

Fundamental Rights in the European Community Legal Order

John L. Murray

Abstract

The role of the courts in the protection of human rights in any legal system is a constitutionally sensitive one. The observance and protection of such rights articulate with many aspects of the exercise of governmental and legislative power. The value nature of human rights accentuates these sensibilities. Some have viewed sovereign law as an essential ingredient in the make-up of national identity, a perception which tends to confirm a presumption that legal systems, while responsive to new pressures, are nonetheless holistic, coherent, and state-bound. National law is a rampart against outside corruption of the national ethos. Inevitably all of this poses particular challenges for a supranational court with jurisdiction to pass judgment on human rights compliance, directly or indirectly, by states that are justly proud of their own legal democratic traditions. The exercise by the European Court of Justice (“Court of Justice” or “Court”) of jurisdiction to protect the individual from breaches of their fundamental rights is a constitutional role which trammels not only the exercise of political power by the institutions of the European Community (the “Community”) but indirectly (and often directly) the use of governmental and legislative power at a national level. This constitutional role, exercised in the context of the doctrines of primacy and direct effect, challenges the ideology of a state’s legal autonomy and the associated sense of self-determination. Not surprisingly, the Court of Justice at the early stages showed a marked reluctance to be drawn into this area.

SPEECH

FUNDAMENTAL RIGHTS IN THE EUROPEAN COMMUNITY LEGAL ORDER

*The Hon. Mr. Justice John L. Murray, Chief Justice of Ireland**

In his work, *The End of History and the Last Man*, Francis Fukuyama posed the question, “[i]n what way can we say that the modern liberal democracy recognises all human beings universally?”¹

“It does this” he responds, “by granting and protecting their rights. That is, any human child born on the territory of . . . [a] liberal state is by that very act endowed with certain rights”² This underlies the historical evolution of the status of the individual in society, from the mere subject of a sovereign, then a citizen of his or her own state to the modern era where the individual in a liberal democracy is him or herself a source of rights by virtue of the human dignity of the person.

When a court is placed in the position of being not the first, but the final, guarantor of the fundamental rights of the individual, it means that the “absolute supremacy or predominance of regular laws” of which the British Constitutionalist Dicey spoke is no longer true.³ Such a court looks to the individual as enjoying those fundamental rights autonomously and, more importantly, antecedent to so-called “regular law” whose validity may be called into question for infringing the rights vested in the individual.

The role of the courts in the protection of human rights in any legal system is a constitutionally sensitive one. The observance and protection of such rights articulate with many aspects

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1. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 202 (The Free Press, 1992).

2. *Id.*

3. See ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 202 (E.C.S. Wade ed., Macmillan 1939) (1885).

of the exercise of governmental and legislative power. The value nature of human rights accentuates these sensibilities. Some have viewed sovereign law as an essential ingredient in the make-up of national identity, a perception which tends to confirm a presumption that legal systems, while responsive to new pressures, are nonetheless holistic, coherent, and state-bound. National law is a rampart against outside corruption of the national ethos.

Inevitably all of this poses particular challenges for a supranational court with jurisdiction to pass judgment on human rights compliance, directly or indirectly, by states that are justly proud of their own legal democratic traditions.

The exercise by the European Court of Justice (“Court of Justice” or “Court”) of jurisdiction to protect the individual from breaches of their fundamental rights is a constitutional role which trammels not only the exercise of political power by the institutions of the European Community (the “Community”) but indirectly (and often directly) the use of governmental and legislative power at a national level. This constitutional role, exercised in the context of the doctrines of primacy and direct effect, challenges the ideology of a state’s legal autonomy and the associated sense of self-determination. Not surprisingly, the Court of Justice at the early stages showed a marked reluctance to be drawn into this area.⁴

The exercise of such a far-reaching constitutional function cannot be lightly undertaken, or more to the point, cannot be undertaken at all, unless there is a credible legitimate basis for doing so. Yet, as we know, the founding treaties contained no reference to human or fundamental rights.⁵

If the Community was to survive, let alone develop as a supranational institution exercising sovereign powers over liberal democracies in which fundamental individual rights were consti-

4. *See generally* *Ayadi v. Council*, Case T-253/02 [2006] E.C.R. II-2139; *Panayotova v. Minister voor Vreemdelingenzaken en Integratie*, Case C-327/02 [2004] E.C.R. I-11055.

5. *See generally* *Single European Act*, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter *SEA*] (amending Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter *EEC Treaty*]); *Treaty Establishing the European Coal and Steel Community*, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter *ECSC Treaty*]; *Treaty establishing the European Atomic Energy Community*, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter *Euratom Treaty*].

tutionally protected, it faced enormous challenges due to this deficit.

This is an opportune occasion to reflect on the past as well as to look afresh at the remarkable evolution of Community law, its complexity and—perhaps most importantly—its future. If the development of Community law may be seen as a narrative of sorts, I am pleased to examine today one of its more important chapters, namely, the protection of fundamental rights in the Community legal order.

It is a chapter of the Community narrative which has been penned in the main by judicial hands, and is of course an aspect of the wider process, led by the Court of Justice, of creating from the Treaty of Rome a supranational constitutional charter. The founding milestones of this process are familiar to all of you here and I do not need to dwell on them: the enunciation of the doctrines of direct effect in *NV Algemene Transport-en Expedietie Onderneming van Gend en Loos v. Netherlands Inland Revenue Administration* (“*Van Gend en Loos*”)⁶ and its subsequent expansion in *Van Duyn v. Home Office*,⁷ of primacy in *Costa v. E.N.E.L.*⁸ and of preemption as early as 1969 in *Wilhelm v. Bundeskartellamt*.⁹

Through these doctrines the Court of Justice made a pivotal contribution to Community law. Through the doctrine of direct effect it effectively revolutionised the functional role of the Treaty of Rome and transformed the individual citizens into agents of integration, a dynamic force capable of promoting evolution of this new legal order by virtue of their right to challenge, in individual cases, the compatibility of national measures with Community law—a route that is perhaps now taken for granted—while the doctrines of primacy and pre-emption ensured the stability and coherence of the Community legal order.¹⁰

This new order, however, had a void at its core. Given that

6. *NV Algemene Transport-en Expedietie Onderneming van Gend en Loos v. Netherlands Inland Revenue Administration* (*Van Gend en Loos*), Case 26/62 [1963] E.C.R. 3.

7. *Van Duyn v. Home Office*, Case 41/74 [1974] E.C.R. 1337.

8. *Costa v. E.N.E.L.*, Case 6/64 [1964] E.C.R. 584, 614.

9. *Wilhelm v. Bundeskartellamt*, Case 14/68 [1969] E.C.R. 1.

10. See *Wells v. Sec'y of State for Transport, Local Gov't & the Regions*, Case C-201/02 [2004] E.C.R. I-723, ¶ 61; *Heppele v. Adjudication Officer*, Case C-196/98 [2000] E.C.R. I-3701, ¶¶ 39-42.

the Treaty of Rome did not *per se* protect fundamental rights (apart from the four freedoms and the prohibition of discrimination) the reluctance of the Court of Justice to grapple with the question of fundamental rights¹¹ soon led to disquiet on the part of constitutional courts, primarily through the proposition, albeit hypothetical, from the Federal Constitutional Court of Germany in *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* (“*Solange I*”)¹² that Community law should be reviewed by national courts for its compatibility with national rights standards prior to implementation.

Faced with the appalling vista of discrete clutches of judicial decisions at the national level pecking at the smooth uniformity of Community law and undermining its operation, the Court finally declared in its decision of 1974—*Nold v. Commission*¹³—that respect for fundamental rights forms an integral part of the general principles of Community law.¹⁴ Fundamental rights were to be protected by the Court, within the Community legal order and within the scope of Community law, according to an unwritten or unenumerated catalogue of rights inspired by the constitutional traditions of the Member States and international human rights treaties to which the Member States subscribed. Some saw this as less than a dramatic move, so that the Court of Justice by doing so was merely, as one commentator put it, “filling a gap in the Treaty [of Rome] that practice had revealed” and safeguarding the integrity of the Community legal order.¹⁵

In later decisions such as *Wachauf v. Forstwirtschaft*¹⁶ and *Tiélorassi v. Pliroforissis*¹⁷ the Court of Justice held that its powers of review extend to Member States’ acts but only to the extent

11. For example, in *Stork v. High Authority*, the European Court of Justice (“Court of Justice” or “Court”) held that it had no power to examine a complaint against a decision claimed to infringe on German constitutional law. See generally *Stork v. High Authority*, Case 1/58 [1959] E.C.R. 43.

12. *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* (*Solange I*), BVerfGE 37, 271 (1974).

13. *Nold v. Commission*, Case 4/73 [1974] E.C.R. 491.

14. The Court had already referred to fundamental rights in dicta in *Stauder v. City of Ulm*, Case 29/69, [1969] E.C.R. 419, ¶ 7, and *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, ¶ 4.

15. See Julio Baquero Cruz, *The Changing Constitutional Role of the European Court of Justice*, 34 INT’L J. LEGAL INFO. 223, 232 (2006).

16. See generally *Wachauf v. Forstwirtschaft*, Case 5/88, [1989] E.C.R. 2609.

17. See generally *Tiélorassi v. Pliroforissis*, Case C-260/89, [1991] E.C.R. I-2925.

that those acts come within the sphere of Community law.¹⁸

It is of course important to recall that the Court of Justice, like any other constitutional court, has never had the power to pick and choose when to deal with certain issues but has had to wait for them to arise. It could only pick up its pen, if I may continue my analogy, when requested to do so. Many of the Court's most far-reaching decisions, including all of those to which I have already referred with the exception of *Nold*,¹⁹ have been the result of preliminary references made by national courts under the Article 234 [Treaty Establishing the European Community ("EC Treaty" or "EC")] (formerly Article 177) procedure.²⁰

This is also true of later decisions such as *Francovich v. Italy*²¹ in which the Court laid down the principle of state liability with regard to individuals for damages caused by a failure to transpose Community Directives.²² Indeed, virtually every important case in the field of non-discrimination, freedom of movement, equality, social security, the rights of migrant workers and their families, and health and safety in the workplace have been decided as a result of references made by national courts under Article 234 EC.²³

In this manner, the development of Community law has relied not only on the willingness of national courts to refer issues to the Court of Justice but also on their acceptance of the resultant decisions as applying not only to the instant case but as a binding legal precedent with *erga omnes* effect. The national courts, whether willingly or reluctantly, have thus played perhaps the most dynamic role of all and the relationship between the national courts and the Court of Justice has therefore been described as one of collaboration rather than competition or, as the Court diplomatically puts it, '*dialogue*.'²⁴

This is not to say, of course, that decisions have never been

18. See *id.* ¶ 41; *Wachauf*, [1989] E.C.R. 2609, ¶ 19.

19. See generally *Nold v. Commission*, Case 4/73, [1974] E.C.R. 491.

20. See Consolidated Version of the Treaty Establishing the European Community art. 234, O.J. C 321 E/37, at 147 (2008) [hereinafter EC Treaty].

21. See *Francovich v. Italy*, Joined Cases 6/90 & 9/90, [1991] E.C.R. I-5357.

22. See *id.* ¶ 39.

23. See John L. Murray, *The Dynamics of a Community Constitution*, in LEGAL ASPECTS OF INTEGRATION IN THE EUROPEAN UNION 35-36 (Emiliou and O'Keefe eds., 1997).

24. See generally Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); see also Robert B. Ahdich,

met with resistance. There have been periodic political 'shots across the bows' of the Court of Justice, particularly where a preliminary reference has led to a strengthening or extension of European Union ("EU") policy. A notable example would be the 'Barber Protocol' saga, arising from the 1990 case of *Barber v. Guardian Royal Exchange Assurance Group*.²⁵ This case, in which the Court of Justice held, in a prospective effect ruling, that occupational pensions constitute part of an employee's pay and must therefore comply with Article 119 of the EC Treaty stipulating equal pay for men and women, saw an attempt by the Member States, spearheaded by a hostile U.K. government, to rewrite the decision of the Court of Justice in the so-called "Barber Protocol" annexed to the Treaty of Rome by the Maastricht Treaty in 1992, which in a subsequent case²⁶ was endorsed by the Court of Justice as what it had meant to say in *Barber*.²⁷

That said, attempts to constrain the Court's impact in the field of fundamental rights have been "weak and few,"²⁸ and in reality, far from being unhappy with the Court's approach, the Member States have so far actively endorsed it.²⁹ The Court's leading role in the protection of fundamental rights has seen successive treaties fashioned by the Member States traditionally playing 'catch up,' if you will, with its case law by enshrining respect for such rights in successive treaties, from human rights references in the Single European Act 1986³⁰ and the preamble to the Maastricht Treaty³¹ to the declaration in Article 6(2) of the Treaty on European Union (Treaty of Amsterdam)³² that:

The Union shall respect fundamental rights as guaranteed by

Between Dialogue and Decree: International Review of National Courts, 79 N.Y.U. L. REV. 2029, 2156-57 (2004).

25. See generally *Barber v. Guardian Royal Exch. Assurance Group*, Case C-262/88, [1990] E.C.R. I-1889.

26. See *Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf*, Case C-109/91, [1993] E.C.R. I-4879, ¶¶ 15-20.

27. See generally *Barber*, [1990] E.C.R. I-1889.

28. ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 192 (2000).

29. See Julio Baquero Cruz, *supra* note 15, at 232; see also Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. OF COMP. & INT'L L. 95, 113 (2003).

30. SEA, *supra* note 5, O.J. L 169/1.

31. See Consolidated Version of the Treaty Establishing the European Community, pmbL, O.J. C 321 E/1, at 9 (2008) [hereinafter TEU].

32. See *id.* art. 6(2), O.J. C 321 E/1, at 11.

[the European Convention on Human Rights] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.³³

This reflects in part the Court's own statement in *Nold v. Commission* that in safeguarding fundamental rights it "is bound to draw inspiration from the constitutional traditions common to the Member States,"³⁴ and that "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed in the framework of Community law."³⁵

As the late Federico Mancini observed in 1989, while the principle of respect for fundamental rights "was forced on the Court from the outside, by the German and, later, the Italian Constitutional Courts,"³⁶ the Court's reading of an unwritten bill of rights into Community law is its "most striking contribution" to the development of a constitution for Europe.³⁷ Achieved within, and parallel to, the overall process of constitutionalization, it has resulted in a situation where, in an ever-increasing field of Community competences, every citizen now has equal rights that can be enforced before the Court, and indeed before national courts, or as Advocate General Jacobs put it in *Konstantinidis v. Stadt Altensteig-Standesamt*,³⁸ "[i]n other words, [a Community national] is entitled to say '*civis europeus sum*' and to invoke that status in order to oppose any violation of his fundamental rights."³⁹

The content of this unwritten bill of rights is of course, by its very nature, impossible to ascertain definitively. However, a number of points are clear. One is that the Court's references to national constitutions as a source of rights have been sporadic and perfunctory, rather than systematic or scientific.⁴⁰ Another is that the European Convention on Human Rights (the "Euro-

33. *See id.*

34. *See Nold v. Commission*, Case 4/73 [1974] E.C.R. 491, 507.

35. *See id.*

36. G. Federico Mancini, *A Constitution for Europe*, 26 COMMON MKT. L. REV. 595, 611 (1989).

37. *See id.*

38. *See Konstantinidis v. Stadt Altensteig-Standesamt*, Case 168/91 [1993] E.C.R. I-1191., ¶ 46.

39. *See id.* at 1212, ¶ 46.

40. *See Nial Fennelly, Pillar Talk: Fundamental Rights Protection in the European*

pean Convention” or “ECHR”)⁴¹ has played, and was bound to play, an increasingly central role in the Court’s case law as a source from which inspiration may be drawn in fundamental rights cases, in comparison to which, other international sources of inspiration referred to, such as various other Council of Europe instruments, and those emanating from the United Nations and the International Labour Organisation (“ILO”) have played bit parts.

While the Court of Justice has never said that the European Convention is formally binding on the Community or that its provisions are directly incorporated into Community law,⁴² it recognized the European Convention’s pre-eminence as early as 1991⁴³ and has repeatedly affirmed that the Convention has “special significance” in fundamental rights cases.⁴⁴ Indeed, the Court of Justice’s use of decisions of the European Court of Human Rights (the “Strasbourg Court”) to define the scope of fundamental rights in Community law⁴⁵ has led to the observation that it has blurred the distinction between the Convention as an ‘inspiration’ for fundamental rights and as a ‘source’ of such rights.⁴⁶

On the other hand, the Court has consistently stated that the nature and scope of a fundamental right must be determined autonomously in Community law.⁴⁷ The expansion of the Community’s competence in the protection of fundamental rights has not only focused attention on this unwritten bill of

Union, 1 JUD. STUD. INST. J. 95, 100 (2008), available at [http://www.jsijournal.ie/html/Volume%208%20No.%201/2008\[1\]_Fennelly_Fundamental_Rights.pdf](http://www.jsijournal.ie/html/Volume%208%20No.%201/2008[1]_Fennelly_Fundamental_Rights.pdf).

41. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

42. P. CRAIG & G. DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 384 (4th ed. 2008).

43. *Tiélorassi v. Pliorforissis*, Case C-260/89, [1991] E.C.R. I-2925, ¶ 41.

44. See e.g., *Kremzow v. Austria*, Case C-299/95, [1997] E.C.R. I-2629, ¶ 14; *Booker Aquacultur Ltd. v. The Scottish Ministers*, Joined Cases C-20/00 & C-64/00, [2003] E.C.R. I-7411, ¶ 65.

45. See, e.g., *Hoechst AG v. Commission*, Joined Cases 46/87 & 227/88, [1989] E.C.R. 2859, ¶¶ 13-18; *Hüls AG v. Commission*, Case C-199/92P, [1999] E.C.R. I-4287, ¶ 62; *Sec’y of State for the Home Dep’t v. Hacene Akrich*, Case C-109/01, [2003] E.C.R. I-9607, ¶ 58; *Carpenter v. Sec’y of State for the Home Dep’t*, Case C-60/00, [2002] E.C.R. I-6279, ¶ 41.

46. D. WYATT ET AL., *WYATT AND DASHWOOD’S EUROPEAN UNION LAW* 272 (5th ed. 2006).

47. See, e.g., *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, ¶¶ 3-4.

rights but, more importantly, raised the spectre of a duality and divergence emerging between the supranational Community legal order and the international system of the European Convention, which some view as undesirable.

The argument has been repeatedly made that the only satisfactory resolution to the question of divergence is for the Community to accede to the European Convention, an option which was discussed as early as 1979⁴⁸ and which the Court held, in its *Opinion 2/94*⁴⁹ on accession, would require Treaty amendment. Accession is also said to be the only solution to the prevailing anomaly whereby, despite the fact that the acts of the EU itself may not currently be challenged directly in the Strasbourg Court, a Member State may be held responsible for alleged violations of a Convention right through the enactment of national legislation implementing Community law,⁵⁰ thereby trapping them between the 'rock' of Community law and the 'hard place' of Convention obligations.

A response to both questions has been provided, not by the Court of Justice, but by the Member States, first, through the 'solemn proclamation' of the EU Charter of Fundamental Rights (the "Charter") at the Nice Summit of 2000,⁵¹ which would be given binding legal status by the Treaty of Lisbon⁵²—the adoption of which is now much less assured, given the rejection of the Treaty by the Irish electorate in a referendum on the 12th of June 2008⁵³—and second, by providing for accession by the Union to the European Convention in that same Treaty.⁵⁴ How-

48. See generally Accession of the Communities to the European Convention on Human Rights: Commission Memorandum, COM (79) 210 Final (April 1979) (analyzing for the first time the issue of accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")).

49. Opinion of the European Court of Justice Regarding the Accession by the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms, *Opinion 2/94*, [1996] E.C.R. I-1759, ¶¶ 34-35.

50. See P. CRAIG & G. DE BÚRCA, *supra* note 42, at 420-24.

51. Charter of Fundamental Rights of the European Union, O.J. C 364/01 (2000) [hereinafter Charter].

52. Treaty of Lisbon (Reform Treaty) art. 6(1), O.J. C 306/01, at 135 (2007), *opened for signature* Dec. 13, 2007 (not yet ratified) [hereinafter Reform Treaty] ("The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Human 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.").

53. The Lisbon Treaty requires ratification by all twenty-seven Member States of the European Union ("EU") to come into force.

54. See Reform Treaty, *supra* note 52, art. 6(2), O.J. C 306/01, at 135 ("The Union

ever, while portrayed as necessary and complementary steps in the furtherance of fundamental rights protection at Community level, these political measures raise potentially serious concerns.

For present purposes I do not wish to dwell too long on the Charter. A syncretic document, containing rights derived from a wide array of sources, including the European Convention and other instruments referred to in the case law of the Court of Justice,⁵⁵ it has been somewhat dubiously portrayed by various political actors in the EU as merely crystallizing and clarifying the catalogue of rights developed in the Court's case law.⁵⁶ While it does not establish any new power for the Community or the EU, it does contain numerous innovations (for example, provisions on biotechnology such as the prohibition on human cloning)⁵⁷ and a commitment to open-ended abstract concepts, such as the dignity of the individual.⁵⁸ It also contains a more neutrally worded right to marriage⁵⁹ which excludes the reference in Article 12 of the European Convention to "men and women,"⁶⁰ a difference highlighted by the Strasbourg Court in the *Goodwin v. United Kingdom*⁶¹ case, to which I refer below.

The Charter's current legal status is also somewhat ambiguous. While, pending adoption and entry into force of the Treaty of Lisbon, it is not legally binding, it has already been accorded an influential place in Community law, firstly, through its endorsement by all EU institutions,⁶² its formal use, under Rule 34

shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competence as defined in the Treaties.").

55. See generally *Baustoffgrosshandlung v. Commission*, Case 4/73, [1974] E.C.R. 491 (fundamental rights of the person).

56. See generally *Defrenne v. Sabena*, Case 43/75, [1976] E.C.R. 455 (right to equal pay for equal work); *Prais v. Council*, Case 130/75, [1976] E.C.R. 1589 (religious freedom).

57. Charter, *supra* note 51, art. 3(2), O.J. C 364/01, at 3 (the prohibition of the reproductive cloning of human beings).

58. See *id.*, pmb., at 2 ("Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, *universal values of human dignity.*") (emphasis added).

59. See *id.* art. 9, at 4 ("The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.").

60. See ECHR, *supra* note 41, art. 12, Rome, Nov. 4, 1950 ("Men and women of marriageable age have the right to marry . . .").

61. See generally *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 3.

62. Even before the "solemn proclamation" of the Charter at the Nice Summit in 2000, the European Commission had stated in a Communication that "[i]t is reason-

of the Rules of Procedure of the European Parliament,⁶³ as a fundamental rights standard against which legislative acts may be measured, and as a source of rights in opinions of Advocates General of the Court and decisions of the Court of First Instance (“CFI”).⁶⁴ In addition, the Grand Chamber of the Court of Justice in 2006 recognized the importance attached to the Charter by the EU Council.⁶⁵ However, it must be noted that thus far, references made to the Charter by the Tribunal and the Court of Justice have largely been window dressing in cases where the right identified has been firmly established by the case law of the Court or where the right is already extant in the Treaty of Rome, for example, in the *Int’l Transp. Workers’ Fed’n and Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti* decision of the Grand Chamber in December 2007.⁶⁶

It would appear reasonable to assume that it is unlikely the Charter will be used in any bold decision until and unless it is rendered legally binding through adoption of the Lisbon Treaty, at which point other issues, such as its relationship to the European Convention, will give rise to more concrete scrutiny, especially where there is a divergence in the text or legal context. In

ble to assume that the Charter will produce all its effects, legal and others, whatever its nature . . . [i]t is clear that it would be difficult for the Council and the Commission, who are to proclaim it solemnly, to ignore in the future, in their legislative function, an instrument prepared at the request of the European Council by the full range of sources of national and European legitimacy acting in concert.” See Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM 644 Final (2000), point 10.

63. See generally Rules of Procedure of the European Parliament, Rule 34, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20081010+RULE-034+OC+XML+V0//EN&language=EN&navigationBar=YES> (“Examination of respect for fundamental rights, the principles of subsidiarity and proportionality, the rule of law, and financial implications.”).

64. See, e.g., *Jégo-Quéré & Cie SA v. Commission*, Case T-177/01, [2002] E.C.R. II-02365, ¶ 47 (holding that the applicant was entitled to an “effective remedy” in light of Articles 6 and 13 of the ECHR and of Article 47 of the EU Charter of Fundamental Rights, that neither Articles 234, 235, nor Article 288 offered Jégo-Quéré effective protection and removing the requirement that the applicant be “individually” concerned). But see *Unión de Pequeños Agricultores v. Council*, Case C-50/00P, [2002] E.C.R. I-06677, ¶¶ 39-40 (reaffirming that individuals had a right to effective judicial protection, but holding that this was to be achieved through the combination of Articles 230, 241, and 234).

65. See *European Parliament v. Council*, Case C-540/03, Grand Chamber, [2006] E.C.R. I-05769, ¶ 38.

66. See *Int’l Transp. Workers’ Fed’n and Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05, Grand Chamber, [2007] E.C.R. I-10779.

this connection, it may be noted that the European Court of Human Rights in its 2002 decision in *Goodwin v. United Kingdom*,⁶⁷ striking down a blanket ban on transsexuals marrying as a breach of the right to marry in Article 12 of the ECHR,⁶⁸ referred, although in a rather self-serving fashion, to the corresponding Charter guarantee's departure, in its view "no doubt deliberately,"⁶⁹ from the wording of the ECHR Article in removing the reference to men and women.⁷⁰

Suffice it to say, then, that the Charter, even in its present non-binding form, can nonetheless be described as a "legally relevant, and constitutionally significant, document"⁷¹ in the Community legal order and may yet, particularly once it becomes legally binding, have far-reaching effects through the case law of both the Court of Justice and importations from the European Court of Human Rights.

The Charter potentially exacerbates rather than resolves the possibility of divergence between the Community legal order and the Convention system and this therefore must remain a preoccupation for the Court of Justice in the field of fundamental rights. This has led the Court to engage increasingly in a dialogue, parallel to its dialogue with national courts, with the Strasbourg Court. It is a dialogue characterized by a spirit of what has been called "*good neighbourliness*,"⁷² in recognition of the need for both courts to work together and to avoid a "*prestige battle*"⁷³ between them. As the then President Wildhaber of the

67. See generally *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 3.

68. See generally *id.*

69. See *id.* ¶ 100.

70. Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms reads:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ECHR, *supra* note 41, art. 12, Nov. 4, 1950, 213 U.N.T.S. 221.

Article 9 of the Charter of Fundamental Rights of the European Union reads:

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Charter, *supra* note 51, art. 9, O.J. C 364/01, at 4.

71. See D. WYATT ET AL., *supra* note 46, at 285.

72. See Rick Lawson, *Current Trend in the Relationship Between Strasbourg and Luxembourg*, paper delivered at the Academy of European Law Meeting in Trier (June 2005), in *Litigating Fundamental Rights in the EU*, 12 (on file with author).

73. See European Commission for Democracy Through Law (Venice Commission), *The Accession of the European Union/European Community to the European Convention on Human Rights*, Comments by Pieter Van Dijk, CDL(2007)096, ¶ 10-12 (Oct. 12, 2007),

Strasbourg Court has put it:

A major goal [in devising the European human rights protection system of the twenty-first century] should be to reinforce a harmonious and efficient interplay between the two systems, in other words their complementarity.⁷⁴

Both Courts have made great efforts to render such complementarity a reality rather than rhetoric. In a few cases, divergence has arisen simply due to the Court of Justice getting the 'first bite of the apple,' as it were, at interpretation of a Convention right and it has shown a willingness to revise such interpretations in line with subsequent rulings in Strasbourg. For example, in its 1989 judgment in *Hoechst AG v. Commission*,⁷⁵ the Court of Justice held that business premises were not covered by Article 8 ECHR⁷⁶ guaranteeing the inviolability of the home.⁷⁷ The Court subsequently reversed this stance some thirteen years later in *Roquettes Frères SA v. Commission*⁷⁸ due to an intervening decision by the Strasbourg Court⁷⁹ which held that the Article *did* in fact extend to business premises,⁸⁰ the Court of Justice explicitly referred to the case law of the Strasbourg Court on the issue since the Court's decision in *Hoechst*.

Possibly a major source of divergence is the fact that, by definition, each court pursues different objectives. It has been said that:

The ECHR interprets the Convention according to the Convention's objectives, while the ECJ interprets it according to

available at [http://www.venice.coe.int/docs/2007/CDL\(2007\)096-e.pdf](http://www.venice.coe.int/docs/2007/CDL(2007)096-e.pdf) [hereinafter Van Dijk], (citing Françoise Tulkens, *Towards a Greater Normative Coherence in Europe: The Implications of The Draft Charter of Fundamental Rights of the European Union*, 21 HUM. RTS. L.J. 329, 331 (2000)).

74. See Egbert Myjer, *Can the EU Join the ECHR—General Conditions and Practical Arrangements*, in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE*, 308 (Ingolf Pernice, Juliane Korkott & Cheryl Saunders eds., 2006) (quoting Luzius Wildhaber, President, Eur. Ct. H.R., Address to the Group of Wise Persons Established to Consider the Continued Effectiveness of the ECHR System (Oct. 18, 2005)).

75. See generally *Hoechst AG v. Commission*, Joined Cases 46/87 and 227/88, [1989] E.C.R. 2859.

76. See ECHR, *supra* note 41, art. 8, Nov. 4, 1950, 213 U.N.T.S. 220.

77. See *Hoechst AG v. Commission*, [1989] E.C.R. 2859, ¶ 18.

78. See *Roquettes Frères SA v. Commission*, Case 94/00, [2002] E.C.R. I- 9011, ¶ 29.

79. See *Société Colas Est v. France*, 2002-III Eur. Ct. H.R. 133 (2002).

80. See *id.* at 149, ¶ 41.

the Community's objectives. However, the two sets of objectives do not necessarily coincide. The Convention's aim is to protect the individual as a human being, while the Community's aim is to further economic and social integration."⁸¹

While these aims are not mutually exclusive it is perhaps inevitable that the different legal order in which the Court of Justice operates necessitates a balancing of interests that may not be familiar to the Strasbourg Court. Firstly, the importance of the doctrine of primacy of Community law over national law means that, in certain instances the Community law standard must apply even if it provides less protection than national or international fundamental rights standards. Secondly, uniformity is integral to the functioning of the Community legal order and, were a national court unwilling to follow a decision of the Court of Justice because it felt it had other obligations under the European Convention—this could give rise to a “veritable constitutional crisis.”⁸² This could readily arise in the context of the *Bosphorus* doctrine as endorsed by the CFI, to which I refer later.

However, while the Court of Justice is therefore required to engage in a more difficult balancing act between fundamental freedoms guaranteed by Community law and fundamental rights that are of a more universal nature it has at least shown some reluctance to sacrifice fundamental rights on the altar of Community integration where this can be avoided. This necessitates continual efforts to reconcile the two, with the doctrine of proportionality used as the favourite medium for doing so, as seen in cases such as *Vereinigte Familiapress Zeitungsverlags v. Heinrich Bauer Verlag*⁸³ and, more recently, *Omega Spielhallen v. Oberbürgermeisterin der Bundesstadt Bonn*.⁸⁴ In *Schmidberger v. Austria*⁸⁵ in 2003 the Court permitted a fundamental right—free-

81. See Clemens Rieder, *Protecting Human Rights Within the European Union: Who is Better Qualified to Do the Job—the European Court of Justice or the European Court of Human Rights?*, 20 TUL. EUR. & CIV. L.F. 73, 102 (2005) (quoting A.G. Toth, *The European Union and Human Rights: The Way Forward*, 34 COMMON MKT. L. REV. 491, 499 (1997)).

82. See *id.* at 98 (quoting Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1123 (1986)).

83. See *Vereinigte Familiapress Zeitungsverlags v. Heinrich Bauer Verlag*, Case 368/95, [1997] E.C.R. I-3689, ¶ 27.

84. See *Omega Spielhallen v. Oberbürgermeisterin der Bundesstadt Bonn*, Case 36/02, [2004] E.C.R. I-9609, ¶ 35.

85. See *Schmidberger v. Austria*, Case 112/00, [2003] E.C.R. I-5659.

dom of expression—to ‘trump’ the right to free movement of goods having decided that the interference with that freedom was proportionate.⁸⁶

The Strasbourg Court has also been required to engage in some nimble footwork to maintain harmony between the two systems. Faced with the erosion of its jurisdiction *ratione personae* and *ratione materiae* as a result of increasing transfers of powers from Member States to the EU,⁸⁷ it has had to attempt to fill the resulting lacuna in human rights protection while displaying considerable reluctance to “pierce the veil”⁸⁸ of the autonomous Community legal order by holding EU Member States responsible for any action taken pursuant to Community obligations.

Thus, while in *Cantoni v. France*⁸⁹ in 1996 the Court held that the fact that the impugned domestic legislation was based almost word-for-word on a Community Directive did not render it immune from review under the Convention, the Court has limited itself to consideration of cases where the respondent State has been able to exercise discretion when applying Community law.⁹⁰

The extent of this tricky tightrope act manifests itself in the *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* case⁹¹ which concerned the impounding by the Irish authorities of an aircraft belonging to the applicant company pursuant to a European Council Regulation imposing a trade embargo on the Federal Republic of Yugoslavia, which implemented the United Nations (“UN”) sanctions regime against that state designed to address the armed conflict and human rights violations occurring there at that time.⁹²

86. See *id.* ¶¶ 93, 94.

87. See generally *Schmidberger*, [2003] E.C.R. I-5659.

88. See Van Dijk, *supra* note 73, ¶¶ 10-12.

89. See *Cantoni v. France*, 1996-V Eur. Ct. H.R. 1614, ¶ 30.

90. See Van Dijk, *supra* note 73, at 3. While the Court slightly extended its power to review Community law in *Mattheus v. United Kingdom*, 1999-I Eur. Ct. H.R. 251, in which it struck down as a violation of Article 3 of Protocol 1 to the Convention a decision of a British court interpreting the EC Treaty, which deprived inhabitants of Gibraltar of the right to vote in European elections, the Court has consistently shied away from confronting questions such as collective Member State liability for the application of Community law. See Kathrin Kuhnert, *Bosphorus—Double Standards in Human Rights Protection?*, 2 *UTRECHT L. REV.* 177, 183-84 (2006).

91. *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, 2005-VI Eur. Ct. H.R. 107.

92. See *id.* ¶¶ 61-71 (detailing the relevant provisions of the UN sanctions regime).

While the High Court of Ireland originally held that the Regulation was not applicable to the aircraft in question,⁹³ the Supreme Court on appeal, having referred the matter to the European Court of Justice for a preliminary ruling, received a response to the contrary, which it was therefore bound to apply in its own decision.⁹⁴ The applicant, having thus lost the benefit of three years of its four-year lease, subsequently lodged a complaint with the Strasbourg Court claiming violation of its property rights under Article 1 of Protocol 1 to the European Convention.⁹⁵

For present purposes, the most salient aspect of the Strasbourg Court's decision is that, while it had previously been held⁹⁶ that Member States of the EU cannot, by ceding powers to an international (or supranational) organization, evade their obligations under the Convention, the equivalent fundamental rights protection afforded by the Community in comparison to the Convention system was held in *Bosphorus* to give rise to a presumption that Member State action taken pursuant to Community obligations is compatible with the Convention, which could only be rebutted where the protection of Convention rights in a given case is "manifestly deficient."⁹⁷

While this test renders Community acts more open to review by the Strasbourg Court, the *Bosphorus* decision indicates that it will continue to shy away from strict or overly-specific scrutiny of such acts.⁹⁸ The test of 'manifest deficiency' has been criticized, not only as being indeterminate and ill-defined, but for its establishment of, as one commentator has put it, "a relatively low threshold for the EU, in contrast to the supervision generally carried out under the ECHR for other [Council of Europe] Member States."⁹⁹ Indeed, it has been questioned whether, due to the different context in which each court operates and the

93. See *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications*, [1994] 2 I.R.L.M. 551 (H. Ct.) (Ir.).

94. For the European Court of Justice's preliminary ruling, see *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications*, Case C-84/95, [1996] E.C.R. I-3953.

95. See *Bosphorus*, 2005-VI Eur. Ct. H.R. 107, 113, ¶ 3.

96. See *M. & Co. v. Federal Republic of Germany*, App. No.13258/87, Nos. 60-63 Eur. Comm'n H.R. Dec & Rep. 138, 144-45 (1990).

97. See *Bosphorus* 2005-VI Eur. Ct. H.R. 107, 158, ¶ 156.

98. See generally *id.*

99. See Kuhnert, *supra* note 90, at 187.

procedural differences between the *a priori* nature of the preliminary reference procedure and the *a posteriori* supervision of the Strasbourg Court, the protection afforded by Community law is in fact equivalent to that of the Convention.¹⁰⁰

Such concerns have bolstered arguments for accession of the EU to the Convention. While accession would not remove the possibility of divergence, it would at least simplify the relationship between the two courts, allowing the Strasbourg Court to review all acts of the Community and allowing the EU Charter of Fundamental Rights to operate in a similar manner to Bills of Rights in other Contracting Parties. Most importantly in the national context, it may help to minimize the risk of Member States being caught between the 'rock' of Community law and the 'hard place' of Convention obligations.

At the same time, accession would serve to further strengthen the "institutional triangle" between the Court of Justice, the Strasbourg Court and the national courts, which raises issues that are generally ignored. The central concern arises from the different way in which each court's decisions affect national legal systems. There is no "schematic way," as the German Federal Constitutional Court has put it, of enforcing decisions of the Strasbourg Court,¹⁰¹ which leaves national courts with considerable discretion. By contrast, decisions of the Court of Justice are, as a matter of Community law, binding on all Member States, including national courts, and thus leave scant discretion to those courts.¹⁰² Moreover, the standards of protection for fundamental rights laid down in the ECHR are minimum standards,¹⁰³ it always being open to contracting states to provide higher or stronger protections for such rights. On the other hand, the degree and scope of protection of such rights as laid down by the Court of Justice are definitive standards and neither States nor their national courts can rely on a claim to give higher protection to fundamental rights should this conflict with the uniform application of community law.¹⁰⁴

These differences become crucial when one considers that

100. See *id.* at 186-87.

101. See Clemens Rieder, *supra* note 81, at 100.

102. See *Costa v. E.N.E.L.*, Case 6/64 [1964] E.C.R. 584, 594.

103. See *id.* at 585.

104. See EC Treaty, *supra* note 20, art. 228, O.J. C 321 E/37, at 145; *Costa*, [1964] E.C.R. 584, 594.

the Strasbourg Court takes a consensus-based approach to human rights issues, referring where possible to substantial consensus between contracting parties on a given issue in rendering its decisions. This so-called consensus is often founded, not on the provisions of national constitutions, but on a tabulation or examination of legislative provisions, or even ‘emerging trends,’ at the national level where a majority of states recognize a particular legal right or give it a particular degree of protection, often to the detriment of the text of the Convention itself. The use of consensus as an interpretive tool in this manner is itself open to criticism and its legitimacy must be further weakened when transported to the Community context, as substantial ‘consensus’ in the Convention context—among forty-seven states—does not necessarily equate to consensus between the twenty-seven EU Member States.

Even in the current climate, where the EU is not a Party to the Convention, the deference shown by the Court of Justice to the Convention system through adherence to Convention case law means that Community law concerning fundamental rights is, to an extent, being ‘ghostwritten’ by the Strasbourg Court. Thus, decisions of the latter court which do not have direct or *erga omnes* effect on EU Member States are accorded such effect when used as precedent by the Court of Justice in its judgments. This in turn may give rise to questions concerning the legitimacy of Court of Justice decisions on these issues for the same reasons as they have arisen with regard to the interpretative methods of the Strasbourg Court.

This is potentially controversial considering signs of the Court of Justice’s increasing willingness to ‘interfere,’ in the name of fundamental rights, in areas which have traditionally been the preserve of the Member States. A notable example is the *Secretary of State for the Home Department v. Akrich* case,¹⁰⁵ concerning immigration, where the Court instructed a British court that it must have regard to right of the spouse to respect for her family life guaranteed by Article 8 ECHR in assessing the application of her husband, a non-EU (or European Economic Area (“EEA”)) national to remain in Britain where the marriage was

105. *Sec’y of State for the Home Dep’t v. Akrich*, Case C-109/01, [2003] E.C.R. I-9607

genuine.¹⁰⁶

This may be compared with earlier cases such as *Demirel v. Stadt Schwäbisch Gmünd*¹⁰⁷ where, in a case concerning the reunification of a Turkish national with his family, the Court of Justice said that it had “no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law”¹⁰⁸ since there were no Community regulations specifically referring to the conditions for the “family reunification of Turkish workers lawfully settled in the Community.”¹⁰⁹

A further example would be *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*¹¹⁰ in which the Court held that a reference for a preliminary ruling relating to the application of Article 28 EC could not be considered inapplicable “simply because all the facts of the specific case before the national court are confined to a single Member State.”¹¹¹ In this manner, the “institutional triangle” that now pertains may be seen as threatening to become a Bermuda triangle in which the importance of national constitutions is lost.

As an international treaty the European Convention on Human Rights is not directly applicable in every state which is a party to it and, in many of the states which are a party it may not have primacy over national law or in particular over national constitutions. Moreover, a state, faced with what it perceived as a wholly unacceptable overriding of a value enshrined in a national constitution, has the express power to repudiate the Convention.¹¹² Even though such a step may involve political difficulties at an international level those difficulties could, in an extreme situation, be outweighed by domestic political difficulties. On the other hand the judicial rulings of the Court of Justice, including when they “import” a Strasbourg Court decision, take precedence over national law, including constitutional law, and

106. *See id.* ¶ 61.

107. *Demirel v. Stadt Schwäbisch Gmünd*, Case 12/86, [1987] E.C.R. 3719.

108. *See generally id.*

109. *See id.* ¶ 28.

110. *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Case 71/02, [2004] E.C.R. I-3025.

111. *See id.* ¶ 19.

112. *See ECHR, supra* note 41, art. 54, 213 U.N.T.S. 221.

are binding on national courts who have a duty to apply them.¹¹³ It is in that context that there is at least a perceived increased risk that national constitutions, and some of their core values, could be emasculated by decisions taken at the European level under the extended rubric of rights protection.

Should the Lisbon Treaty be adopted—and, as I have stated above, this is now less assured—with its Charter of Rights, and followed by accession of the European Union to the Convention on Human Rights, inherent tensions would inevitably exist in a post-Lisbon Europe between the judicial organs that traditionally have a final responsibility in defining and protecting individual rights. These tensions may in turn raise questions concerning the legitimacy of an international or a supranational court making decisions involving core constitutional powers and moral values. However, any such potential problems, either real or perceived, are far different from the challenges which the European Community faced fifty years ago when there was no Charter and the Treaties were entirely silent on fundamental rights. That was a scenario fraught with pitfalls which were overcome by the combined judicial wisdom of the European Court of Justice in Luxembourg and national courts. The potential post-Lisbon problems stem, on the contrary, from an over-endowment of sources of individual rights and institutions charged with protecting them at the supranational and international level. Given the history of the past fifty years it can only be hoped that over time the same wisdom can be brought to bear to find a means by which the judicial protection of fundamental rights can be achieved in a coherent and legitimate manner with due regard for the diversity of Member States to which the preamble of the Lisbon Treaty pays tribute.

113. See EC Treaty, *supra* note 20, art. 228, O.J. C 321 E/37, at 145; Costa v. E.N.E.L., Case 6/64, [1964] E.C.R. 584, 594.