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Human Rights and the European Court of Justice: An Appraisal

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Abstract

Through the decisions of the European Court of Justice ("ECJ"), human rights have been placed at the forefront of the agenda of the European Union ("EU"). In analyzing the jurisprudence of the Court, one is struck both by the substantive impact that it has had on the development of human rights throughout the Union and by the procedural route through which this has been accomplished. This brief Essay will attempt to highlight both of these developments and explore some of the challenges that the Court faces as it confronts a vastly different world from that facing Europe in 1957.

ESSAYS

HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE: AN APPRAISAL

*Elizabeth F. Defeis**

Through the decisions of the European Court of Justice (“ECJ”), human rights have been placed at the forefront of the agenda of the European Union (“EU”). In analyzing the jurisprudence of the Court, one is struck both by the substantive impact that it has had on the development of human rights throughout the Union and by the procedural route through which this has been accomplished. This brief Essay will attempt to highlight both of these developments and explore some of the challenges that the Court faces as it confronts a vastly different world from that facing Europe in 1957.

At the close of World War II, when the promise of an integrated Europe emerged, the repair of Europe, devastated both economically and physically by the War, was the primary concern.¹ The immediate focus was on economic integration and the creation of a common market that would result in a higher standard of living for all. Thus, when the Treaty of Paris,² which created the Coal and Steel Community, and the Treaty of Rome

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1. See GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 4-5 (2d ed. 2002). World War II left a power vacuum filled by not only the Soviet Union and the United States, but also the Western European nations. See *id.* In order to begin rebuilding Europe, Belgium, the Netherlands and Luxembourg created a customs union which led to a common trading area. See *id.* at 4; Treaty Instituting the Benelux Union, Feb. 3, 1958, 381 U.N.T.S. 260 (entered into force Nov. 1, 1960). In fact, Churchill advocated modeling a post-WWII Europe after the United States in a speech given on Sept. 19, 1946 in Zurich. See T.R. REID, *THE UNITED STATES OF EUROPE: THE NEW SUPERPOWER AND THE END OF AMERICAN SUPREMACY* 35-36 (2004). Churchill urged, “[w]e must build a kind of United States of Europe.” *Id.* at 36.

2. Treaty establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter Treaty of Paris].

("EEC Treaty"),³ which created the European Economic Community ("EEC"), were adopted, little attention was paid to the protection of human rights.⁴ Human rights were being addressed in other forums. One of the purposes of the United Nations ("U.N.") was promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. In furtherance of this purpose, one of the first resolutions adopted by the General Assembly was the Universal Declaration of Human Rights in 1948.⁵ The Genocide Convention was also adopted in 1948⁶ and the major U.N. covenants on human rights were then being developed.⁷ In addition, under the auspices of the Council of Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") was signed in 1950 and was subsequently ratified by each of the original members of the EEC.⁸

Although principally designed to further economic goals, today, the EU, through its numerous directives and regulations,

3. Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

4. Unlike the deliberations surrounding the drafting of the Treaty establishing a Constitution for Europe in 2004, which were purported to be open and transparent, the *travaux préparatoires* for the Treaty of Rome have not been disclosed. See generally Christopher Engel, *The European Charter of Fundamental Rights: A Changed Political Opportunity Structure and its Normative Consequences*, 7 EUR. L.J. 151 (2001). Also see PETER NORMAN, *THE ACCIDENTAL CONSTITUTION* (2003) for a comprehensive description of the deliberations and the issues addressed at the Convention that formulated the Draft Constitution.

5. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

6. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

7. See International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), at 49, U.N. GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (Dec. 16, 1966). The Universal Declaration of Human Rights was a standard of achievement towards which nations should strive. It was a resolution of the U.N. General Assembly and thus not binding. The two human rights conventions were intended to convert the guarantees of the Universal Declaration of Human Rights into legally binding obligations.

8. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 220. The European Court of Human Rights sits in Strasbourg, and individuals, as well as Member States, may take complaints of human rights violations directly before the court. Jurisdiction over Member States is compulsory. All Member States of the European Union ("EU") and most potential members, such as Macedonia, have ratified the Convention.

has in effect legislated in broad areas that affect individual rights. Throughout its fifty year history, the ECJ has decided many cases which deal with fundamental rights such as non-discrimination,⁹ freedom of religion,¹⁰ association¹¹ and expression.¹² Undoubtedly, in the next fifty years, with both the widening and the deepening of the Union, the Court will be faced with new controversies involving human rights. Issues such as the legality of anti-terrorist measures, standards to be applied to expanded equality provisions, and restrictions on the movement of persons and goods are certain to come before the Court.

As is well known, neither the Treaty of Paris nor the EEC Treaty contains what can be considered a bill of rights. Although the EEC Treaty does contain a Social Chapter which gives limited mention to human rights and the protection of workers rights, its primary focus is to improve working conditions on a harmonized basis throughout the Community.¹³ Specific individual rights that the EEC Treaty protects include the freedom of movement and gender equality with respect to equal pay for male and female workers.¹⁴ Beyond the mention of these principles, however, the EEC Treaty offers little to no protection in other areas of human rights, nor does it contain any specific provisions to enforce these rights.¹⁵ This stunning omission can best be attributed to the drafters' vision of the nature of the institution being created; that is, one of limited competence, primarily concerned with economic matters, that would not unduly encroach on the rights of the Member States.¹⁶ As envis-

9. *See* Defrenne v. Sabena, Case 43/75, [1976] E.C.R. 455.

10. *See* Prais v. Council, Case 130/75, [1976] E.C.R. 1589.

11. *See* Union Syndicale—Amalgamated European Pub. Serv. Union v. Council, Case 175/73, [1974] E.C.R. 917.

12. *See* VBVB & VBVB v. Commission, Joined Cases 43 & 63/82, [1984] E.C.R. 19.

13. *See* EEC Treaty, *supra* note 3, Title III. Moreover, its provisions were aspirational and called upon Member States to promote improved working conditions and an improved standard of living.

14. *See id.* art. 48 (providing that “[f]reedom of movement for workers shall be secured within the Community”); *id.* art. 119 (providing that “[e]ach Member State shall . . . ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work”).

15. *See generally id.*

16. The concept of competences in the EU is analogous to enumerated powers in the United States. Specifically, a competence is:

The right to decide or legislate in a given field of activity. A competence is described as either exclusive or shared, depending on whether the Community has the sole authority to act or whether member states also have some

aged in 1957, human rights were to be protected by individual Member States through their national constitutions and laws.¹⁷ Indeed, each of the original members of the EU had strong human rights protections in their national constitutions or laws.¹⁸ In addition, since each Member State was also party to the ECHR, the guarantees of the Strasbourg process were available to its citizens.

This vision of fundamental rights protection, based on limited competence of the institution and alternate mechanisms available for the protection of human rights, is strikingly similar to the view that prevailed in the U.S. Constitutional Convention of 1787.¹⁹ Human rights were hardly considered during the constitutional debates at the Constitutional Convention held in Philadelphia. The U.S. Constitution was intended to set forth a plan of governance for the new nation and was to be a government of enumerated powers.²⁰ As such, in the judgment of the Founders, protection of human rights in the federal charter was unnecessary and was to be left to state constitutions and laws.²¹

Both visions proved erroneous. In the United States, commencing with the sweeping decisions of the Marshall court con-

jurisdiction. Under the Treaty of Rome, the European Court of Justice ultimately determines where a competence lies; the Court is entitled to rule in its own favour when the supremacy of Community law over national law is in dispute.

Euro-Know, A Concise Encyclopedia of the European Union: Competence, <http://euro-know.org/dictionary/c.html#competence> (last visited Mar. 3, 2008). The term "competences" has been called "Euro-Speak." See *Snoring While a Superstate Emerges?*, *ECONOMIST*, May 8, 2003, at 146.

17. See Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights Within the Legal Order of the European Communities*, 61 *WASH. L. REV.* 1103, 1113 (1986).

18. See LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 32-33 (1978).

19. See Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 *CORNELL INT'L L.J.* 153, 154-55, 168-69 (1998).

20. See *id.*

21. George Washington, the first President and a delegate to the Convention, noted that having a Bill of Rights was considered by many to be quite useless in a system where "the people evidently retained every thing which they did not in express terms give up." However, Washington recalled, "there was not a member in the convention, I believe, who had the least objection to what is contended for by the Advocates for a *Bill of Rights*." Letter from George Washington to Marquis de Lafayette (Apr. 28, 1788), in 4 *THE FOUNDER'S CONSTITUTION*, at 400, art. 3, § 2, cl. 3, doc. 16 (Philip B. Kurland & Ralph Lerner eds., 1986), available at http://press-pubs.uchicago.edu/founders/documents/a3_2_3s16.html.

cerning extent of federal power through the Necessary and Proper Clause and the Commerce Clause, federal authority has expanded beyond the imagination of the original framers of the Constitution.²² Similarly, the competence of the Union now encompasses environmental, consumer and investment protection as well as health and education and other social and cultural dimensions. In addition, it should be emphasized that neither the doctrine of direct effect nor the doctrine of supremacy was explicit in the EEC Treaty.²³ Both of these far reaching principles were effected through decisions of the ECJ, thereby enlarging the authority of the EU over Member States and the competence of the ECJ itself.

While the United States soon corrected the lack of human rights protections in the Constitution through the adoption of the Bill of Rights, it is the ECJ that has been instrumental in integrating human rights into the fabric of the Union. Indeed, although the need for a specific list of human rights for the EU has long been debated, it was only in 2000 that the Charter of Fundamental Freedoms for the European Union was proclaimed.²⁴ The Charter not only explicitly reaffirms the rights set forth in the European Convention but covers a range of rights not included in the Convention, such as the right to good

22. See *McCulloch v. Maryland*, 17 U.S. 316 (1819). "It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term." *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824); see also SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 224 (1993).

23. See Weiler, *supra* note 17, at 1112.

24. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, O.J. C 364/01 (2000) [hereinafter EU Charter]. In 1979, the European Commission proposed that the European Communities accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, in 1996, the European Court of Justice ("ECJ") held that unless the EC Treaty was amended, the Community did not have the power to accede to the Convention. The Court noted that, in the absence of any such treaty provision, accession by the Community to the European Convention on Human Rights ("ECHR") is beyond its power since it would result in a substantial change to the Community's system for protection of human rights, entailing the Community's integration into an institutional system where the provisions of the ECHR would be incorporated into the Community law. Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, [1996] E.C.R I-1759, [1996] 2 C.M.L.R. 265. In 1989, The European Parliament formulated a comprehensive catalogue of Fundamental Rights, but this attempt to enact a bill of rights for the Union was also unsuccessful. See Hans Christian Krüger, *The European Union Charter and the European Convention on Human Rights: An Overview*, in *THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS*, at xvii (Steve Peers & Angela Ward eds., 2004).

administration and social rights of workers. It is composed of a preamble and chapters pertaining to dignity, freedom, equality, solidarity, citizens' rights and justice, and incorporates fifty paragraphs enumerating extensive rights. However, while the Charter has political force it is not legally binding on Member States.²⁵ While other EU institutions, such as the Parliament and the Commission, have now taken up the mantle of human rights protections, it is the ECJ that must be credited with integrating human rights into the *acquis communautaire* of the EU.

How has this been accomplished? In 1964, in order to ensure the uniform application of Community Law throughout the Community, the ECJ enunciated the principle of supremacy of Community law over the domestic law of the Member States, establishing a new legal order for Member States.²⁶ While the EEC Treaty, unlike the U.S. Constitution, does not contain a supremacy clause, primacy of European law rests on two principles. The first is the "duty of loyalty" which enjoins Member States to "take all appropriate measures . . . to ensure fulfillment of" the community's tasks.²⁷ The second principle is the duty to "abstain from any measure which could jeopardise the attainment of the [treaty] objectives."²⁸

At the outset, the supremacy doctrine was vigorously re-

25. The Charter was included as Part II in the Draft Treaty Establishing a Constitution for Europe, O.J. C 310/1 (2004) [hereinafter Draft Treaty] that was not ratified. It was intended to be legally binding on the Union and on Member States when they are implementing Union law. Although not included in the text of the Reform Treaty of Lisbon, it is referred to in the Treaty and is intended to be legally binding. Draft Treaty of Lisbon (Reform Treaty), O.J. C 306/01 (2007), signed on Dec. 13, 2007 (not yet ratified) [hereinafter Reform Treaty].

26. See *Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585, ¶ 4.

27. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, art. 10, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam].

28. *Id.* The ill-fated Constitutional Treaty of 2004 did contain a primacy clause. Article I-6 provides, "[t]he Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States." Draft Treaty, *supra* note 25, art. I-6. Although the existing primacy doctrine does not extend to issues dealing with Common Foreign and Security Policy nor with Police and Judicial Cooperation in Criminal Matters, the Draft Treaty would have expanded the primacy doctrine to make it applicable across the entire range of the Union's activities. See Anthony Arnall, *The Draft Constitution: Issues and Analyses: The Member States of the European Union and Giscard's Blueprint for its Future*, 27 *FORDHAM INT'L L.J.* 503, 508-09 (2004); Koen Lenaerts & Damien Gerard, *The Structure of the Union According to the Constitution for Europe: The Emperor is Getting Dressed*, 29 *EUR. L. REV.* 289, 311 (2004).

sisted by some Member States particularly when matters affecting human rights were at issue. While the EEC Treaty contained very limited human rights provisions, the constitutions of Member States were for the most part adopted subsequent to World War II and contained human rights provisions modeled on documents such as the Universal Declaration of Human Rights, the U.S. Bill of Rights and the French Declaration on the Rights of Man.²⁹ Thus, it was unacceptable to some Member States to implement community legislation without scrutinizing it through the lens of their own constitutional guarantees of fundamental rights. Indeed, the German Constitutional Court in 1967 held that since the Community legal order lacked specific protection of human rights, the transfer of power from the German legal system to the Community had to be measured against domestic constitutional provisions.³⁰

In what has been characterized as “an exercise of bold judicial activism,”³¹ the Court held in a series of cases that fundamental rights of individuals were enshrined in the general principles of Community law protected by the Court, and that fundamental rights form part of the Community law,³² which is “inspired” by the constitutional traditions of Member States.³³ It further held that in addition to constitutional provisions, rights found in international agreements which the Member States had collaborated on or were a party to are relevant in the Court’s analysis.³⁴ The substance of these decisions has now been incorporated into the subsequent treaties of the EU. For example, the Single European Act of 1987³⁵ urges all Member States to

29. See HENKIN, *supra* note 18, at 32-33. The French Constitution of 1958 was an anomaly in that, apart from the right to equal protection, there were few fundamental rights specified in the text of the Constitution. For a description of the integration of fundamental rights in France, see Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in *THE EU AND HUMAN RIGHTS* (Philip Alston ed., 1999).

30. Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Oct. 18, 1967, 22 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 223 (1967) (F.R.G.).

31. Weiler, *supra* note 17, at 1105.

32. See *Stauder v. Ulm*, Case 29/69, [1969] E.C.R. 419, 427.

33. See *Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, ¶ 4.

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

35. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] (amending EEC Treaty).

work together to promote democracy on the basis of fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and European Social Charter, notably freedom, equality and social justice. The Treaty on the European Union, adopted in 1992, converts this concern for human rights into an obligation of the Union.³⁶ Finally, the Amsterdam Treaty, adopted in 1999, now formally incorporates fundamental human rights into the institutions of the EU.³⁷ The Treaty provides that the "Union shall respect fundamental rights, as guaranteed by the European Convention . . . as they result from the constitutional traditions common to the Member States, as general principles of Community law."³⁸

Initially, it should be noted that the term human rights appears rarely in the case law of the ECJ. The term is used when referring to international treaties, such as the European Convention for the Protection of Human Rights.³⁹ Rather, the ECJ refers to "fundamental rights" as general principles of Community law that must be protected by the Court. These general principles of Community law are construed by the Court more broadly than the rights contained in international human rights conventions and include not only those rights but also rights recognized in the constitutional law of Member States.⁴⁰

Some commentators have suggested that the fundamental rights doctrine of the ECJ was primarily motivated by the Court's desire to protect the supremacy doctrine enunciated by the

36. Consolidated Version of the Treaty on the European Union, O.J. C 321 E/1 (2006) [hereinafter TEU] (the treaty was originally signed in 1992).

37. See Treaty of Amsterdam, *supra* note 27, art. 6.

38. *Id.*

39. Human rights clauses are also contained in agreements with third countries. See Philip Alston & J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy*, 9 EUR. J. INT'L. L. 658, 688-95 (1998). Alston and Weiler note that the EU has played a large role in non-EU countries by supporting human rights and democratic initiatives. Human rights clauses are now included in over fifty Community agreements mainly dealing with trade or foreign aid.

40. See generally de Witte, *supra* note 29. Unlike Article 38(1) of the Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945), which permits the International Court of Justice to use general principles of law in determining what the law is, the EEC Treaty explicitly allowed the ECJ to apply general principles in very limited circumstances. EEC Treaty, *supra* note 3, art. 215.

Court from being rejected at the national level.⁴¹ While to some extent a valid observation, it is also clear that the Court's activist posture with respect to human rights was a response to the increasing capacity of the Community to regulate and affect human rights. What is undisputed is that the ECJ has played a central role in shaping the human rights discourse and the treaties that now incorporate human rights protection.⁴²

The influence of the Court on the substantive development of human rights law can be illustrated through its decisions in the area of equality and non-discrimination and cannot be overstated. Article 119 of the EEC Treaty provided in its first paragraph that "[e]ach Member State shall . . . maintain the application of the principle that men and women should receive equal pay for equal work."⁴³ In 1976, a female worker, relying on Article 119, challenged a work policy that paid male airline stewards more than females for the same work.⁴⁴ The ECJ ruled that Article 119 had a "direct effect" on Member States and that an individual had a right to sue not only Member States or instrumentalities but also private actors in state courts whether or not domestic legislation implementing Article 119 existed.⁴⁵ This ground breaking decision was notable not only because it enunciated the direct effects doctrine but also because the ECJ elaborated on the nature of Article 119. It acknowledged that the

[P]rovision forms part of the social objectives of the Community which is not merely an economic union, but is at the same time intended by common action, to ensure social progress and seek constant improvement of the living and working conditions of their people This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community.⁴⁶

In subsequent cases, the ECJ expanded the equality principle into a general equality right between men and women which exists at the core of EU law and has provided the basis for the encompassing regulations and directives in the area of gender

41. See Weiler, *supra* note 17, at 1137.

42. See de Witte, *supra* note 29, at 866.

43. EEC Treaty, *supra* note 3, art. 119.

44. See *Defrenne v. Société anonyme belge de navigation aérienne Sabena*, Case 43/75, [1976] E.C.R. 455.

45. See *id.* ¶ 1.

46. *Id.* ¶ 10.

equality.⁴⁷

The Amsterdam Treaty has expanded the scope of the equality principle and allows the Council to take action to combat “discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”⁴⁸ In a recent case, the Court stated that the principle of non-discrimination on the grounds of age “must thus be regarded as a general principle of Community law.”⁴⁹ Thus, a German law that permitted short term employment contracts for persons over 52 years of age was challenged as violating a Community Directive that set forth a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation in employment.⁵⁰ In ruling that the law was in conflict with the Directive, the Court noted that the Directive “does not itself lay down the principle of equal treatment in the field of employment and occupation [T]he source of the actual principle underlying those forms of discrimination being found . . . in various international instruments and in the constitutional traditions common to the Member States.”⁵¹

In recent years, the ECJ has effectively incorporated not

47. For example, Council Directive No. 75/117, O.J. L 45, at 19 (1975) provided for equal pay “for the same work or for work to which equal value is attributed.” Article 119 of the EEC Treaty referred to “equal pay for equal work.” EEC Treaty, *supra* note 3, art. 119. In *Jenkins v. Kingsgate Ltd.*, Case 96/80, [1981] E.C.R. 911, ¶ 22, the Court upheld the validity of the directive. The Court noted that the directive, “which is principally designed to facilitate the practical application of the principle of equal pay outlined in Article 119 of the treaty in no way alters the content or scope of that principle as defined in the Treaty.” The concept of pay has been construed broadly by the Court to include travel privileges and voluntary redundancy payments. See *Barber v. Guardian Royal Exchange Assurance Group*, Case 262/85, [1990] E.C.R. I-1889; *Garland v. British Rail Eng’g Ltd.*, Case 12/81, [1982] E.C.R. 359; see also ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 547-49 (2006). For example, between 1975 and 1992, the Council adopted six different directives: (1) the Equal Pay Directive of 1975; (2) the Equal Treatment Directive of 1976; (3) the 1978 Social Security Directive; (4) the 1986 Directive on equal treatment in occupational social security schemes; (5) the 1986 Directive on equal treatment between men and women engaged in an activity including agriculture in a self-employed capacity and on the protection of self-employed women during pregnancy and motherhood; and (6) the 1992 Directive on the protection of pregnant women from exposure to hazardous substances in the workplace and on rights to maternity leave. See Sonia Mazey, *The European Union and Women’s Rights: From the Europeanization of the National Agendas to the Nationalization of a European Agenda*, J. EUR. PUB. POL’Y 131, 140 (1998).

48. Treaty of Amsterdam, *supra* note 27, art. 13.

49. *Mangold v. Helm*, Case C-144/04, [2005] E.C.R. I-9981, ¶ 75.

50. Council Directive No. 2000/78, O.J. L. 303/16 (2000).

51. *Mangold*, [2005] E.C.R. I-9981, ¶ 74.

only the provisions of the ECHR, but also the decisions of the European Court of Human Rights into its human rights jurisprudence. It has recently cited The Charter on Fundamental Freedoms⁵² and noted that the while the Charter is not legally binding, the principle aim of the Charter is to reaffirm rights as they result from constitutional traditions and international obligations common to Member States, the Treaty on the European Union and the European Convention on Fundamental Rights and Freedoms.⁵³

It has been noted that the ECJ has drawn fundamental rights from the unwritten law of the Community and that similarly “could hold that the Charter of Fundamental Rights codifies these unwritten fundamental rights of Community law.”⁵⁴ Thus, just as the European Convention has become part of the *acquis communautaire* of the EU through decisions of the ECJ and subsequent treaty incorporation, the Charter might similarly achieve this status through decisions of the ECJ.⁵⁵

This integration of human rights under the leadership of the ECJ is particularly striking since, as noted earlier, there is no specific provision in the EEC Treaty affecting human rights of individuals. Further, although the EEC Treaty contains provisions for judicial review, the provisions were intended to protect against encroachments by the Community on the rights of Member States and to guarantee that the Community would not overstep its jurisdictional limits. Judicial review could not be viewed at that time as affording protection to individuals for violations of human rights.⁵⁶

What are some of the challenges facing the ECJ today in the area of human rights? While the ECJ has been instrumental in

52. See generally *European Parliament v. Council of the European Union*, Case C-540/3, [2006] E.C.R. I-5769.

53. See *id.* ¶ 38.

54. Engel, *supra* note 4, at 153.

55. Although most commentators have advocated that the EU accede to the ECHR and adopt the Charter of Fundamental Rights for the European Union, Advocate General Francis G. Jacobs has voiced skepticism that neither should be adopted by the Union. See Francis G. Jacobs, *The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice: The Impact of European Union Accession to the European Convention on Human Rights*, in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE* 291 (Ingolf Pernice, Juliane Kokott, & Cheryl Saunders eds., 2006).

56. See Weiler, *supra* note 17, at 1111.

ensuring the protection of fundamental rights within the legal order of the Union, it must still grapple with the standards that are to be applied when evaluating measures in light of human rights concerns. There is still no comprehensive bill of rights for the EU. Thus, the Court must continue to define and set forth standards for the protection of human rights throughout the Community.⁵⁷ Further, the Amsterdam Treaty has expanded the concept of equality beyond gender equality to include age, disability, sexual orientation and religion. The Court will no doubt be increasingly called upon to interpret the equality principle in those areas as well.⁵⁸

Although the Court applies the principles of the ECHR and cites decisions of the European Court of Human Rights, the Court technically is not bound by such decisions and will presumably insist on the jurisdictional right to interpret the Convention itself. Thus the question of possible conflicts between the European Court of Human Rights and the ECJ remain.⁵⁹

The Court must resolve the issue of possible conflicts of international obligations with community measures, provisions of the European Convention and indeed with provisions of the EEC Treaty itself. In several recent decisions, the Court of First Instance ("CFI") was faced with a challenge to community measures that, pursuant to resolutions of the U.N. Security Council, froze the assets of the Petitioners without a hearing.⁶⁰ These measures were challenged as violating both the ECHR and provisions of the EEC Treaty. The CFI affirmed the supremacy of

57. See generally de Witte, *supra* note 29.

58. See Mangold v. Helm, Case C-144/04, [2005] E.C.R. I-9981 (where the ECJ ruled in a case involving Member State legislation that was challenged as violating a council directive prohibiting age discrimination); see also Sebastian Krebber, *The Social Rights Approach of the European Court of Justice to Enforce European Employment Law*, 27 COMP. LAB. L. & POL'Y J. 377 (2006).

59. The literature on potential for conflict between decisions of the ECJ and decisions of the European Court of Human Rights is voluminous. See Alston & Weiler, *supra* note 39; Elizabeth F. Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights*, 19 DICK. J. INT'L L. 301 (2001); Vernon Valentine Palmer, *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 (2005); see also Hoechst A.G. v. Commission, Joined Cases 46/87 & 227/88, [1989] E.C.R. 2859; Niemietz v. Federal Republic of Germany, 16 Eur. H.R. Rep. 97 (1993), Eur. Ct. H.R. 13710/88 (1992).

60. See Yusuf & Al Barakaat Int'l Foundation v. Council, Case T-306/01, [2005] E.C.R. II-3533; Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649.

Security Council Resolutions and held that the court has no authority to call into question, even indirectly, the lawfulness of Security Council Resolutions in light of Community.⁶¹

With the enlargement of the European Union and the increase in movement of persons across borders, actions of Member States in response to security and other concerns must be evaluated against human rights standards of the EU.⁶² Thus, for example, the action of a Member State that allows for swift deportation of immigrant members of an EU country deemed a threat to public safety comporting with EU standards might ultimately come before the Court.⁶³

Finally, as the Court is called upon to decide an increasing number of cases that deal with human rights, the issue of access by private litigants and public interest groups to the ECJ might be addressed. Article 230 of the EEC Treaty, which permits individuals to challenge community measures, requires that the alleged violation of fundamental rights, is "a direct and individual concern."⁶⁴ This requirement has been interpreted very strictly by the ECJ and comparatively few cases dealing with fundamental rights are brought to the Court. While a treaty amendment would be required to allow public interest groups to litigate human rights issues, the Court might itself reconsider its previous jurisprudence with respect to access.⁶⁵

61. See *Yusuf*, [2005] E.C.R. II-3533; *Kadi*, [2005] E.C.R. II-3649. In both cases, the Court of First Instance ("CFI") upheld the sanctions regime of the United Nations and found objections based on violations of fundamental right to be beyond the jurisdiction of the Court. The CFI did reserve one area of judicial review. The Court held that if the Community measures are mandated by Security Council decisions, the EU regulations will be examined, not for compliance with obligations under the ECHR, but rather compliance with *jus cogens* norms. The Court stressed that decisions of the Security Council must be enforced even if they violate treaty obligations such as those occurring under the ECHR. Both cases have been appealed and are awaiting disposition by the ECJ.

62. Alston and Weiler have noted, "the challenges posed by enlargement are not only structural or size-related. With enlargement, the Union will be importing a new set of unresolved minority issues as well as additional human rights challenges, whose solutions will test the strength of many Community policies." Alston & Weiler, *supra* note 39, at 672.

63. Italy has recently attempted to expel Romanian nationals after a murder occurred in which it was alleged that Romanians were implicated. This action has been challenged by Romanian officials as violative of the rights of EU citizens. See *Italian Expulsions Worry Romania*, BBC NEWS, Nov. 6, 2007, <http://news.bbc.co.uk/2/hi/europe/7079769.stm>.

64. de Witte, *supra* note 29, at 875.

65. See Alston & Weiler, *supra* note 39, at 709-10; de Witte, *supra* note 29, at 875-83.

These and other challenges will undoubtedly be faced by the Court. If the challenges are met with the same scholarship, care and innovation that the Court has exhibited in the past, one can rest assured that human rights are in good hands.