

THE FUNDAMENTAL RIGHTS JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE: PROTECTION FOR HUMAN RIGHTS WITHIN THE EUROPEAN UNION LEGAL ORDER

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Abstract

Since the European Economic Community was formed in pursuit of narrow economic objectives, the original EEC Treaty did not make provisions for a regime of fundamental rights protection. However, the evolution of the “Economic Community” into a “political union” with wider political and social aims, as well as the capacity to have adverse implications on the individual citizens of the Member States constituting the European Union, rendered necessary the establishment and development of a fundamental rights protection mechanism within the EU. This article appraises the extent to which the European Court of Justice has provided adequate protection for human right within the European Union legal order through its fundamental rights jurisprudence.

Özet

Avrupa Ekonomik Topluluğu'nun; dar ekonomik amaçların gerçekleştirilmesi çerçevesinde oluşturulmuş olması münasebetiyle, Avrupa

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Ekonomik Topluluğu Anlaşması'nda, insan haklarının korunmasıyla ilgili bir rejimin kuruluşuna yönelik bir vurgu yapılmamıştır. Fakat Avrupa Topluluğu'nun; basit bir "ekonomik topluluktan", kapsamlı politik ve sosyal bir vizyona ve üye ülkelerin vatandaşlarının temel hakları üzerinde olumsuz etkilere sebep olabilecek bir kapasiteye sahip karmaşık bir "politik birlik" olarak gelişmesi, sistemli bir insan hakları koruma mekanizmasının oluşumunu ve gelişimini bir gereklilik haline getirmiştir. Bu makalenin amacı, Avrupa Birliği Mahkemesi'nin Avrupa Birliği içerisinde insan haklarına sağladığı korumanın yeterliliğini incelemektir.

Keywords: *European Union Law, EU Human Rights Protection, Fundamental Rights*

Anahtar Kelimeler: *Avrupa Hukuku, Avrupa Birliği'nde İnsan Haklarının Korunması, Temel Haklar*

INTRODUCTION

Although the original EEC Treaty did not establish a regime of fundamental rights protection, due to the assumption that the acts of a Community with only narrow economic objectives would not threaten human rights, the evolution of the European Community into a political union with wider aims and greater capacity to have adverse effects on the fundamental rights of the individual citizens of the Member States constituting the European Union (EU), rendered inevitable the development of a mechanism to safeguard fundamental rights. Therefore, notwithstanding that the European Court of Justice (ECJ) initially refused to hear fundamental rights claims and, following the expression of concerns by national constitutional courts about the protection of human rights entrenched in their national constitutions, exploited the human rights discourse in the dissolution of threats against the supremacy of Community law, the Court has, through its constitution-building function, developed and safeguarded a number of rights. Since despite its transformation, the European Union's focus remains on economic objectives, the most important obstacle to the fulfillment by the Court of its task of human rights protection seems to be their reconciliation with the promotion of fundamental economic freedoms where they encounter the latter in an oppositional relationship. However, in spite of this dilemma, the Court has displayed a willingness to establish an adequate system of protection for human rights by extending its human rights jurisdiction to acts of Member States, by allowing the Member States to rely on the protection of human rights as a grounds for derogation of Treaty obligations, and by adopting an accommodating approach to the protection of rights by

individual Member States lacking a ‘common European ground’ such as ‘human dignity’ as perceived by the German Basic Law.

Section I of the paper deals with the question as to whether the European Court of Justice should protect human rights, and after concluding that it does, moves onto Section II and the question as to whether the Court has done so. Section III discusses ECJ treatment of Member State actions when enforcing fundamental rights, followed by an analysis of the potential impact of EU adoption of the Charter of Fundamental Rights in Section IV. After a discussion of the potential impact of the European Union’s accession to the European Convention of Human Rights in Section V, the paper concludes.

I. THE ECJ SHOULD PROTECT HUMAN RIGHTS

There are a number of factors necessitating the judicial safeguarding of human rights in the EU by the ECJ. First, the protection of fundamental rights is an indispensable element of modern democratic governance, and therefore if the EU is to exist as a genuinely democratic system of governance, it is necessary that fundamental rights are afforded adequate protection within its territory. The institutional capacity of the ECJ makes it the best-equipped body, within the EU, to effectively fulfill the requirements for a body responsible for the protection of human rights. Bearing in mind the significant democracy deficit¹ in the EU polity and the lack of adequate parliamentary scrutiny, it could be contended that judicial protection of fundamental rights is an absolute necessity. Although the European Parliament is an elected body, it does not possess the authority or jurisdiction to enact binding legislation; the primary legislative body in the EU, the Council of Ministers, is composed of ministers representing the executive branches of the Member States.

The body responsible for drafting EU laws, the European Commission, is composed of appointed officials; due to the informal nature of the negotiations between the primary political decision-makers in the EU, the policy-making process lacks transparency. The provision of adequate judicial protection of fundamental rights could, therefore, constitute an effective remedy for human rights infringements by EU legislation enacted through a decision-making process suffering from a substantial deficit in democracy as a result of this lack of transparency. In this sense, the democracy deficit in the EU system of

¹ See 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 WASHINGTON L. REV. 1103 (1986).

governance constitutes one of the reasons why the ECJ must safeguard fundamental rights within the EU.

Even in the absence of this deficit, the modern rights-based concept of democracy requires the existence of a judicial mechanism to safeguard human rights against potential infringements resulting from the acts or decisions of the legislative and executive branches of the system of governance. The accession to the EU of states from Central and Eastern Europe, which have shorter experiences with democracy, too, requires the ECJ to assume an active role in the development and protection of human rights,² since it is necessary, through the harmonization of human rights law in the EU, to bring the degree of protection afforded in those countries in line with that provided in Member States with longer democratic traditions.

Notwithstanding the fact that the EU was initially formed to be fundamentally an economic ‘community’ focusing on the achievement of limited objectives with no foreseeable impact on civil liberties, it has been transformed into a political ‘union’ with the capacity to have direct adverse effects on the fundamental rights enjoyed by the individual citizens of the Member States constituting that union.

The expansion of the jurisdiction of EU institutions, through treaty amendments and the ECJ’s judicial activism, into fields such as asylum, immigration, police and judicial co-operation in criminal matters, the environment, education, health, consumer protection and the like, means that it is necessary to subject the acts of EU institutions to a higher degree of judicial scrutiny for their potential implications on human rights. Initially, it was assumed that in the event of a clash between Community acts and fundamental rights, the latter would be guaranteed by the national constitutions of the individual Member States. However, the subordination of national laws, including constitutional provisions, to European Union law, through the establishment of the doctrine of supremacy in *Van Gend en Loos v. Netherlands*³ and *Costa v ENEL*,⁴ invalidated this assumption, thereby requiring the ECJ to be responsible for protecting fundamental rights. Therefore, the development of the EU from an organization with narrow economic aims into a polity engaging in activities with broad economic, political and social implications, combined with the doctrine of supremacy preventing national

² Vaughne Miller, *Human Rights in the EU: The Charter of Fundamental Rights*, House of Commons Library, Research Paper 00/32 (2000), available at www.bath.ac.uk/esml/Library/pdf-files/EUCharter.pdf.

³ Case 26/62 [1963] ECJ.

⁴ Case 6/64 [1964] ECJ.

constitutions from guaranteeing civil rights against potential encroachments by EU law, forms a further basis for the arguments in favor of the provision of human rights by the ECJ.

It has been contended that the protection of human rights could legitimize the EU. According to this view, the assumed benefits for European citizens that would emanate from the establishment of a common market are not adequate enough to justify the competence transferred to the EU institutions, and the necessary justification could be secured through the expression of a commitment to human rights, since they have been assigned 'symbolic pre-eminence.'⁵ Moreover, a commitment to fundamental rights could provide the European Union with a political identity reflecting the values underpinning and characterizing the form of society envisioned by the European integration project. Furthermore, since the economic phase of integration appears to have been, to a large extent, accomplished, human rights could constitute a new basis for further integration.⁶ Nevertheless, the EU must ensure that human rights are considered to be an underpinning objective of the integration rather than an instrument of integration.

Since the conception and exploitation of human rights protection in such an instrumental fashion may jeopardize their proper and effective safeguarding, if fundamental rights are not afforded protection for their intrinsic value, this may lead to the adoption of a less principled and more pragmatic attitude to the task of safeguarding human rights. Therefore, it seems more appropriate to construe these rights as fundamental values embodying human dignity, autonomy and freedom, which are indispensable to lead a decent life, rather than conceptualizing them as instrumental or symbolic values that could be exploited for the achievement or furtherance of other objectives. In this sense, even though it is feasible that the protection of human rights could play an instrumental role in the legitimization of the EU as a system of governance, the propriety of the conceptualization of human rights in instrumental terms appears to be questionable.

⁵ See Andrew Williams, *EUROPEAN UNION HUMAN RIGHTS POLICIES: A STUDY IN IRONY* (Oxford 2004).

⁶ See Samantha Besson, *The European Union and Human Rights: Towards A Post-National Human Rights Institution?* 6 *HUMAN RIGHTS L. REV.* 323 (2006), available at <http://hrhr.oxfordjournals.org/cgi/content/abstract/ngl001v1>; Weiler, *supra* note 1.

II. HAS THE COURT PROVIDED ADEQUATE PROTECTION FOR HUMAN RIGHTS?

The first and foremost condition necessary for the ECJ to provide adequate protection for human rights is arguably the willingness on the part of the Court to treat human rights protection as an end in itself. For if the Court utilizes human rights in an instrumental fashion for the purpose of furthering other objectives, it is likely to adopt a pragmatic approach to human rights protection, which means that in a clash between human rights protection and the promotion of other objectives, there is a likelihood of the latter (other objectives) being of greater importance to the Court. Therefore, in the absence of the adoption by the Court of a principled approach to human rights protection, it would not be a fair and accurate conclusion that the ECJ provides consistent and adequate protection for fundamental human rights. Although fundamental human rights and fundamental economic freedoms need not necessarily be construed as always being in conflict, the approach adopted by the ECJ in dealing with situations where there is a clash between the protection of human rights and the promotion of the European Community freedoms is a significant factor when considering whether the Court has treated human rights protection as an end in itself and, ultimately, afforded adequate protection to human rights. Therefore, the promotion of fundamental freedoms constitutes the most important obstacle to the protection of human rights by the ECJ. In other words, the most noteworthy impediment faced by the Court in its task of safeguarding human rights has been observed in cases where human rights directly oppose economic freedoms. It has not been easy task for the Court to reconcile the protection of human rights with the promotion of fundamental freedoms for the reason that the primary objective of the Treaty, which the ECJ interpreted in the process of the constitutionalization of the European legal system, was initially the establishment of a union based on economic integration, and the Treaty contained no express provision on human rights. Therefore, the ECJ's early case law on the protection of human rights led to the impression that the discourse of human rights was manipulated to extend the scope and reach of Community law, and that economic freedoms were given priority over human rights.⁷

The Court's initial approach to the protection of human rights seems to support these criticisms that were directed towards the Court. Since it had declined to recognize the existence of fundamental rights protection within the European legal order⁸ until the German and Italian constitutional courts expressed concerns about the protection of the fundamental human rights

⁷ See Jason Coppel and Aidan O'Neill, *The European Court of Justice: Taking Rights Seriously*, 29 COMMON MARKET L. REV. 669 (1992).

⁸ Case 1/58, *Friedrich Stork & Co v. High Authority of the ECSC*, [1959] ECR 17.

embedded in their national constitutions,⁹ it could be postulated that in its early case law, the ECJ had not treated the protection of fundamental rights as an end in itself, but rather employed the human rights rhetoric as a means to avert the threat by these national courts that they would have to address the issue by subordinating Community law to the national constitutional provisions safeguarding human rights.

The important point here, in my opinion, is not, as Mancini¹⁰ contended, the fact that the ECJ was compelled by national courts to safeguard human rights, but that human rights were employed in an instrumental fashion to maintain the ‘integrity, unity and supremacy of Community law.’¹¹ The latter is more significant than the former in that the manipulation of human rights law as an instrument to achieve other means indicates that the overriding objective is not the safeguarding of fundamental human rights, but the protection of other Community objectives. Therefore, the degree of protection provided for human rights was dependent on its compatibility with the overriding interests of the Community, whereas ample safeguards for human rights requires the protection of human rights to be an end in itself. In this sense, it can be inferred from its early case law on human rights that the ECJ was motivated by the ulterior motive of protecting the overriding status of Community law by using the discourse of human rights as just an instrument, thereby failing to fulfill what many would consider to be a prerequisite for an economic union – creation of an effective regime for the protection of human rights.

However, that the concern for the integrity, unity and supremacy of Community law constituted the ulterior motive of the ECJ *ab initio* does not necessarily mean that the Court’s attitude to the protection of human rights has remained unchanged. A general analysis of the ECJ’s recent case law may, in fact, lead us to the conclusion that there has been a significant shift in the Court’s approach to the protection of human rights. For instance, developments such as the Court’s extension of its human rights jurisdiction into Member State actions,¹² the recognition by the ECJ of Member States’ right to rely on human rights protection as a basis for derogating from Community economic freedoms,¹³ and the high deference shown by the ECJ to the Member States which are willing to provide greater protection for certain human rights that lack

⁹ Case 11/70, *Internationale Handelsgesellschaft MbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹⁰ G. Federico Mancini, *A Constitution for Europe*, 26 COMMON MARKET L. REV. 595, 611 (1989).

¹¹ Coppel and O’Neill, *supra* note 7, at 672.

¹² Case 5/88, *Wachauf v. Germany* [1989] ECR 2609; Case 260/89 *Elleniki Radiophonia Tileorasi AE (ERT) v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925.

¹³ Case C-112/00, *Schmidberger v. Austria* [2003] ECR I-5659.

a ‘common European ground’¹⁴ could be regarded as manifestations of the Court’s willingness to augment judicial protection of human rights. Furthermore, the ECJ’s holding in *Mary Carpenter*,¹⁵ that the permissibility of restrictions placed by the individual Member States on the economic freedoms under the relevant Treaty provisions are conditioned on their compatibility with fundamental rights, seems to be an indication of the greater willingness on the part of the Court to allow non-market values to play a greater role in its reasoning. Likewise, the Court’s statement in the *ERT* case that “...measures which are incompatible with respect for human rights, which are recognised and guaranteed [in Community law], could not be admitted in the Community”¹⁶ appears to indicate the adoption by the Court of a genuine approach to the protection of human rights since it implies that measures may be invalidated by the ECJ on the sole ground that they lack compatibility with human rights. In other words, this statement seems indicate that the Court has elevated human rights to a higher status in the normative hierarchy of legal rules as a criterion against which the validity of other substantive legal measures is to be determined. In the absence of further examination of the case, it may be concluded from the wording of this statement that the ECJ has commenced to perceive human rights protection as an end in itself and hence has taken a significant step in a direction towards providing adequate judicial protection for human rights.

Nevertheless, one should not rely on the mere usage of the language of human rights protection to conclude vis-à-vis the actual degree of protection afforded to human rights by the Court. The context in which such a usage has taken place is extremely important. In my opinion, the cases of *ERT* and *Mary Carpenter*, which concerned the imposition of an obligation on Member States to comply with human rights when derogating from the principle of free movement, do not constitute good examples of cases where the Court assigned greater weight to human rights against other Community objectives. Although in these cases the Court recognized the violations of human rights on an individual basis to invalidate substantive legal measures, which appears to assign a higher priority to human rights since human rights were used as a restriction on derogations from economic freedom, it is still possible that the decision does not cast any light on the Court’s approach to the protection of human rights. In this type of case, the relationship between fundamental rights and economic freedoms is not contradictory but complementary – the former

¹⁴ Case C-36/02 Omega Spielhallen- und Automatenanstalt v. Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609.

¹⁵ Case C-60/00, *Carpenter v. Secretary of State for Home Department* [2003] ECR I-6279.

¹⁶ Case 260/89, *Elleniki Radiophonia Tileorasi AE (ERT) v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925, para. 4.

have been employed as an extra mechanism to protect the latter. Therefore, it would not be accurate to state that the ECJ has given priority to the protection of human rights over other objectives of the Community, such as the economic freedoms. Indeed, the *ERT*-type cases, in which fundamental rights are used to restrict derogations from economic freedoms on policy grounds, seem to aid the proposition accusing the ECJ of the instrumental manipulation of the human rights discourse for the purpose of advancing the economic objectives of the Community. Prior to the *ERT* decision, a non-discriminatory restriction on the economic freedoms, which was justified on public policy grounds, was deemed not to fall within the remit of Community law and therefore could not be reviewed for compatibility with the general principles of Community law.¹⁷ A cynical account of this development could be that the ECJ has manipulated the discourse of human rights protection to extend its jurisdiction into a realm previously belonging to national authorities for the purpose of providing additional protection for the economic freedoms. Of course, this is only one way of viewing the decision; another way of looking at it is that the Court has given a broad meaning to the phrase ‘scope of Community law’ for the purpose of extending its fundamental rights jurisdiction so as to provide greater judicial protection for human rights by ensuring that considerations of fundamental rights prevail even over the public interest requirements of the Member States.

The standpoint of the European Court in relation to the protection of fundamental rights becomes clearer in cases where Member States rely on the protection of human rights as a basis to derogate from economic freedoms. This type of case represents a candidly-conflicting relationship between economic freedoms and fundamental human rights, and, therefore, requires the Court to undertake a balancing exercise between the two conflicting interests. The leading case representing this type of situation is *Schmidberger*,¹⁸ where Austria wanted to rely on the need to protect the freedom of expression and the freedom of assembly of its citizens as a basis for derogating from the principle of the free movement of goods. In brief, the Court held the following: first, the Court appeared to have struck a neutral balance between the free movement of goods and the fundamental rights involved by avoiding the establishment of a normative or constitutional hierarchy between them; it stated that neither the principle of the free movement of goods nor the fundamental rights at issue were absolute. While the former is subject to the restrictions under Article 30 of the European Community Treaty and ‘mandatory requirements’ as laid down in the *Cassis*¹⁹ case, the latter are subject to certain limitations based on objectives

¹⁷ Cases 60-61/84, *Cinetheque v. Federation Nationale des Cinemas Francais* [1985] ECR 2605.

¹⁸ Case C-112/00 *Schmidberger v. Austria* [2003] ECR I-5659.

¹⁹ Case 120/78 *Rewe-Zentrale AG v. Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon)* [1979] ECR 649.

justified on the public interest as can be inferred from the second paragraphs of Articles 10 and 11 of the European Convention of Human Rights.²⁰

Second, the Court balanced the ‘legitimate interest’ of protection of human rights directly against the protection of the free movement of goods through the application of a proportionality test²¹ and concluded that “the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade.”²²

On the face of it, the decision appears to constitute a significant move towards the provision of greater judicial protection for human rights²³ since it assigns human rights a constitutional status equal to that of the Community market freedoms, recognizes the protection of human rights as a legitimate interest which in principle justifies a restriction of the market freedoms, and applies a lax proportionality test conferring a wide margin of discretion on the Member States to judge the degree of restrictions required for the protection of fundamental rights.

Nevertheless, the decision may be subject to criticism for a number of reasons. First, the Court’s failure to recognize a constitutional or normative hierarchy between market freedoms and human rights indicates that the degree of protection afforded to human rights will, to a large extent, depend on the facts of individual cases, which will be evaluated through the balancing exercise of the proportionality test.²⁴ In my opinion, such a pragmatic approach, omitting the need to recognize human rights as standards, in possession of a special constitutional status against which the validity of other Community measures can be assessed, is not appropriate for the provision of adequate protection for basic human rights. Although the application of the lax proportionality test and the conferral on the Member States of a wide margin of discretion to determine the degree of restriction necessary for the protection of basic human rights could be regarded as important precautions designed to remedy the defect of the decision caused by the failure to give human rights a higher normative status than economic freedoms, the Court’s readiness to balance human rights

²⁰ Case C-112/00 Schmidberger v. Austria [2003] ECR I-5659, paras. 79-80.

²¹ *Id.*, paras. 81-82.

²² *Id.*, para. 93.

²³ Takis Trimidas, *The ECJ and the Draft Constitution: A Supreme Court for the Union?*, Federal Trust Constitutional Online Paper 05/04, at http://www.fedtrust.co.uk/uploads/constitution/05_04.pdf (last visited Jul 2, 2009).

²⁴ See Costas Kombos, *Fundamental Rights and Fundamental Freedoms: A Symbiosis on the Basis of Subsidiarity* 12 EUROPEAN PUBLIC LAW 433 (2006).

protection directly against market rights by applying a proportionality test means that there is a possibility, however small, of human rights protection being subordinated to the European Community market freedoms. Yet effective protection of human rights requires that those rights be recognized as special standards, with the validity of other substantive legal rules being dependent upon their compliance with these special standards for human rights. Thus, the Court's adoption of a pragmatic approach to human rights protection without assigning a pre-eminent constitutional status to human rights norms is not congruent with the object of providing effective safeguard for human rights.

Moreover, even if the application of the proportionality test, requiring human rights to be weighed directly against the economic freedoms, could be justified, the current balancing regime that recognizes the protection of the economic freedoms as the default position and regards violations of human rights as a 'wrong' that may be justified under certain circumstances, creates further theoretical and practical difficulties. The concept of justification connotes conduct which is essentially wrong but tolerated.²⁵ Therefore, the theoretical problem is that the current test is based on the misleading assumption that the constitutional provisions restricting economic freedoms for the purpose of safeguarding basic human rights are tolerated 'wrongs.' This is significant because the proportionality test essentially balances values; for that very reason it is important to set the protection of human rights as the default and judge the merits of other values against those standards. The practical significance of this is that, under the present test, the burden of justification is on the Member States which have taken steps to protect human rights. This is inconsistent with both the European human rights system and the democratic States' constitutional duty to protect human rights. Furthermore, the application of the proportionality test in this particular fashion appears to shift the balance between the protection of human rights and the promotion of the freedoms in favor of the latter, since it is set as the default deviations from which a contrary position ought to be justified. In this sense, it may be contended that the aptness of the present proportionality test to ensure adequate protection for basic human rights appears to be questionable.

Further, the ECJ has not provided guidance regarding whether protection of human rights is to be construed as a separate basis for derogation from the free market obligations, or if it falls within either the public policy justification under Article 30 of the EC Treaty or the mandatory requirements as laid down in the *Cassis* case. It could be submitted that fundamental rights protection must be contemplated as an autonomous grounds for justification. The purpose

²⁵ See Christopher Brown, *Schmidberger*, 40 COMMON MKT L. REV. 1499 (2003).

underlying the existence of the justification is to imbue the Member States with a degree of regulatory autonomy in order to ensure the satisfaction of different needs at the national level. In other words, one could maintain that this justification has been created in order to enable the Member States to pursue national aims that are incompatible with the European Union's objectives. However, the fact that protection of human rights is a common objective, pursued not only by the Member States but also by the union as a whole, distinguishes it from the other justifications.²⁶ Therefore, since the protection of fundamental rights has a special status as a common interest of the Member States and the European Union, it should not be treated in the same manner as the other grounds, especially in terms of the restrictions placed on their invocation. Moreover, protection of human rights should not be construed as falling within the category of the public policy justification under Article 30 of the EC Treaty and its equivalents – the concept of 'public policy' is required to be interpreted very strictly,²⁷ implying that the degree of protection provided for human rights under this provision would be limited. This would also lack compatibility with the wide margin of discretion that the Court is willing to confer on the Member States. In addition, the contemplation of the protection of human rights as a separate justification would symbolize the legal recognition of the exceptional status of human rights, while simultaneously allowing for greater judicial flexibility in approaching the protection and development of fundamental rights.

The approach espoused by the ECJ in the *Omega* case, regarding human rights inimitably safeguarded in the specific legal orders of the individual Member States, arguably deserves praise for it can be regarded as a notable move towards the addition of judicial protection for human rights. In *Omega*, Germany attempted to justify its derogation from the principles of freedom to provide services and free movement of goods in the guise of protecting 'human dignity' as entrenched in the Basic Law of Germany. Notwithstanding the absence of 'common European ground' for the protection of 'human dignity' as perceived by the German constitutional order, the ECJ held that "[i]t is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States regarding the precise way in which the fundamental right or legitimate interest

²⁶ Matej Avbelj, *The European Court of Justice and The Question of Value Choices – Fundamental Rights as an Exception to the Freedom of the Movement of Goods*, Jean Monnet Paper 6/04, available at <http://www.jeanmonnetprogram.org/papers/04/040601.html> (last visited Jul 3, 2009).

²⁷ Case C-36/02, *Omega Spielhallen und Automatenaufstellung v. OberBürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para. 30.

in question is to be protected.”²⁸ The essential aspect of the holding is that in order for an individual Member State to adopt measures restrictive of the common market freedoms for the purpose of safeguarding a fundamental human right entrenched in its national constitution, it is not necessary that the substantive content of the fundamental right intended to be protected is founded on a EU-wide shared conception. It is a significant development in that it indicates that the Court is prepared to respect and protect not only rights recognized by the EU but also constitutional provisions entrenching uncommon fundamental rights. The Court’s classification of the justifications, based on the safeguarding of human rights lacking common ground as falling within the public policy provision,²⁹ may be viewed as a retreat from the move towards enhanced protection of human rights for the aforementioned reasons. Nevertheless, notwithstanding the allure, from a human rights perspective, of the submission requiring the acceptance of the highest standard of human rights protection guaranteed by any of the Member States as an EU norm, the approach taken by the Court may be justified on the ground that a highest standard rule would result in the imposition of the standards of a single Member State onto the whole union.³⁰ It could be considered to be a positive development in favor of human rights protection, since although it does not follow a ‘highest standard’ approach, it does not prevent the individual Member States from providing greater protection by allowing them to safeguard human rights not formally recognized by the EU. Moreover, the Court confers a wide margin of appreciation,³¹ while giving the Member States responsibility to determine whether the restriction is justifiable or not via the application of the proportionality test. By the application of the doctrine of judicial subsidiarity, which provides that decisions must be taken at the level capable of achieving the best result, the Court has ensured that the institutions in the best position to understand the degree of protection demanded by the national constitutions apply the proportionality test. In this sense, the approach adopted by the ECJ in relation to human rights lacking common ground, appears to be a step towards broadening the scope of human rights protection within the European Union.

Therefore, it seems fair to conclude that, although in its early case law on human rights the ECJ seems to have engaged in an instrumental exploitation of the human rights discourse for the purpose of averting threats by national constitutional courts to the supremacy of Community law, thus failing to fulfill the condition precedent of the establishment of a coherent and effective regime to safeguard human rights, an overall analysis of the Court’s recent human

²⁸ *Id.*, para. 37.

²⁹ *Id.*, para. 36.

³⁰ *Avbelj*, *supra* note 26.

³¹ *Id.*, para. 31.

rights jurisprudence indicates a greater willingness on its part to adopt an approach based upon the recognition of the intrinsic value of human rights. Such a shift in the approach of the Court to the protection of fundamental rights is arguably evident in the Court's extension of its human right jurisdiction to Member State actions, its acknowledgement of human rights as a basis for derogation from the economic freedoms, and its permissive attitude to the protection of fundamental rights lacking a 'common European ground.' However, the Court's failure or unwillingness to establish a normative hierarchy between the economic freedoms and human rights by assigning a pre-eminent status to the latter, its adoption of a proportionality test recognizing the enforcement of the market freedoms as the default and the protection of human rights as the deviation in the event of a clash between the two, as well as the absence of clear guidance as to whether human rights protection is regarded as an autonomous justification for derogation, which is important in determining the potential restrictions on its validity as a justificatory ground, demonstrate that there still remain significant steps to be taken by the Court in order to provide effective safeguards for fundamental rights.

III. ECJ TREATMENT OF MEMBER STATE ACTIONS WHEN ENFORCING FUNDAMENTAL RIGHTS

A further requirement underpinning the establishment of an effective regime of human rights protection for the EU is arguably that the ECJ should not tolerate any encroachment on fundamental rights, regardless of whether the infringements emanate from acts conducted by individual Member States or by Community institutions.³² The existence of an arbitrary distinction in the treatment of infringements through Member State actions and of violations via Community acts would form a significant obstacle to the development of a coherent, consistent and effective mechanism to protect fundamental rights. The existence of such a distinction would lead to the absurd situation in which a violation of fundamental rights would be subjected to condemnation when it had been committed by a Community institution but escape judicial scrutiny when it results from an action by a Member State. Therefore, although the only subjects of early human rights litigation in the ECJ were acts of the Community institutions where, in its initial case law, the Court exhibited considerable reluctance to acknowledge the susceptibility of Member State actions to human rights scrutiny under Community law,³³ in later cases the Court extended the

³² J. H. H. Weiler & Nicholas J. S. Lockhart, "Taking Rights Seriously" *Seriously: The European Court and its Fundamental Rights Jurisprudence*, 32 COMMON MKT L. REV. 51 (1995).

³³ Joined Cases 60 and 61/84, *Cinetheque v. Federation Nationale des Cinemas Francais* [1985] ECR 2605; Case 149/77 *Defrenne v. Sabena* [1978] ECR 1365; Case 12/86 *Demirel* [1987] ECR 3719.

scope of its human rights jurisdiction to Member State actions conducted in the context of EU law.³⁴ However, under the current jurisprudence of the ECJ, Member State actions which could be subjected to human rights review by the ECJ are confined to measures that have been adopted in the implementation of Community law³⁵ and in derogation of Treaty provisions.³⁶ In other words, the ECJ has limited its human rights jurisdiction *vis-à-vis* Member States to situations where Member States fail to act in compliance with fundamental rights when implementing and executing Community law, and when derogating from the free movement provisions. This, in effect, means that although the extension of ECJ's fundamental rights jurisdiction to Member State acts appears to have reduced the probability of the abovementioned absurdity occurring through the different treatment of Member State actions compared to Community actions, the limited nature of that jurisdiction prevents the removal of the potential absurdity in its entirety, because Member State measures adopted outside the context of Community law are still immune from fundamental rights review by the ECJ. This may lead to situations where the basic principle of equality before the law is compromised in that, outside of the context of EU law, individual citizens who suffer from substantially the same infringement are likely to receive different types, as well as different degrees, of protection due to the varying nature of fundamental rights regimes. In this sense, it may be submitted that the ECJ provides limited protection for human rights against violations by Member State acts in that it asserts jurisdiction only regarding measures adopted in the context of the EU law.

However, a comparison of the cases of *Wachauf* and *ERT* seems to indicate that the ECJ scrutinizes Member State acts in derogation from Treaty provisions more than that for Community acts.³⁷ As an example of the former, which involved a Member State measure employed in the implementation of a Community rule, the Court stated that fundamental rights were not absolute, that they should be considered in their social function, and that they could be restricted in favor of the common organization of a single market.³⁸ This could be interpreted to signify that fundamental rights were assigned more value as an instrument -- rather than value as a norm -- and that the ECJ would subordinate these fundamental rights to Community objectives. In the latter situation, which involved a Member State measure in the form of derogation from certain free

³⁴ Case 5/88, *Wachauf v. Germany* [1989] ECR 2609; Case 260/89 *Elleniki Radiophonia Tileorasi AE (ERT) v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925.

³⁵ Case 5/88, *Wachauf v Germany* [1989] ECR 2609.

³⁶ Case 260/89 *Elleniki Radiophonia Tileorasi AE (ERT) v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925.

³⁷ *Coppel and O'Neill*, *supra* note 7, at 669.

³⁸ Case 5/88, *Wachauf v. Germany* [1989] ECR 2609, para. 18.

movement measures, fundamental rights were assigned a high position in the normative hierarchy in that the Court held that in order to be legal, derogations must be in compliance with the requirements of fundamental rights.

A cynical interpretation of this development is that the Court intended to employ fundamental rights as an additional layer of protection for Community freedoms against Member State actions. Thus, this comparison appears to suggest that in both cases the primary concern of the ECJ was to promote the Community objectives, thereby subordinating the safeguarding of fundamental rights to those objectives. Therefore, the Court has been accused of subjecting Member State derogations from Community freedoms to a higher standard than the Community measures, its primary purpose being the extension of the reach of Community law.³⁹ If this interpretation is correct, it could form a basis for the contention that the ECJ has afforded a lower degree of protection for human rights in cases involving Community measures, since, although the Court has had no difficulty in asserting human rights jurisdiction vis-à-vis Community actions, it seems to have failed to subject the acts in question to sufficient scrutiny. However, since the Court, in the *Schmidberger* case, struck a neutral balance between fundamental rights and economic freedoms, it recognized the protection of fundamental rights as a basis for derogation from Community market freedoms. In doing so, the Court accorded a wide margin of discretion to Member States in the evaluation of the degree of restriction that could be placed on the economic freedoms for the safeguarding of human rights and it would not be fair to conclude that the ECJ has subjected Member State actions to stricter scrutiny for the sole purpose of extending the scope of Community law to areas of national autonomy.

Although the provision of Member States with an adequate degree of autonomy necessitates that the ECJ should refrain from scrutinizing Member State actions performed outside the EU context for compliance with fundamental rights, there are a number of reasons why Member State acts should not be treated differently than Community acts in the enforcement of fundamental rights. First, the establishment of a coherent, consistent and ultimately effective mechanism for protection of human rights requires the Court to enforce human rights without tolerating any infringement of them regardless of whether the violating measure has been issued by a Member State or a Union institution.

Secondly, it would be incongruous for the ECJ, and endanger its integrity, to subject to rigorous scrutiny Member State acts affecting Community market

³⁹ Coppel and O'Neill, *supra* note 7, at 669.

freedoms, while embracing a non-interventionist approach to fundamental rights infringements by the Community bodies.⁴⁰ For although it was initially established as an economic community with constricted objectives, the EU has arguably evolved into a political union with broader aims and more direct effects on individual citizens. In this sense, since the ECJ is not merely a court of an economic community but the court of a pseudo-political union constituted by its Member States, it would not be inappropriate to submit that the Court has both the jurisdiction and the duty to ensure that Member State actions comply with fundamental rights.

Thirdly, notwithstanding that the EU does not have a federal governance system, it would not be accurate to construe the EU as an entity entirely discrete from its constituent Member States.⁴¹ The majority of actions under European Union law takes place at the Member State level and is conducted by Member State officials. This means that the Member State officials or agencies acting in the implementation or execution of European Union law perform a function with not only national, but also a European Union, dimension. In this sense, Member States could, to a large extent, be regarded as institutions of the European Union. Therefore, the objections, based on the conception of the EU as an entity separate from its Member States, to the Court's extension of its human rights jurisdiction to Member State actions, seem to lack a reasonable basis. A legal regime necessitating some of its bodies to be bound by fundamental rights while providing others with immunity would compromise its own integrity, coherence and effectiveness. Hence, although it must be accepted that the extension of the jurisdiction of the ECJ into the human rights aspects of Member State actions leads to a reduction in the autonomy of national authorities, this is a cost that must be paid for the establishment of a coherent and effective regime to protect fundamental rights.

IV. POTENTIAL IMPACT OF THE CHARTER OF FUNDAMENTAL RIGHTS

Although the Charter has not yet been referred to by the ECJ and its legal status is yet to be clarified, it is important to consider its potential impact, should it be given legal effect, on the role of the ECJ in the development and protection of human rights in the EU. The purpose of this section is not to adopt a stance on the issue of whether the Charter should be assigned a legally binding status, but to discuss the possible impact of a legally-binding Charter on the role of the ECJ in the protection of human rights. The Charter could be considered as a further move towards the establishment of a more coherent and effective

⁴⁰ Weiler and Lochard, *supra* note 32.

⁴¹ *Id.*

human rights protection regime in that it may lead to an increased degree of legal certainty by codifying and consolidating the fundamental rights recognized by the EU and safeguarded by the ECJ through its fundamental rights jurisprudence. It does not obstruct the further development of human rights by allowing the provision of more extensive protection for the rights in question⁴² and by respecting the ‘diversity’ of national constitutional systems;⁴³ it guarantees the right of individual citizens to have an effective remedy for infringements of human rights;⁴⁴ and it incorporates, not only the traditional civil and political liberties, but also economic and social rights. Furthermore, the transformation of fundamental rights from values finding expression merely as part of the general principles of European Union law into positive rights entrenched in a ‘bill of rights’ would further encourage, and even place the ECJ under an obligation, to address the questions of fundamental rights in a more manifest and direct fashion.⁴⁵ The existence of the Charter as a bill of rights for the EU would also lead to the establishment of a hierarchy of norms in the EU legal system and position human rights provisions at the apex of that normative hierarchy, thus avoiding the direct balancing between human rights and fundamental economic freedoms as norms of equal ranking. In this sense, the Charter seems to have a potentially enhancing effect on the role of the ECJ in the development and protection of human rights. However, it also possesses aspects which may be subject to criticism from the perspective of the protection of human rights — while the categorization of the incorporated rights into ‘principles’ and ‘rights’ may undermine the Charter’s advantage concerning legal certainty, the provision in Article 51(2) of the Charter restricts the jurisdiction of the ECJ over fundamental rights vis-à-vis Member State acts. Therefore, one could submit that although certain aspects of the Charter appear to have the potential to augment the position of the ECJ as a body safeguarding human rights, certain aspects of its design seem to envisage a more restricted role for the ECJ than the status quo.

Notwithstanding that the Charter does not create new rights, it may secure an increased degree of legal certainty in that it provides an express catalogue of the fundamental rights that have been recognized by the EU and its Member States

⁴² Articles 52(3) and 54 of the Charter of Fundamental Rights of the European Union (2000); Article II-113 of the Treaty Establishing a Constitution for Europe (TECE).

⁴³ Preamble to the Charter of Fundamental Rights of the European Union (2000), para. 3.

⁴⁴ Art II-107 of TECE.

⁴⁵ See John Morjin, *Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution*, 12 EUR. L. J. 15 (2006).

that are to be protected by the ECJ via its jurisdiction over human rights.⁴⁶ Since the Charter is designed to constitute a bill of rights for the EU, the elevation of the Charter into a legally-binding instrument may lead to the resolution of the difficulties connected with the uncertainties emanating from the absence of a hierarchy between the fundamental market freedoms and the fundamental rights, and should result in the favoring of human rights. In other words, the exaltation of the Charter into a bill of rights for the EU may mean that the rights it incorporates would be assigned a higher status in the hierarchy of norms, thereby necessitating the ECJ to apply them as criteria against which the validity of other measures are assessed rather than requiring the Court to engage in a balancing exercise between fundamental rights and the market freedoms. Nevertheless, although the Charter promotes legal certainty by providing a comprehensive catalogue of the currently recognized rights, the reference in the Charter to the distinction between ‘rights’ and ‘principles’ may lead to the occurrence of fresh legal uncertainties, since it is unclear whether certain provisions communicate rights or principles.⁴⁷ In addition to the generation of legal uncertainty, the categorization in question is likely to lead to the more significant problem of the relegation of the less traditional social and economic rights as mere inspirational principles.⁴⁸ Thus, the existence of this categorization may form an obstacle to the development and provision of adequate protection for the incorporated socio-economic rights by the European Court of Justice. In this sense, the stance of the original preamble to the Charter, which recognized the values underpinning civil, political, social and economic rights as indivisible and universal, and which was altered due to political pressure, based mainly on concerns regarding the propriety of rendering such statements of policy justiciable, was more amiable from a pro-human rights perspective. Therefore, if the Charter is to empower the ECJ to provide coherent, adequate and effective safeguarding of fundamental rights, it is necessary to remove the distinction under debate and to assign the socioeconomic rights an equal status with the more traditional civil and political liberties.

A further aspect of the Charter that could be subject to criticism is that, under the current human rights jurisprudence of the ECJ, any Member State measure adopted in the context of Community law could be subjected to human

⁴⁶ Tania Kyriakou, *The Impact of the EU Charter of Fundamental Rights on the European Union System of Protection of Rights: Much Ado About Nothing?* 5 WEB JCLI (2001), at <http://webjcli.ncl.ac.uk/2001/issue5/kyriakou5.html> (last visited Jul. 3, 2009).

⁴⁷ Aileen McColgan, *The European Union Charter of Fundamental Rights* (2004) 1 EUR. HUM. RIGHTS L. REV. 2; Damian Chalmers, *et al.*, *EUROPEAN UNION LAW TEXT AND MATERIALS* (Cambridge, 2006).

⁴⁸ McColgan, *supra* note 47.

rights review by the ECJ.⁴⁹ Under Article 51(2) of the Charter, the Court's fundamental rights jurisdiction in relation to Member State actions has been restricted to measures adopted in the implementation of EU law, excluding the Court's human rights control over derogations from Treaty provisions.⁵⁰ Although the wording of this provision appears to broaden the scope of human rights scrutiny under EU law, since EU law is broader than Community law (for it also includes the second and third pillars), it could be construed as having the objective, or at least the effect, of curtailing the scope of the ECJ's jurisdiction over human rights.⁵¹ This wording carries the danger that infringements of fundamental rights emanating from measures adopted by Member States in derogation from EU law would escape the Court's human rights scrutiny. It could also mean that the pre-emptive or constitutional status assigned to human right norms as criteria of legal validity would, at least partially, be removed since human rights would no longer operate as conditions precedent for the legal validity of Member State measures, insofar as derogations are concerned. Moreover, the restriction of the ECJ's jurisdiction in relation to Member States in the context of the implementation of EU law appears to have the potential to lead to the absurd situation where the Court would be able to strike down national laws encroaching on fundamental rights if they have been adopted in the implementation of EU law but would have to ignore similar infringements caused by measures adopted in derogation of EU law. Since the derogations are generally grounded upon public policy, there is the possibility that fundamental rights, which are based on individual interests, would be subordinated to public interests. Therefore, the Court must address this issue by adopting a broader interpretation of the provision in question so as to include derogations.

Notwithstanding these drawbacks, it may be submitted that the Charter deserves praise for its adoption of a prospective approach to the protection of fundamental rights. Although it does not introduce new rights, it leaves open the possibility of the development of new rights by expressing that the provisions of the Charter are not to have any limiting effect on the fundamental rights protected by the national constitutions of the individual Member States.⁵² Although Article 52(3) establishes the ECHR standard as the minimum standard of protection, it does not restrict the protection provided by the ECJ to that standard.⁵³ Especially, the inclusion of the common constitutional traditions of

⁴⁹ Case 260/89 *Elleniki Radiophonia Tileorasi AE (ERT) v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925.

⁵⁰ TECE, Article II-111(1).

⁵¹ Morjin, *supra* note 45; Sionaidh Douglas-Scott, *The Charter of Fundamental Rights as a Constitutional Document*, 9 EUR. HUM. RIGHTS L. REV. 37 (2004).

⁵² Article II-113 of TECE; Eugene Regan, *WHAT THE CONSTITUTIONAL TREATY MEANS: FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION* (Institute of European Affairs 2005).

⁵³ *See* Kyriakou, *supra* note 46.

the Member States as a source of fundamental rights is significant in that it implies that the Charter does not constitute an exhaustive catalogue of the recognized fundamental rights, thereby permitting the Court to formulate additional rights by exploring the constitutional traditions of the various Member States.⁵⁴ Therefore, the adoption by the Charter of a prospective approach to fundamental rights protection means that the concerns related to the potential ‘chilling effect’ of the codification of fundamental rights in a written document⁵⁵ are unnecessary. In other words, the Charter is unlikely to operate as an obstruction to the provision of adequate protection by the ECJ by restricting its fundamental rights jurisdiction to a limited catalogue of rights.

Moreover, despite the existence of the potential for the relegation of the socioeconomic rights due to the ‘principles-rights’ categorization, their inclusion in the Charter is significant in that this is an indication of their recognition as human rights which would allow the Court to consolidate the applicability of these rights through its interpretation and application of the Charter. Hence, the significance of the inclusion of those rights in the Charter, to a large extent, depends on the ECJ’s approach to their interpretation and application. They will either acquire practical significance or remain as principles with symbolic significance depending on the attitude of the Court to define their scope and meaning. Therefore, although the qualified language of the provisions articulating socioeconomic rights may lead to a degree of reluctance on the part of the ECJ to adopt a liberal approach to the interpretation of the rights in question, the inclusion of those rights in the Charter extends the Court’s fundamental rights jurisdiction by adding to the catalogue of rights on which it could adjudicate.

V. POTENTIAL IMPACT OF THE EU’S ACCESSION TO THE ECHR

While the ECJ had held that the Community lacked competence to enter into an agreement for acceding to the European Convention on Human Rights (the “Convention”),⁵⁶ the TECE empowers, and even requires, the European Union to conclude such an agreement.⁵⁷ Notwithstanding the concerns vis-à-vis the Union’s accession to the Convention, such as the fear that the autonomy of the Union’s legal regime would be jeopardized and that the ECJ would be subordinated to the European Court of Human Rights (ECHR), it may be

⁵⁴ See Andrew William, *European Union Human Rights Policy and the Convention on the Future of Europe: A Failure of Design?* 28 EUR. L. REV. 794 (2003).

⁵⁵ See Joseph H. H. Weiler, *A Constitution for Europe? Some Hard Choices*, 40 J. COMMON MKT. STUD. 563 (2002).

⁵⁶ Opinion 2/94 [1994] ECR I-1759.

⁵⁷ TECE, Article I-9(2).

submitted that the establishment of a coherent and more effective regime for the protection of human rights, the greater possibility of legal certainty and the avoidance of the different judicial treatment of similar human rights issues in Europe will necessitate that the EU accede to the Convention.⁵⁸ The accession would mean that all legislative and executive actions of the EU institutions and the Member States, and judgments of the highest courts of the Convention signatories, including those of the ECJ, relating to human rights would be subject to review by the ECHR for compliance with the Convention. Since, as a consequence of the accession, the ECHR would acquire the status of the final arbiter on the issue of human rights in Europe, whose decisions and interpretations would be followed by the courts of the parties to the Convention, including the ECJ, the accession is likely to contribute extensively to the development of a more effective mechanism for the protection of fundamental rights based on coherent interpretation and consistent application of human rights principles, thereby serving the achievement of legal certainty.

The most important source of legal uncertainty in European law on human rights issues is the jurisdictional overlap between the ECJ and the ECHR. The assumption of responsibility for the interpretation of the same document – i.e. the Convention – by two Courts, with different institutional capacities and purposes, in distinct contexts could lead to different, and, more significantly, conflicting interpretations, thereby creating legal uncertainty and fundamental unfairness. An overlap of jurisdiction or potential for conflict between the two Courts could arise in a number of contexts including the review of the same Member State action by both Courts,⁵⁹ and the processing by the Courts of different cases involving similar or identical issues.⁶⁰ The extension of the reach and scope of EU law and the potential impact of the Charter of Fundamental Rights means that the number of occasions on which similar or identical fundamental rights cases or issues appear before the two European Courts will rise. There have already been occasions where ECHR decisions have contradicted ECJ decisions.⁶¹ For instance, in the *Hoechst*⁶² and *Niemietz*⁶³

⁵⁸ European Commission for Democracy Through Law, Draft Opinion No. 256/2003,, Implications of a Legally Binding EU Charter of Fundamental Rights Protection in Europe; Hans-Christian Krueger, *Why the EU Should Accede to the ECHR*, at <http://www.eumap.org/journal/features/2002/may02/whyaccedetoechr> (last visited Jul 4, 2009).

⁵⁹ *Bosphorus v. Ireland* [2006] 42 EHHR 1; Case 84/95 *Bosphorus v. Ireland* [1996] ECR I-3953.

⁶⁰ *E.g.* the ECJ's holding in Cases 46/87 & 227/88 *Hoechst AG v. Commission* [1989] ECR 2859 is comparable to the decision of the ECHR in *Niemietz v. Germany* (Series No. 251).

⁶¹ Contrast, for example, the ECHR decision in *Open Door Counselling Ltd. and Dublin Well Women Centre v. Ireland* (Series No. 246), with the Opinion of the Advocate General in Case 159/90, *SPUC v. Grogan* [1991] ECR 4685; the approach of the ECJ in Case 260/89 *Elleniki Radiophonia Tileorasi AE (ERT) v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925 with the ECHR's in *Lentia v. Austria* (Series No. 276); and the ECJ's holding in

cases, the two European Courts expressed different views on the significance and scope of the right to inviolability of the home in the commercial and professional contexts. While the ECHR interpreted the right to privacy under Article 8 of the Convention as extending to business premises, the ECJ did not concur. Not only may this lead to legal uncertainty but it may also cause the different treatment of citizens suffering from similar or identical fundamental rights infringements. Therefore, the establishment of a coherent human rights jurisprudence and the institution of an effective system to safeguard fundamental rights based on equal treatment of similar human rights issues requires the accession of the EU to the Convention.

Moreover, although the ECHR has no jurisdiction to process lawsuits pursued directly against the EU and its institutions, it has been held that Member States could be held responsible for infringements of human rights emanating from EU actions. In the *Matthews*⁶⁴ case, the ECHR held the UK responsible for the infringement of the right to vote in elections for legislature, as guaranteed by Protocol 1 to the Convention, by the Council Decision requiring the UK to deny Gibraltar citizens the right to vote in the European Parliament elections. This case demonstrates that, in the absence of the accession of the EU to the Convention, the decisions of the ECHR, holding Member States responsible for human rights violations emanating from EU actions could lead to situations where Member States are subjected to conflicting obligations in the implementation of a judgment of the ECHR. Since the execution of the Court's judgment in the *Matthews* case necessitated the modification of a provision of EU law, in relation to which the UK had no independent authority, the discharge by the UK of its obligations under the judgment was not feasible. However, had the EU been a signatory to the Convention, the implementation of human rights judgments would not constitute any difficulties. In this sense, the accession of the EU to the Convention could serve the augmentation of human rights protection in Europe by removing the difference in the treatment, by the European Court of Human Rights, of the Member States and the EU institutions. At any rate, it does not make sense to set the ratification of the Convention as a condition precedent for EU membership, while the EU itself does not fulfill this requirement.⁶⁵ Furthermore, since all Member States of the EU are subject to the external

Cases 46/87 & 227/88 *Hoechst AG v. Commission* [1989] ECR 2859 with the decision of the ECHR in *Niemietz v Germany* (Series No. 251).

⁶² Cases 46/87 & 227/88, *Hoechst AG v Commission* [1989] ECR 2859.

⁶³ *Niemietz v Germany* [1992] 16 EHRR 97.

⁶⁴ *Matthews v UK*, 28 EHRR 361 (1999).

⁶⁵ Hans-Christian Kruger, *Why the EU Should Accede to the ECHR*, at <http://www.eumap.org/journal/features/2002/may02/whyaccedetoachr> (last visited Jul. 4, 2009).

supervision of the ECHR, the consistent and efficient application and enforcement of human rights in Europe would benefit from the EU's accession to the Convention, so that the acts of the EU institutions affecting fundamental rights would be subject to the same external scrutiny as those of its constituent Member States. In other words, human rights violations would be subjected to consistent applications of human rights laws regardless of the source of the infringements.

The accession would enhance the protection for human rights, not only by contributing to the securing of legal certainty and equal treatment of human rights infringements regardless of the source they emanate from, but also by establishing an additional layer of scrutiny. Following the accession, the ECHR would have the final say on the issue of fundamental rights in Europe and would be able to review the decisions of the ECJ in cases involving human rights, which means that measures affecting human rights, be they adopted by a Member State or an EU institution, would be subject to a further layer of scrutiny. This potential development has formed the basis for objections to the accession such as the fear that the autonomy of the European Union's legal system would be endangered and that the ECJ would be subordinated to the ECHR. However, it could be argued that the autonomy of the EU legal system is not threatened by the accession since the ECHR would only scrutinize the legislation affecting human rights as guaranteed by the ECHR, and more importantly, the values underpinning the Convention are not contradictory with those inspiring the EU. Both courts have engaged in the common activity of exploring the shared values underpinning the European human rights.⁶⁶ Further, even if the autonomy of the European Union's legal system would be affected by the accession, the propriety of expressing concerns vis-à-vis autonomy, when human rights protection is at stake, is questionable.⁶⁷ The objection concerning the subordination of the ECJ, too, seems to be unfounded, since the primary responsibility for securing compliance with the Convention would, even following the accession, remain with the ECJ in the EU context;⁶⁸ the ECJ would become part of the remedies to be exhausted before the issuing of an application to the ECHR.⁶⁹ The doctrines of 'subsidiarity' and 'margin of appreciation' which govern the relationship between the ECHR and national authorities of the Member States would be equally applicable to the relationship

⁶⁶ Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 COMMON MKT L. REV. 629 (2006).

⁶⁷ Kruger, *supra* note 65.

⁶⁸ *Id.*; Opinion No. 256/2003, European Commission for Democracy Through Law, Draft Opinion, Implications of a Legally Binding EU Charter of Fundamental Rights Protection in Europe (2003).

⁶⁹ European Convention on Human Rights, art. 35.

between the two courts. This, in effect, constitutes a significant platform for the adaptation by the ECJ of the ECHR jurisprudence to the peculiar necessities of the EU, thereby conserving its status as the ultimate authority on the interpretation of EU law.⁷⁰ In addition, the purpose behind the accession is arguably not the creation of a hierarchical relationship between the ECJ and the ECHR, in order to give primacy to the latter,⁷¹ but is to recognize and benefit from the institutional capacity and specialization of the ECHR, which is arguably relatively better equipped to deal with human rights issues, bearing in mind that it has been established for the specific purpose of safeguarding human rights as entrenched in the Convention. Since the ECHR is not concerned with the economic objectives of the EU, the accession may also lead to the establishment of a hierarchical categorization between economic freedoms and fundamental rights, thus positioning the latter at the apex of the hierarchy as required for the provision of adequate protection for human rights.

Therefore, since the objections to the accession seem to be unfounded and the potential benefits of the accession are significant – in that it would contribute extensively to the augmentation of human rights protection in Europe by securing a higher degree of legal certainty, ensuring the uniform application of human rights law in Europe, and instituting an additional scrutiny mechanism – it could be argued that the accession of the EU to the Convention is appropriate and, indeed, desirable from the perspective of the protection of human rights. Given the importance of the establishment of a dialogue between the two courts an interim measure, in anticipation of the accession, such as the creation of a preliminary reference mechanism, akin to that constructed between the ECJ and Member State courts under Article 234 of the EC Treaty, could be of some benefit in that this may assist in the diminution of discrepancies in the interpretation and application of human rights by these two European courts. Such a mechanism would empower the ECJ to seek the opinion of the ECHR by referring questions regarding the interpretation of the Convention rights.

CONCLUSION

In conclusion, it is crucial to understand that the protection of fundamental rights constitutes an essential aspect of modern democratic governance, and, therefore, if the EU is to form a genuinely democratic system of governance, fundamental rights must be afforded adequate safeguarding against potential infringements emanating from the acts or decisions of the legislative and executive branches of the European Union and its constituent Member States.

⁷⁰ European Commission for Democracy through Law, *supra* note 68; Kruger, *supra* note 65.

⁷¹ *Id.*

Notwithstanding the ECJ's unwillingness to concern itself with human rights protection, due to the absence of specific reference to the rights in question in the EU treaties, and its engagement, in its early fundamental rights jurisprudence, in an instrumental exploitation of human rights in the upholding of the doctrine of supremacy, its recent case law demonstrates that the Court has developed a greater willingness to provide greater protection for human rights. This shift from an approach based on an instrumental conception of human rights towards an approach reflecting greater focus on the intrinsic value of human rights could be inferred from the Court's expansion of its human rights jurisdiction as to cover both acts of the European Union and acts of the Member States, the recognition by the Court of human rights as a justification for derogations by Member States from Treaty obligations, and most importantly the Court's permissive approach to human rights lacking common European bases and inimitably safeguarded in specific legal orders of the individual Member States.

Nevertheless, in order to provide adequate protection for human rights, it is necessary for the Court to take a number of steps. First, it is necessary to establish a normative hierarchy between the fundamental economic freedoms and human rights by assigning pre-eminence to the latter for the purpose of ensuring that fundamental rights are not compromised in the furtherance of any other interest. Second, it must adopt a proportionality test recognizing the protection of human rights as the default and the promotion of any conflicting interests as deviations, in order to avoid the misleading conceptualization of human rights as 'tolerated wrongs.' Third, it should recognize protection of human rights as autonomous grounds for derogation, separate from public policy and mandatory requirements grounds, so that the invocation of human rights would not be subjected to the conditions that the other grounds are required to satisfy. Fourth, it is important that the Court does not treat Member State acts differently from acts of the European Union in the application of human rights norms; it must condemn any encroachments regardless of whether they are caused by Member States or EU institutions. This is essential to the development of a consistent and coherent body of human rights law.

The Charter of Fundamental Rights, if exalted to a binding status, arguably has the potential to establish a more coherent regime of human rights protection by increasing legal certainty through the consolidation of fundamental rights in a single document, by allowing for the provision, by national as well as European Union law, of more extensive protection than that provided by the ECHR system, and by incorporating not only the traditional civil liberties but also socioeconomic rights. The Charter would also entrench human rights as constitutional norms and criteria of legal validity for primary legislation, and

place the ECJ under an obligation to address human rights issues in a more direct and manifest manner. There are, of course, a number of factors in the Charter that could be subjected to criticism, the most important of those being the reference to the distinction between ‘rights’ and ‘principles’— which is likely to create fresh uncertainties and lead to the relegation of the social and economic rights as mere inspirational principles lacking capacity to be enforced – and the curtailment of the ECJ’s human rights jurisdiction over measures taken by Member States in the implementation of European Union law. Therefore, if the Charter is to serve well the objective of the promotion and protection of human rights, especially by empowering the ECJ to provide coherent, adequate and effective safeguarding for the rights in question, it is crucial that the aforementioned distinction be removed and the provision restricting the jurisdiction of the Court be amended. Moreover, human rights could benefit extensively from the EU’s accession to the European Convention on Human Rights, since it seems to have the potential to secure a higher degree of legal certainty, ensuring a uniform application of human rights norms in Europe and instituting an additional scrutiny mechanism guarding human rights against possible infringements by EU institutions.

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