1989b:4) defined regimes as “institutions with explicit rules, agreed upon by governments, which pertain to particular sets of issues in international relations”. The prevailing definition, however, was provided by Krasner (1983b:2) who was much more inclusive by claiming that international regimes are “implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations”.

Although the last definition offered to widen the scope of regime contents by acknowledging the importance of principles and norms besides rules and considered them in their implicit character as well, Krasner preserved the overwhelming focus on material self-interest behind regime formation and functioning. For the latter to be effective and indeed possible, some sense of common interest was perceived as an indispensable condition. Young (1994) supported this claim in observing that, despite the acknowledged need for a regime regulating environmental policy, the divergence of economic goals

between industrialised and less developed nations makes its formation difficult. And since the interests underlying any regime are articulated in the structure of preferences within individual countries, the more convergence and overlap among them, the higher the success in implementing the regime (Milner 1997).

All of the above inevitably invites the question of whether international human rights instruments should be considered within the framework of regime theory and whether, in fact, they deserve the label “regimes” at all. They do represent institutions with explicit rules agreed upon by governments, and they also imply the convergence of actors’ expectations, but do they really pertain to an area of international relations? Their subject matter being the regulation of relations between rulers and ruled within political communities,¹¹ human rights instruments are perhaps more aptly categorised as a phenomenon of domestic-political rather than international-relations importance. However, on the account that by signing up to international human rights instruments governments accept a commitment towards the other government-parties to that instrument, the last claim is unreasonable and the natural belonging of such instruments to the area of interstate relations seems uncontested. With respect to this, human rights instruments naturally belong to the family of international regimes at a fundamental level: the fact of state acceptance of certain normative and procedural constraints as legitimate and of international authority replacing a certain area of the original national sovereignty (Donnelly, 1986:602). Human rights thus represent just another issue-area in which states choose to renounce parts of their sovereign national authority through an international regime, in order to reduce the costs of anarchy.

It is in another related aspect, that their conceptualisation within regime theory is more problematic and here it is the theory that widens and adapts, rather than the idea of human rights instruments. Analysing them, Beitz (2003) posed the thesis that they do not only institutionalise existing interaction. On the contrary, being normative standards within various political arenas, they propagate change and ideals. Because of its nature, human rights codification attracts a host of normative thinking basing itself on a purportedly universalisable sense of justice rather than on the idea of self-interest. It is precisely the seeming irreconcilability between these two that Hurrell (1995) took as his cue in making the case for expanding the focus of regime theory. In his analysis, human rights codification

¹¹ According to Jones (1994:3), human rights developed in the mid-eighteenth century as political instruments fulfilling the function of checks upon political power.

came as a useful tool to conceptualise the relation between law and norms on the one hand, and power and interests on the other beyond the narrowing view of seeing the former as simply a reflection of the latter.

The argument can be advanced in two steps. Firstly, the sustained interaction of states within the international system develops quasi-societal qualities by generating the interest of maintaining common rules and institutions often based on normative considerations (see Bull and Watson 1984). Secondly, the existence of such qualities of interaction, implying a degree of common identity among its actors, is indispensable for the creation and functioning of any regulatory regime (Buzan 1993). Within this idea, Hurrell (1995) saw international law as the political foundation that is necessary before regimes can come into play. The degree of identity sharing in this sense ranges from the mutual recognition of sovereign actor-ness (minimal) to the acceptance of the fundamental values of the other as one's own (maximal). This view is consistent with Kratochwil's influential contentions that classic regime theory is characterized by an egregious lack of familiarity with legal theory (1984:344) and that the conception of law as a coercive order needs revision (1984:345).

The above presents the case for widening the scope of regime theory by inserting normative considerations into the process of preference formation by participating actors. International human rights regimes¹² create another pole in its categorisation structure where cooperation is prompted not exclusively by the states' self-interest, but also by legitimate normative thinking resulting from their perception of shared identity and the need to preserve the established political order, both domestically and internationally. As much as human rights regimes are defined by material state interest (e.g. Britain and the regime of abolishing slave trade in the eighteenth century), they are also the product of defending shared values and principles, such as human life and human dignity - an especially relevant idea after the Second World War - and liberalism and democracy, carefully protected among Western European states after 1950. In other words, to discuss human rights in terms of regimes requires the important reconciliation of the convenient view that regimes lend structure to politics with the far less congenial position that rules lend structure to structure (see Onuf and Peterson 1984:329).

¹² After the preceding discussion it is justified to label international human rights instruments 'regimes'.

The idea of human rights is plagued by difficult-to-reconcile debates at a number of levels. Firstly, the understanding of human rights as naturally belonging to individual human beings¹³ opposes the view that they only exist within codes agreed collectively that provide a corresponding duty, usually held by an authoritative institution.¹⁴ Secondly, and related to the above, human rights are contested with reference to their spatial applicability. One side, espousing Burton's (1972) ideas on world society, holds that they are universally applicable across the globe. The other sees them as socially embedded and only making sense if emerging within a certain social context and corresponding to its particular conception of the "good life". The latter view challenges the former's individualist approach as socially destructive by arguing the need for a more community-oriented stance (Marx 1987).¹⁵ The third distinction refers to generations of rights, the most contested one discussing the relative importance of civil and political rights on the one hand, and economic and social rights on the other. It is a debate of primacy, within which one side holds that without civil and political rights no community of people at any level can achieve economic and social rights;¹⁶ the other side countering that without enjoying economic and social rights in the first place it makes no sense to possess the civil and political rights.¹⁷

¹³ The idea of natural rights is seen as directly linked to the concept of liberalism that evolved in Western political thought from the Enlightenment period onwards. Human rights are thus 'natural', conceived as a moral entitlement which human beings possess in their natural capacity as humans, and not by virtue of any special arrangement into which they have entered or of any particular system of law under which jurisdiction they fall (Finnis 1980). Locke is arguably the most prominent defender of the idea claiming that certain rights self-evidently belong to the individuals as human beings (see Locke 1990).

¹⁴ Bentham held that human rights are "nonsense upon stilts" and a contradiction in terms if not established by a system of positive law with the corresponding duty of an institution of authority (Bentham 1987:53). Relatedly, Burke saw the proclamation of "natural rights" in declarations and charters as a socially dangerous and inadequate substitute for effective legislation (Burke 1790).

¹⁵ The individualist approach was defended by Dworkin as a possibility to "trump" collective objectives which infringe on individual freedoms (Dworkin 1977: xii). Habermas (2001), on the other hand, argued that the very concept of rights makes sense only within a collectivity of individuals who agree through deliberation on their exact contents, scope and form.

¹⁶ Sartori (1965) saw it as an inherent feature of any democratic political system that it is the most socially and economically vulnerable who will make full use of their civil and political rights in order to better their condition. For Cranston (1964, 1967:43-52), economic and social entitlements do not satisfy a number of conditions, which prevents one from qualifying them as rights proper.

¹⁷ Beetham (1995:59) defended the view that corresponding duties for economic and social rights are assignable and practicable. Relatedly, Wieruszewski (1994:69) attacked the problem of whether

ANALYSING HUMAN RIGHTS REGIMES

Stemming from the above and vindicating human rights regimes as spanning a wide range of possible explanations as to their emergence, there exists most broadly two conflicting approaches to analysing them. One holds that states form such regimes out of altruistic and ideological reasons. It puts predominant stress on the power of ideas to reshape the understanding of national interest (Sikkink 1993). The outcome is twofold: a willingness to surrender a degree of sovereignty and a preparedness to project human rights standards internationally. Through a process of transnational socialisation, helped by the inherent “logic of appropriateness” of human rights regimes, eventually all states see it as an important element of their membership in international society to sign up to them (Finnemore and Sikkink 1998). Because of the impact of principled ideas and norms on identities and interests, the “spiral model” of socialisation easily becomes self-sustainable after exerting international pressure solely defined by ideological reasoning on hesitant states (Risse and Sikkink 1999:17-35).

Putting the emphasis on material interests, the other approach informed by realism in IR sees human rights as yet another instrument of pursuing geopolitical goals. Krasner, who defined international human rights regimes as mechanisms “designed to encourage some states to adopt policies that they would not otherwise pursue” (1995: 140), claimed that ‘only when powerful states [had a material interest to] enforce principles and norms were [such] regimes consequential” (1995: 141).¹⁸ Relatedly, Miller (1979) saw human rights as mere interests in disguise - a view supported by Herman and Chomsky (1979) who accused the US of often abusing the language of human rights in order to ensure a favourable investment climate abroad. Evans (2001) supported this claim by defining human rights as the outcome of politics, and human rights regimes as reflecting the interests of the hegemon in international relations.

economic and social rights should be taken seriously at all with the problem of how to proceed once the inevitable agreement that they should be taken seriously had finally been arrived at.

¹⁸ In his study Krasner took up four cases. Religious toleration was successfully imposed only in the 17th century in areas where local rulers were too weak to resist (1995:144-52). Slave trade was abolished because major European powers, notably Great Britain, vigorously monitored and enforced the regime (1995:152-5). The protection of minority rights in Europe in the 19th and the beginning of the 20th centuries failed because the dominant powers were unwilling to enforce treaty provisions (1995:155-61). Finally, the modern regime of individual human rights protection has been only fitfully and incompletely accepted, because the most powerful advocates of universal human rights, such as the USA and West European states, have not had the resources and inclination to compel or entice recalcitrant states to accept such practices (1995:161-4).

It is obvious that the above two views are conflicting, but are they mutually exclusive? If human rights regimes do indeed span a wide range of categorisations within regime theory, e.g. explanations arising out of state interest and explanations arising out of their inherent logic of appropriateness, then it makes sense to identify analytical dimensions belonging to both sides in analysing any of them. Ignatieff (2001) recognised this duly in seeing the complex nature of human rights regimes as necessarily implying that different states join them for different reasons. Both the politics of interest and the power of ideas exist and are observable in different composition in the reasons of every state to become a contracting party to a certain human rights instrument. Because it is specific to the state parties, this analytical dimension is hard to capture in its totality for any given regime only by referring to the regime itself. It does, however, create a useful conceptual background to the effort of identifying and analysing four other explanatory factors that together establish a framework fit for application across the board.

In the current state of affairs, there are a host of global international human rights instruments spread along the issue areas that they codify. Three of them, the Universal Declaration of Human Rights of 1948 and the two International Covenants of 1966¹⁹ form the core of the global human rights regime. The Covenants span the globe in having almost universal membership. In accordance with the UN Charter, there have also been several successful attempts at establishing regional human rights regimes open for membership to the states within a given region and applicable only within that region. So far there have been three such regimes: (1) the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); (2) the 1969 American Convention on Human Rights (the American Convention); and (3) the 1981 African Charter on Human and Peoples' Rights (the African Charter). In the Asian continent it has not yet been possible to establish a regime of a comparable level of detail.

Bearing in mind the above, the question arises: how can we explain the emergence of those regional regimes in broad enough terms that are valid for all? Each of them, of course, has its own idiosyncrasy based on the interaction among its contracting parties and their motives to participate. If, however, commonality exists this makes it possible to construct through comparison a generalisable model of analysis – a line of research that has been well defined and defended by

¹⁹ These are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Landman (2002). After all, the resemblance that regional human rights regimes have with each other are hardly coincidental (Onuf and Peterson 1984:338). Starting from the background analytical dimension, that interest and ideology are simultaneously present in the foundations of any of them, the following is an attempt to identify an explanatory framework empirically based across the regions where such regimes exist.

To start with, there is the important element of historical context generating a certain geopolitical interest in establishing each of the regimes. The end of the Second World War, dubbed the “human rights war”,²⁰ brought home the realisation that codifying certain norms and monitoring their implementation is indispensable to the effort of avoiding its recurrence. This realisation gave the necessary political impetus to initiate the creation of the global human rights regime in the first place. Completing the dimension of historical context is the following sharp ideological division of political doctrine between East and West, which resulted in a bi-polar world of enhanced cohesion within both sides and prolonged confrontation among them. It split the global regime in two parts (i.e. the two International Covenants) and, more importantly, provoked the geopolitical interest of both Western Europe and the USA²¹ in establishing human rights regimes making political authoritarianism less likely.

For similar reasons, Eastern Europe remained without a human rights regime while, in the post-colonial context, Africa responded to the predominantly individualist conception adopted by Western liberal democracies with a more socially oriented instrument codifying a host of collective duties and rights within its norms. Thus diversity, for the most part, arose out of the context within which the regional regimes were established. It materialised in the set of rights enshrined by the given instrument and, relatedly, the nature and degree of effectiveness of the implementation mechanism it contains. The European system of human rights protection personified by the ECHR, for example, restricted itself to civil and political rights “necessary in a democratic society”, and did not accord much prominence to rights contributing to an “ideal commonwealth” (Robertson

²⁰ “The last [the Second World] War was essentially the ‘human rights’ war, inflicted on peoples by those who espoused a monstrous racist doctrine, and waged simultaneously against man and the community of men, with unprecedented systematic cruelty” (René Cassin at a Press Conference on 8 July 1947, quoted in Leben 1999: 87).

²¹ Donnelly (1986:625, 637) found a reasonable explanation for the establishment of the American Convention in the dominant power of the USA, which employed its hegemonic status to ensure the regime’s creation and support its operation.

1982:83, van Dijk and van Hoof 1990, Vasak 1982). By contrast, the American Convention, drawing on the 1948 American Declaration of the Rights and Duties of Man, incorporated a wide set of social and economic rights, owing to the negative effect that unemployment and social exclusion have had on Latin American societies (Panizza 1993, Panizza 1995:187).

In its turn, the Charter of Banjul, establishing the regime of human rights protection within the Organisation of African Unity, added a rather comprehensive set of social duties towards the family, the nation and the state (see Espielli 1982, M'Baye 1982, Ndiaye 1982, Kaballo, 1995). Howard (1986:15-7) saw this as the outcome of the specific set of social values characteristic of the African continent, whereby life is communal and decision-making is consensual and distributive. Finally, in Asia, a human rights regime spanning all the continent still remains a remote eventuality (see Halliday 1995, Christie 1995, Yamane 1982, Boutros-Ghali 1982). The Cairo Declaration of 1990 and the Bangkok declaration of 1993²² demonstrate a certain level of agreement, but fall short of establishing a fully fledged regional human rights regime containing a comprehensive set of rights and determining an implementation mechanism.²³

The above description leads to the second analytical dimension in conceptualising regional human rights regimes. It is derived from Dower's (1998) idea of distinguishing between systems of global and regional ethics. Regional human rights regimes prove to be much more suitable than their global counterparts in grasping and adapting to regional ethics. They aptly pay attention to local circumstances and benefit from a regionally-tailored approach, which does nevertheless incorporate certain universal principles. Being "the local bearers of a global burden" (Vincent 1986:95), regional human rights regimes are consistent with the ideas of IR theorists, for whom the world of states is organised in an

²² The Bangkok Declaration of April 1993 preceded the 1993 World Conference on Human Rights and was a regional, Asia Pacific, contribution to the Vienna Declaration along with the Tunis Declaration of November 1992 and the San José Declaration of January 1993 (see Boyle 1995:80-1).

²³ The implementation mechanisms of these regimes also differ substantially. ECHR (see [Hhttp://conventions.coe.int/treaty/en/Treaties/Html/005.htm](http://conventions.coe.int/treaty/en/Treaties/Html/005.htm)) only incorporated individual complaints later in its development. The judgements of the Court in Strasbourg, however, have had an enormous effect on domestic legislation regarding the protection of human rights. Within the American Convention (see [Hhttp://www.cidh.oas.org/Basicos/basic3.htm](http://www.cidh.oas.org/Basicos/basic3.htm)) states were obliged to accept individual complaints. However, its Court has been less influential. Finally, the African Charter (see [Hhttp://www.hrcr.org/docs/Banjul/afchr.html](http://www.hrcr.org/docs/Banjul/afchr.html)) resorts to the well-established but much less effective mechanism of periodical state reporting and monitoring compliance. The Cairo Declaration is available at [Hhttp://www.humanrights.harvard.edu/documents/regionaldocs/cairo_dec.htm](http://www.humanrights.harvard.edu/documents/regionaldocs/cairo_dec.htm) and the Bangkok Declaration at [Hhttp://www.thinkcentre.org/article.cfm?ArticleID=830H](http://www.thinkcentre.org/article.cfm?ArticleID=830H)

international society exhibiting various layers of cohesion and commonality embedded in each other (Bull 1977, Buzan 2004). Regional instruments bring the analysis one level down, which opens the space for a more detailed codification in terms of human rights of the system of regionally specific ethics of interaction between states, and between states and the individuals under their jurisdiction.

Thirdly, and related to their embeddedness within a stronger social environment, regional human rights regimes emerge as counterweight to the realisation that ratification of global instruments may not be even a crude guide to the actual commitment to human rights protection in the contemporary world (Vincent 1986:99, Falk 1981:33). Indeed, as Landman (2001) and Keith (1999) demonstrated empirically, the bigger number of states signing up to global human rights regimes does not necessarily imply an improvement in the standard of protection. Regional regimes are thus a way to withdraw the possibility for states to reap the legitimacy of being party to the International Covenant on Civil and Political Rights, for example, without bearing the costs of compliance.²⁴ They are an expressed manifestation of the interest on the part of their contracting parties in mutually binding each other to a certain mode of political behaviour, thus extracting a stronger commitment to implementation than the global regimes. This idea relates positively with Moravcsik's (2000) republican liberalism thesis explaining the creation of the ECHR.²⁵

Finally, regional regimes appear to be the best operationalisation of the division between *jus commune* and *jus proprium* in human rights norms. Leben (1999) conceptualised it as the fundamental distinction in human rights protection that is observed at each level of analysis. At the regional level, it separates the individual understanding of human rights protection by each state (*jus proprium*) from the dispositions shared across the region (*jus commune*). The bigger the latter, the more ground for creating an effective regional human rights regime. The division can be seen as mirroring internationally, at a higher level of analysis, the reconciliation of individual moralities held by autonomous persons within bounded political communities (Ingram 2002:217-8) and relates the creation of regional regimes to the political theory of reconciling conflicting claims to rights.

²⁴ This statement must be qualified as, no doubt, some regional regimes are more effective than others. Among its counterparts, the most far-reaching are the effects produced by the ECHR, which remains the "jewel in the crown" in human rights protection (Lalumière 1993:xv).

²⁵ Moravcsik (2000:225-8) claimed that the self-interest on the part of its contracting parties to "lock in" democratic rule domestically and abroad through the enforcement of human rights, was essential in the creation of the ECHR.

In view of the above, it is important to analyse regional regimes as initially originating from the human rights *jus commune* within the region and subsequently sustaining and developing it. Such regimes are never constructed on *tabula rasa* (Dower, 1998). They draw norms from both one level up - the global human rights regimes, and one level down - the national constitutions and legal systems of their contracting parties. The case of the ECHR is particularly relevant here. Its norms combined much of what was already codified by the ICCPR with the common traditions of the participating states. In the words of one of its creators:

...[t]he nations of western Europe [were] co-heirs to an inheritance, a common heritage [in need of] protection. It was only necessary to make a comparison of the provisions in the constitutions, declarations of rights, statutes and customary laws [...] with reference to human rights [in order to extract] the points of resemblance (Teitgen 1993:3).

The *jus commune* on which the Convention could be based was thus particularly large. Relatedly, the operation of the Convention itself and the case-law of its Court time and again reinforced and re-interpreted this *jus commune* by requiring “guilty” governments to amend legislation, grant human rights remedies or pay monetary damage to claimants (Carter and Trimble 1995: 309).

These four analytical dimensions, historical context, regional ethics, commitment to implementation and *jus commune*, form a coherent conceptual framework for the understanding of regional human rights regimes. It is embedded in both the wider regime theory and the resulting two contrasting approaches to explaining state motives for signing up to human rights instruments. As much as these dimensions are relevant in the analysis of the regional human rights regimes placed at the level immediately below the global, it is not self-evident whether they can be successfully utilised at an even lower level of analysis. The case of the EU Charter of Fundamental Rights is particularly relevant in this regard as it represents an effort of sub-regional norm codification. Is the so constructed analytical framework adequate for its analysis or does the Charter present it with irreconcilable conceptual tensions? An answer to this question is the objective of the remainder of the article.

ANALYTICAL IMPLICATIONS OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

If the subject-matter of human rights presents regime theory with interesting horizons, so does the European experience among its counterparts. It stands out as the environment where norms and principles have found their strongest support and have generated a considerable compliance pull beyond what other regional human rights regimes have managed to secure within their geographical remits. Yet it seems to be on the verge of splitting, following the creation of the EU Charter of Fundamental Rights. The latter represents an ontologically separate level of analysis in representing a human rights regime within an already existing regional regime, the ECHR. The Charter is influenced by, and borrows from the Convention in many respects. But does it also create another epistemological level of analysis by introducing analytical dimensions additional to those already established above? In other words, can the creation of the Charter be explained through reference to historical context, regional ethics, stronger commitment to implementation and *jus commune*, or does it make those irrelevant and require the introduction of additional analytical concepts?

Before engaging with these questions, a few words on the Charter are in order. The idea for its creation acquired the first joint high-level public acknowledgment at the European Council of Cologne in June 1999 during the German Presidency of the European Union.²⁶ The member-state executives agreed to give a mandate to a special body, whose composition was to be decided by the end of the same year, to start working on the text. After several months of discussing which institutions should be represented in the drafting convention and how, the 1999 Tampere European Council defined its representation to include national governments, national parliaments, the European Parliament and the Commission, with representatives of the European Court of Justice involved as observers. Work commenced soon after that and at the Nice Summit at the end of 2000, the European Parliament, the Commission and the Council solemnly proclaimed its outcome: the Charter of Fundamental Rights of the European Union consisting of

²⁶ “Presidency conclusions of the Cologne European Council”, 3-4 June 1999, European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union, available at [Hhttp://europa.eu.int/council/off/conclu/june99/june99_en.htm](http://europa.eu.int/council/off/conclu/june99/june99_en.htm)H.

seven sections and fifty four articles and containing no implementation mechanism.²⁷

In comparison to the three regional human rights regimes considered in the first part of the article, the Charter stands out as a qualitatively new type. It not only binds the EU member states, but also the Union's common institutions. This has not been the case with the Council of Europe, the Organization of American States or the Organization of African Unity. In addition, its ratification by the contacting parties is not independent but forms an integral part of the process of ratifying the so-called Constitutional Treaty of the Union finalised in June 2003. As things stand now, a cursory reference to the Charter is included in the main body of the latter, while the full text is attached as its second part. The articles of the Charter envisage no implementation mechanism and contain no provisions creating a special organ charged with monitoring its application, which distinguishes it as well from the other three regional human rights regimes.

The Charter does indeed seem to be incomparable to them in many respects. However, since it involves the authorities of sovereign states in a regulatory framework of behaviour in relation to the people under their jurisdiction, it makes sense to treat it on a par with other human rights regimes. It is a peculiar document in a particular context and in its preparation involved many different institutional actors including members of the European Parliament, members of national member-state parliaments, representatives of member-state governments and representatives of the European Commission. This distinguishes it from classic human rights instruments, both regional and global, which are usually drafted by governmental representatives and submitted for subsequent parliamentary approval and ratification. In addition, the Charter was prepared within a peculiar framework among other international organizations – the EU is not a state, nevertheless possesses far-reaching authority within its field of competence. These are the arguments against qualifying the Charter as a regional human rights regime.

On the other hand, the charter looks very similar to an international human rights instrument. It repeats normal standards contained in a number of existing and

²⁷ Three years later the text of the Charter, which formed Part Two of the Draft Constitutional Treaty of the European Union presented by D'Estaing to the Heads of State at Thessaloniki on 20th June 2003, contained some amendments in Section VII – General Provisions. A modest implementation mechanism has been established by the European Parliament through the appointment of a network of experts (the Human Rights League) with recognised authority in human rights matters with the task to assess the implementation of each of the rights listed in the Charter (see De Schutter 2003:4).

operative international documents that have guided state behaviour, including the behaviour of EU member states for decades now. And most importantly, it limits state power with regard to the people under their authority. The potential argument that since the EU is not a state, it is not strictly state power that the Charter limits, holds little ground. The fact that the EU, through its institutions, possesses any powers at all is only attributable to a location of primary sovereignty, i.e. that of its member states. The power it yields can thus only be satisfactorily conceptualised as an extension of state power. The EU has it no more than by the exclusive consent of its members. And since none of the human rights regimes binding these states contains self-executing norms that apply for every authority to which they extend their power, there is a need for a special regime when the latter escapes the remit of the former. In these circumstances, the Charter is needed to remedy this discrepancy by a subsequent regulation of the pooled authority of the Union resulting from the gradual transferral of state power.

Most broadly, there are four points justifying the qualification of the Charter as a regional human rights regime and not just an EU specific code of rights. Firstly, it contains articles that are hardly relevant for the EU, such as the prohibition of torture and inhuman and degrading treatment.²⁸ The reason for including such a provision is not due to the risk of the European Commission becoming an agent of torture, but more likely due to the wish to demonstrate the belonging of the Charter to the family of human rights regimes. Secondly, and as already discussed above, the Charter is clearly a measure against an institution yielding power over the people in its authority. Thirdly, the Charter visually looks like an international human rights instrument of the type of the Universal Declaration of Human Rights of 1948 or the Helsinki Final Act of 1975. The latter two were not officially ratified or even signed, but proclaimed just as the Charter was at Nice in December 2000. Nevertheless, their belonging to the family of human rights regimes is uncontested. Finally, the discourse during the Convention drafting the Charter is well indicative of its nature as a human rights regime as it emphasised the universal dimension of fundamental rights and underlined commonalities rather than distinctions. The main points of reference in the drafting process were global norms and rules, agreed upon and accepted by organisations beyond the national or EU level, and even beyond the Council of Europe (see Lerch, 2003:6).

²⁸ Article 4 of the EU Charter of Fundamental Rights: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

Considering the most fundamental dimension of analysis, that of the combination between ideology and interests in state motives behind signing up to it, the Charter makes the first step of fitting positively into the conceptual model. The calculation of its contracting parties indeed exhibits both the politics of interest and the power of ideas in prompting them to consent to its creation. It is beyond the scope of this study to analyse the composition of motives for every EU member state. Instead the case of Germany, the main proponent of the idea of the Charter, is taken up below.

In terms of nation-state identity, following the catastrophe of the Second World War, Germany underwent a process of its thorough and profound reconstruction and based it on the three pillars of Christianity, democracy and social market economy. European integration proved to be the most potent anchor for it and, as a result, Germany had been the staunchest supporter of various policies within the European Union, including EU-specific human rights codification. In the current government, it was the ideological conviction of the Green Party on the normative inappropriateness of continuing the process of economic integration without an explicit and specific human rights regime for the Union, that played a central role in the creation of the Charter.

The idea was laid down in the coalition agreement, with which the party entered government (Eicke 2000), figured in its Chapter IX *Sicherheit für alle – Bürgerrechte stärken* under the heading “EU Initiatives” and its promotion was taken very seriously by the Party chief and Germany’s Foreign Minister, Joschka Fischer (Tarschys 2003:170). Consequently, upon commencement of its Union Presidency in January 1999, the German government included in its programme *Europe’s Path into the 21st Century* a commitment that EU policies must demonstrably protect human rights so that European decisions are meaningful to its people (Miller 2000).

Besides the power of ideas, however, the promotion of the Charter was also dictated by the political interest of preserving the compatibility of the legal orders of the Union and Germany. The German Constitutional Court is legally required to ensure the screening of legislation operative within the country’s boundaries for conformity with the national constitutional guarantees of fundamental rights (*grundrechte*). In at least a couple of cases in the 1990’s it held that as long as an adequate standard of fundamental rights protection was not offered under EU law, it would not regard itself precluded from scrutinising Union measures for conformity with German fundamental rights, and where necessary, from

invalidating or disapplying such measures within Germany (Shaw 2000:345). Supporting the idea of the Charter has thus been a continuous interest of the German political establishment.

In terms of historical context, the end of the Cold War in Europe in the late 1980's presented the Union with a challenge of self-reflection, with an effect that was similar to the one that the end of Second World War had on the creation of global and regional human rights regimes. There were two main mechanisms through which it worked. Firstly, the Union faced an unprecedented number of membership applications, which made its upcoming enlargement incomparable to any previous ones (Hafner 1999:783). There had been human rights conditionality before,²⁹ but not in same explicit format as the 1993 Copenhagen criteria for membership.³⁰ One of the important reasons for this is the fact that most of the applicant states have post-communist, newly democratised political systems with little tradition and experience in human rights protection, and this logically generates “nervousness about how authority [will be] exercised within an Union [that includes states] with weak and short liberal democratic traditions” (Duff 2000).

Secondly, and related to the above idea that the Charter is provoked by the historical context of opening up the Union to newly democratised states, is the fact that in the 1990's the ECHR as a regional human rights regime stretched far beyond its original design and, as a result, diminished its capability of ensuring the desired commitment to implementation. By 1999 the ECHR was ratified by more than forty-one states, almost half of which only recently emerged from the human-rights unfriendly grips of communism. In such circumstances, the Union is justified in fearing that the human rights regime that has served its development for more than four decades (De Schuter 2003) is perhaps becoming overstrained and less effective in monitoring compliance. In this respect it is relevant to note that among the sources of the Charter's provisions, the ECHR stands out as the

²⁹ Most relevant are the examples of Greece, Portugal and Spain, which were newly democratised in the 1970's when they applied for Union membership. For a comparative analysis of the role of the EU in their democratisation see Bojkov (2000).

³⁰ The Copenhagen membership criteria require that the candidate country must have achieved: (1) stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; (2) the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; (3) the ability to take on the obligations of membership including adherence to the aims of political, economic & monetary union. See [Hhttp://europa.eu.int/comm/enlargement/intro/criteria.htm](http://europa.eu.int/comm/enlargement/intro/criteria.htm).

most oft-used one, which transpires as well in the explanatory memorandum commissioned by the Presidium³¹ demonstrating which rights in the Charter are equivalent to those contained in the ECHR.

The latter explanation links two of the analytical dimensions discussed in the previous part, historical context and commitment to implementation, in addressing the Charter. At the sub-regional level of analysis represented by the European Union, they prove to be relevant conceptualisations for its newly established human rights regime. It can be reasonably claimed that the dimensions of regional ethics and *jus commune* are also pertinent analytical tools. Regional ethics would conceptualise the Charter as marking the Union's transition from the ethics of economic integration that at times contravenes human rights considerations³² to the ethics of reaching its *finalité* (Menéndez 2003) as a fully-fledged human rights organisation (Von Bogdany 2000). *Jus commune* would in turn stress the Cologne mandate stating that "the European Council believes that this Charter should contain the fundamental rights and freedoms [...] derived from the constitutional traditions common to the Member States".³³ Evidently, the Charter benefits from a wide *jus commune* stemming from the liberal democratic constitutions of the EU members.

But this is not all. There are two additional analytical dimensions that were not discussed earlier, since they are irrelevant for the creation of the three regional human rights regimes, but are extremely relevant in the analysis of the Charter. They stem from the characteristics of the European Union as a unit of analysis that has gone far beyond the classic international regime or organisation (Peters 1999:133) and has acquired a number of *sui generis* systemic properties justifying treating it as an instance of nothing other than itself (Rosamond 2000:15). The latter point has led some authors in their effort to analyse the EU with the help of comparative politics (Hix 1994) and to define it as a political system closely resembling the domestic political organisation of nation states (Hix 1999). It is in this respect that the dimensions of legitimacy and constitutionalism need to be added in analysing the EU Charter of Fundamental Rights.

³¹ Convention document CHARTE 4473/00.

³² Maclaren (2000) held that often the choices of national governments in protecting their citizens' economic and social rights are constrained for the sake of implementing measures promoting the global competitiveness and functioning of the common market of the Union.

³³ "Presidency Conclusion of the Cologne European Council", 3-4 June 1999, European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union, available at [Hhttp://europa.eu.int/council/off/conclu/june99/june99_en.htm](http://europa.eu.int/council/off/conclu/june99/june99_en.htm)

Legitimacy is related to the fact that the Charter fulfils the function of legitimating the integration project in which member-state governments have involved their countries, and which is recognised as increasingly alienating the ordinary citizen. Schönalu (2001), for example, saw the process of creating the Charter within the drafting Convention as a revealing debate over the fundamental values keeping the Union together and giving it legitimacy in the eyes of its citizens. It is uncontested that the Charter deepens the human rights legitimacy of the Union beyond what the ECHR is able to provide in terms of making sure that its contracting parties respect the norms they have signed up to in all their activities. The latter has become largely ineffective in controlling the Union due to the gradual “clever sleight of hand” (De Schutter 2003:5) by which EU member states transferred powers to the common institutions without making sure that they are bound in the same way as by the ECHR.

Both texts related to the Charter contain direct reference to legitimacy and improved visibility of fundamental rights within the Union. The Cologne Conclusions held that the “protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy”. It also noted that “there appears to be a need [...] to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens”.³⁴ Reaffirming those statements, the draft presented at the Nice summit saw the Union as contributing to the preservation and development of common values, to which end “it is necessary to strengthen the protection of fundamental rights [...] by making [them] more visible in a Charter”.³⁵ Such references point undoubtedly to the motivation shared by all EU member states to create the regime of the Charter in order to enhance the legitimacy of the integration project that they are part of.

The dimension of constitutionalism is supported by Castiglione's (2002) idea to see reasons of constitutional procedure behind creating the Charter. The Convention drafting was later repeated at a higher level in the Convention on the Future of Europe charged with preparing the Union's Constitution. It preserved similar mechanism of work and was composed of a similar ratio of representatives of national governments, parliaments and Union institutions. The Charter itself found its place in the outcome of the work of the second Convention, which alone provides a perfect justification for why it was created in the first place. This also

³⁴ Ibid.

³⁵ Charter Preamble - http://www.europarl.eu.int/charter/pdf/text_en.pdf

proves to be a reasonable explanation for why the Charter does not contain any implementation mechanism, since Constitutional Bills of Rights usually do not.

Relatedly, the greatly increased powers of governance of Union institutions in comparison to the first decades of its existence necessarily invites a more vigorous re-consideration of its objectives and guiding principles.³⁶ Rearranging the treaties has been an issue of long standing in EU politics, and in the absence of treaty-enshrined protection of fundamental rights, it was the European Court of Justice that laid the initial foundations vindicating their respect and within its efforts of constitutionalising the Union declared them as “general principles” of Union law (Weiler 1999:107). Such status, however, has been seen as unsatisfactory since, in the potential clash between community objectives enjoying firm legal basis in the treaties and human rights defended merely as “general principles”, the former will naturally enjoy priority (Meehan 2000). It is precisely this inconsistency that the Charter, being part of a wider constitutional process, addresses.

CONCLUSIONS

If the subject-matter of human rights presents regime theory with interesting horizons, so does the European experience among its regional counterparts. It stands out as the environment where norms and principles have found their strongest support and have generated a considerable compliance pull. Two explanations are advanced in addressing this outcome. Europe is the historical source of the idea of human rights (Leben 1999) and it played a prominent part in “the ruthless and wholesale destruction of individuals and groups” and in “the extreme deterioration” of relations between states and their people (Szabo 1982:21). The ECHR is currently being supplemented with another regime that has the potential to further and strengthen the protection of human rights in Europe in the years to come.

The EU Charter of Fundamental Rights lends itself to analysis based on the broad conceptual framework constructed with reference to the European, American and African human rights regimes. It is defined by historical context, is a reflection of particular regional ethics, and promotes a strong commitment to implementation. It steps on the wide *jus commune* of human rights norms available across the

³⁶ The Charter can thus be seen as addressing the greatly increased powers of governance acquired by EU institutions and the emerging possibility that, as these powers are exercised, human rights within the Union will inevitably be affected (Goldsmith 2000).

liberal democratic member states of the European Union. However, the Charter also introduces two additional analytical dimensions: legitimacy and constitutionalism. They appear irrelevant in the analysis of the other three regional regimes, since none of them were aimed at legitimising or constitutionalising the organisation that provided the framework for their establishment, but are indispensable in conceptualising the Charter itself.

The need for broadening the analytical perspective arises out of the specificity of the Charter and the specificity of the political domain within which it emerged – the European Union. On the one hand, the Union certainly presents regime theory with a substantial empirical strain. It cannot be simply analysed as a group of rational states for whom cooperation and its regulation is defined without any reference to norms and principled ideas. On the other hand, the Charter itself bears a multiple identity representing an interesting combination of two poles: a constitutional bill of rights with partial resemblance to domestic human rights guarantees in liberal democracies, and a veritable regional human rights regime of the type that helped articulate the analytical dimensions of historical context, regional ethics, commitment to implementation and *jus commune*.

The Charter proves to represent a separate level of the analysis both ontologically and epistemologically. It goes one step further than the three regional human rights regimes in its relation to both the organisation within which it emerged and the member states forming it. Ontologically, it is a qualitatively different human rights regime which in its specificity comes close to a constitutional bill of rights. Epistemologically, it widens the framework of analysing such regimes by introducing two new elements indispensable for its conceptualisation.

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