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The Role of the European Court of Justice in the Protection of Fundamental Rights

- A Satisfactory System of Human Rights Protection? -

Master thesis
20 points

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Public International Law & EC Law

Spring 2007

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Summary

The Court of Justice's ability to enforce a satisfactory system of human rights protection for the European Union has been questioned over the years and still is today. For, despite the changing and increasingly improved status of fundamental rights within the Community legal order, the development of the general principles doctrine and fundamental rights are subject to a number of criticisms. On the basis of these criticisms, the aim of this thesis is to make an evaluation of the performance of the European Court of Justice in the protection of fundamental rights within the Community legal order to see whether it provides for a satisfactory system of human rights protection. The concerns are rooted in the organisation's initial lack of a standard of human rights protection as well as the original focus on economic integration and the creation of the common market.

On a philosophical level, the core issue of the thesis is the dilemma of whether the Court of Justice in its protection of fundamental rights gives preference to principles, *i.e.* the rights of individuals, or policy, *i.e.* the collective goals of the Community.

On a preliminary note, a perspective that is always a burning issue when litigating human rights is the question of access to justice. In this respect, the ECJ is criticised for not providing adequate mechanisms for litigation fundamental right violations. The criticism is in particular levelled against the restrictive standing regulations for individuals.

Notwithstanding the codification of the general principles doctrine, it has been contended that the jurisprudential and unwritten nature of the solution adopted by the ECJ is lacking in legal certainty as well as in democratic legitimacy. Further criticisms of the general principles doctrine concern the standard of protection in addition to the status of the general principles in the Community hierarchy of norms.

The economical aspects of the criticisms that have been levelled against the ECJ include, in essence, scepticism regarding the Court privileging the economic integration goals of the Community at the expense of fundamental rights.

The conclusions drawn from the examination of the subject matter of this thesis is that Court of Justice allows itself considerable freedom and flexibility in the definition and application of fundamental rights. Additionally, while the moral basis for the Community protection of rights is principles, the problem is that the Court of Justice actually deals with policy. In other words, while the high rhetoric of the Community fundamental rights protection is anchored in the individual and the rights of individuals, in practice it is the collective goals of the Community and the general interest of the society as a whole that steer the Court of Justice in its

decisions. As a result, it can be concluded that the Court of Justice offers a satisfactory fundamental rights protection for Community purposes. However, it does not offer a satisfactory system for the protection of human rights.

Preface

“The road is long with many a winding turn that leads us to who knows where, who knows when” (Sidney Russell & Robert Scott)

Embarking on the journey of writing this thesis there have been moments of clarity and insightfulness as well as times of frustration and despair. Amid all these challenges, mental ghosts and detours it has sometimes been hard to believe that there is a finish. But, then you are there. And all the efforts and sacrifices turn into complete and utter satisfaction of reaching the final destination. Jubilation!

First, I would like to express my sincere gratitude to my supervisor, Ola Zetterquist, for excellent guidance and inspirational counselling. Throughout the course of this thesis, his wisdom and constructive advice have helped me on my path, in particular in defining problem areas and clarifying the deeper issues of the subject matter.

Furthermore, special thanks are extended to friends, near and far, and to the “Georg Jensen necklace support group” who have contributed with incentive when motivation was failing.

Finally, I would like to extend my profound gratitude and heartfelt appreciation to my family and in particular my parents for never-ending support and encouragement *en masse* (albeit this, worryingly enough for the future lawyer, sometimes appeared in slightly illegal forms, such as threats and bribery). Not everyone is privileged with such devoted and loving parents and for this I feel blessed.

Linda Hansson
June 4, 2007

Abbreviations

AG	Advocate General
CAP	Common Agricultural Policy
CETS	Council of Europe Treaty Series
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CMLRev.	Common Market Law Review
EC	European Community
ECB	European Central Bank
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECJ	European Court of Justice (seated in Luxembourg)
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights (seated in Strasbourg)
EC Treaty	Treaty establishing the European Community (1992)
EEC	European Economic Community
EEC Treaty	Treaty establishing the European Economic Community (1957)
ETS	European Treaty Series
EU	European Union
Euroatom	European Atomic Energy Community
GATT	General Agreement on Tariffs and Trade
ICCPR	International Covenant on Civil and Political Rights
IGC	Intergovernmental Conference
JHA	Justice and Home Affairs
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Co-operation
OJ	Official Journal
NATO	North Atlantic Treaty Organisation
NGO	Non Governmental Organisation
TEC	Treaty establishing the European Community (1992)
TEU	Treaty on European Union (“Maastricht Treaty”, 1992)
ToA	Treaty of Amsterdam (1997)
UN	United Nations
UNTS	United Nations Treaty Series
Web JCLI	Web Journal of Current Legal Issues

1 Introduction

1.1 Subject background

In the aftermath of the Second World War, several organisations were created in order to deal with the post war situation. On an international level the United Nations (UN) took over after the failure of the League of Nations to avert the Second World War.¹ Further, the General Agreement on Tariffs and Trade (GATT) was negotiated to be the pre-eminent agreement in the international trade arena,² while the North Atlantic Treaty was signed to address the growing concern of the security of Western Europe.³

On the European scene, three organisations, the Organisation for European Economic Co-operation (OEEC, now Organisation for Economic Co-operation and Development (OECD)), the European Communities and the Council of Europe were established to combat two major threats: the economic deterioration of the continent and the lack of respect for human dignity, as had been shown during the war. Whereas the OEEC and the European Communities focused on the economical aspect the Council of Europe was concerned with the protection of human rights and preventing any reoccurrence of the atrocities that took place during the Second World War.⁴

In their quest for economical restoration, which was supposed to be achieved by close co-operation of States, the European Communities also aspired to avoid any future inhumanity between the people of the Member States. However, human rights were not included in the original Community treaties, although the drafters discussed the issue. The main reasons for this exclusion was, as stated before, the separation of foci between the European Communities and the Council of Europe as well as the, above mentioned belief in the economic process set out in the Community treaties and the improbability of any future violation of human rights in its wake.⁵

The silence of the original Treaties led the Community institutions to take action in order to remedy this oversight. The problem became significant after the Court of Justice had established the principles of direct effect (*i.e.* the immediate enforceability of Treaty provisions in national courts by individual applicants) and the supremacy of Community law over national law. Thus it became legally and politically imperative to try to vindicate

¹ Sands & Klein: *Bowett's Law of International Institutions*, p. 23f.

² *Ibid.*, p. 116.

³ *Ibid.* p. 191.

⁴ Betten & Grief: *EU law and human rights*, p. 53.

⁵ *Ibid.* p. 53.

fundamental rights on the Community level.⁶ Particularly so when the supremacy of the Community was threatened by challenges of the German Constitutional Court, *Bundesverfassungsgericht* as well as the Italian Constitutional Court, *Corte Costituzionale*. For, these two countries, with constitutional orders and judicial review, could not accept the direct effect and the supremacy of Community law without an assurance that human rights would be protected within the Community legal order.⁷ The institution responsible for developing a standard for human rights protection within Community law became the European Court of Justice. By reading an unwritten Bill of Rights into the Community law, the Court of Justice filled the gap in the legal protection of individuals in Community affairs.

1.2 Aim and problem

The aim of this thesis is to make an evaluation of the performance of the European Court of Justice in the protection of fundamental rights within the Community legal order to see whether it has provided the European Union with a satisfactory system of human rights protection.

The evaluation is performed according to the criteria of the rights theory of the European Court of Human Rights in Strasbourg. So, it is this theory, and not the actual practice of the ECtHR, that sets the standard as to which the ECJ's performance is measured.

The underlying problems of the performance of the European Court of Justice in the protection of fundamental rights are twofold. The first problem relates to the method by which the Court of Justice developed the fundamental rights protection through its case law. The second relates to the economic language in which the political ambitions of the Community are clothed.

Firstly, the Court of Justice's jurisprudential approach and its formula of general principles of law generate issues. For, the unwritten nature of the general principles doctrine generates questions as to the legal certainty of the fundamental rights system, to the diverging standards of protection, as well as to the status of the general principles. Furthermore, the judicially created fundamental rights protection that the EU offers seems lacking in democratic legitimacy.

Secondly, although the EU is a political organisation, which is hinted at in the Preamble of the EC Treaty where the classic mantra "an ever closer union among the peoples of Europe" is set out, one of the Community's objectives, however, is to pursue economic integration. In order to achieve

⁶ Weiler: Fundamental Rights and Fundamental Boundaries: On the Standards and Values in the Protection of Human Rights, p. 56.

⁷ *Ibid.* p. 57.

European unity critics feel that over the years the Court has manipulated the language of fundamental rights to pursue economic integration goals.

1.3 Method and material

In order to evaluate the performance of the European Court of Justice in its protection of fundamental rights the method of this thesis parts from critical theory. For, the basis of the evaluation is criticisms that have been levelled against the ECJ. These criticisms reflect the scepticism in particular about the ability of the Court of Justice to enforce a satisfactory system of human rights.

The thesis is based on a wide range of materials. Apart from primary material, as instruments of Community law and case law from the European Court of Justice and to some extent the Court of Human Rights, a wide range of textbooks and articles have been used. The electronic sources include information from the official website of the EU as well as a number of articles.

1.4 Delimitations

As this thesis has an historical perspective on the role of the Court of Justice up until today, the impact of the EU Charter of Fundamental Rights is largely left outside the scope of the thesis. However, its role cannot completely be omitted and therefore it is mentioned in passing, notably, in the second chapter.

Another aspect that is excluded from the scope of this thesis is the Constitutional Treaty.

Further, the question of a Community accession to the European Convention of Human Rights is left outside the scope of this thesis, due to the limited amount of space. I do not go into any detail as to this subject matter, but, as regards the EU Charter of Fundamental Rights, the subject may be touched upon.

General principles include more than just fundamental rights. However, I do not deal with general principles of law as a general category.

1.5 Terminology

Regarding the use of the terms 'human rights' and 'fundamental rights' respectively, the term 'human rights' appears rarely in the case law of the European Court of Justice. For, that term is mainly used in two instances in this context: first, when reference is made to international treaties for the protection of human rights and specifically so to the European Convention

on Human Rights and second, when reference is made to ‘human rights clauses’ within the agreements made between the European Community and third countries.⁸ The EU is, however, bound by ‘fundamental rights’ (TEU Article 6.2). This term should not be seen as narrower in scope, but rather as a potentially broader notion due to the full wording of TEU Article 6.2.⁹ For, within the EU, the term ‘fundamental rights’ has double meaning. It includes not only the classical civil and political rights, but also the Community market freedoms. Moreover, the term is commonly used in EU discourse since it includes rights that can be invoked for legal as well as natural persons.¹⁰ In this thesis I mainly stick to this division of the two terms. Thus, the term ‘fundamental rights’ is used when reference is made to human rights within the EU, whereas the term ‘human rights’ is used when referring to them in a more general sense.

The terminology of the two European Courts – the European Court of Justice and the European Court of Human Rights – might at times be confusing. I refer to the Luxemburg based EC court, the European Court of Justice, as the ‘Court of Justice’, ‘ECJ’ or simply the ‘Court’, whereas the Strasbourg based European Court of Human Rights, founded by the Council of Europe, is referred to as the ‘Court of Human Rights’, or the ‘ECtHR’. Besides, the European Convention on Human Rights is referred to as the ‘Convention on Human Rights’, the ‘Convention’ or the ‘ECHR’.

The generic term of ‘European Court of Justice’ includes the actual European Court of Justice as well as the Court of First Instance. The latter is not a separate Community institution, but a judicial body that is attached to the European Court of Justice. For the purpose of this thesis, no distinction is made between the two courts by means of terminology. Therefore, both are referred to under the name of the former, unless they differ in opinion.

Concerning the numeration of articles in the different Community Treaties, I mainly follow the numbering of the articles of the EC Treaty and Treaty on European Union after the latest amendments according to the Nice Treaty, unless otherwise stated. As to avoid confusion, in chapter 2, where the different EU instruments are introduced, reference is made to the relevant articles both with the old and the renumbered versions.

1.6 Disposition

The division of disposition in this thesis is mainly twofold. The first part is a descriptive part – with basic information on the protection of human rights within the EU – that then leads us in to the second, more problem based,

⁸ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 860.

⁹ *Ibid.* p. 860.

¹⁰ Shaw: *Law of the European Union*, p. 331.

part – where the issues regarding the suitability of the Court of Justice as a protector for human rights are raised from a critical perspective.

The point of departure for this thesis is a classical descriptive part of the standing of fundamental rights in the EU. After an introductory chapter follows, in chapter two, a more philosophical presentation of the core topic of the thesis, namely the issue of principles and policy. Chapters three and four, outline a presentation, historical in nature, of instruments and case law relevant for the protection of fundamental rights in the EU. Regarding these two chapters, my aim is not to make an exhaustive survey of all events leading up to the position of fundamental rights in the EU today. Instead I focus on the comprehensive picture of the developments. Since the protection of fundamental rights has developed through the case law of the Court of Justice, chapter three, concerning the various Community treaties, is less elaborated than chapter four, which covers the Court's development of the general principles of law.

Thereafter, in chapter five to eight, the thesis continues with its main issue, *i.e.* the evaluation of the role of the European Court of Justice in the protection of fundamental rights from a critical perspective. Each of these chapters deals with an aspect of the criticisms that have been levelled against the European Court of Justice.

Chapter five elaborates on the issue of whether the Court of Justice has provided European citizens with adequate mechanisms for litigating fundamental rights violations. The criticisms concern the restrictive standing for individuals and groups, as well as the discrepancy between the Community institutions and the Member States, on one hand, and private parties, on the other. Since this is a question of access to justice, the chapter can be seen as preliminary, since all other rights are dependent upon this right. For, justice without real access to a court is justice denied.

Chapter six focuses on the standard of protection. Since fundamental rights in the EU are protected only indirectly as general principles of law and not as well defined statutory rights, questions arise as to what rights should be protected. The issues at hand in this context regard the unpredictability of the judicially created system of fundamental rights and the diverging standards of protection. The chapter starts off by describing the sources of the standard of protection, continued by an account of the criticisms that have been levelled against the Court of Justice in this context. Thereafter follows a discussion of the core matter, namely, whether the Court of Justice should protect fundamental rights through a minimum or a maximum standard of protection.

Chapter seven encompasses the question of the status of the unwritten general principles. After a development of the issues of their legal basis and their hierarchical position in the Community legal order, follows a section as to whether general principles take the form of binding rules or as mere guidelines.

Chapter eight examines the effect of the economic aspect of the Community on its fundamental rights protection. The main issue is whether the Court of Justice has privileged economic integration at the expense of fundamental rights. This chapter includes *inter alia* the issues of a marketisation of the concept of fundamental rights, the need for litigants to establish an economic nexus in order to fall under the Community fundamental rights protection and the hierarchical relationship between free market rights and fundamental rights.

Finally, in chapter nine, a summary conclusion of the findings of the previous chapters is presented as well as some concluding remarks. The discussion on principles versus policy, initiated in chapter two, is continued here as well.

2 Principles v. policy – individual rights v. collective goals

The subject matter of this thesis is the role of the Court of Justice in protecting fundamental rights. However, the core topic of the thesis relates to the issue of principles versus policy, *i.e.* individual rights versus collective goals. Therefore, chapter two introduces an observation in this respect.

In order to explain the core subject matter of the thesis a philosophical approach is needed. For that reason, a model of analysis of legal theory from Dworkin is used. This model of analysis, which is applied to solve the issues of protection of rights, is general in nature and generally applicable. Although it is not only valid for the European Union it still has special significance within the Community legal order.

The above-mentioned model of analysis emanates from the premise that there are two major grounds of political justification, namely principles and policies.¹¹ Arguments of principle are arguments that intend to establish an individual right, thus justifying a political decision by showing that the decision in question respects and secures some individual or group right.¹² Moreover, arguments of principle claim that particular programs must be carried out or abandoned because of their impact on particular people, even if the community as a whole is by some means worse off in consequence.¹³ In other words, justifications of this kind argue that a particular rule is necessary in order to protect an individual right some person has against other people, or against the society or government as a whole.¹⁴

In contrast, arguments of policy are arguments that intend to establish a collective goal, hence justifying a political decision by showing that the decision at hand advances and protects some collective goal of the community as a whole.¹⁵ Arguments of policy try to illustrate that the community as a whole would be better off if a particular program is pursued.¹⁶ Accordingly, a particular rule is desirable because that rule will work in the general interest for the benefit of the society as a whole.¹⁷ Consequently, arguments of policy are goal-based.

¹¹ Dworkin: Taking Rights Seriously, p. 83.

¹² *Ibid.* p. 82 & 90.

¹³ Dworkin: A Matter of Principle, p. 2f.

¹⁴ *Ibid.* p. 375.

¹⁵ Dworkin: Taking Rights Seriously, p. 82 & 90.

¹⁶ Dworkin: A Matter of Principle, p. 2f.

¹⁷ *Ibid.* p. 375.

In short, principles are propositions that describe rights; policies are propositions that describe goals.¹⁸

Adjudication is characteristically a matter of principle rather than policy.¹⁹ Dworkin is of the opinion that judges should rest their judgments on controversial cases on arguments of political principle, not on arguments of political policy.²⁰

As far as this thesis is concerned, Dworkin's model of analysis illustrates the dilemma of whether the Court of Justice in its adjudication gives preference to the individual rights of its members, *i.e.* if it favours principle, or the collective goals of the Community as a whole, *i.e.* if it favours policy. In other words, is the ECJ's focus on the best interest of the individual or on the best interest of the society? The answer to this question is presented in the final chapter of the thesis.

¹⁸ Dworkin: Taking Rights Seriously, p. 90.

¹⁹ Dworkin: A Matter of Principle, p. 3.

²⁰ *Ibid.* p.11.

3 The protection of fundamental rights in the EU – Instruments

3.1 The original Treaties with the EEC Treaty

When the original three Community Treaties (the EEC Treaty, ECSC and Euroatom Treaties) were signed in the 1950's they were not concerned with human rights and contained therefore no provisions regarding the protection of these rights.²¹ For, although politically motivated, which is seen in the Preamble, the EEC Treaty, also known as the 'Treaty of Rome', was restricted, in terms of the material provisions, essentially to the aims of economic integration and its essential task was the creation of a common market between the Member States.²²

The fundamental rights that were to be found in the original version of the EEC Treaty were mainly the four freedoms, i.e. the free movement of goods, persons, services and capital (now to be found in Articles 23, 39, 49 and 56 TEC, originally in Articles 30, 48, 59 and 73.B), which were necessary for the accomplishment of the common market. Closer to the traditional concept of human rights, the EEC Treaty also included the two prohibitions of discrimination – first, discrimination on grounds of nationality and second, equal pay without discrimination based on sex (now to be found in Articles 12 and 141 TEC, originally in Articles 6 and 119).²³

3.2 The Treaty on European Union

With the Treaty on European Union (TEU),²⁴ also known as the 'Maastricht Treaty', the European Union was born. The TEU covered, encompassed and modified the previous treaties²⁵ and brought about an institutional change, establishing the three-pillar²⁶ structure.²⁷

As opposed to the original Community Treaties, with their essentially economic character, the TEU contained to some extent a regulation of

²¹ Craig & de Búrca: EU Law – Text, cases and materials, p. 317.

²² The website of Know Europe:

<http://www.knoweurope.net/cgi/toc/full_rec?action=byid&id=093/0000010>.

²³ Nergelius: Amsterdampfördraget och EU:s konstitutionella maktbalans, p. 141.

²⁴ Signed in Maastricht on 7 February, 1992 and entered into force on 1 November, 1993.

²⁵ For more information see Articles G, H and I in TEU (1992).

²⁶ The first pillar was the European Communities, the second was the Common Foreign and Security Policy (CFSP) and the third was Justice and Home Affairs (JHA).

²⁷ Craig & de Búrca: EU Law – Text, cases and materials, p. 22.

rights. For, already in third recital of the preamble the first reference to human rights is made where the Heads of State are:

“CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law”.

One of the basic aims and principles set out in the common provisions is the respect for human rights. Article 6 .2 (former Article F.2) states that:

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

This article is the result of the codification of a principle developed by the European Court of Justice.²⁸ This development of fundamental rights as general principles of law is treated below.²⁹

Furthermore, Article 11 (former Article J.1) states that in defining and implementing a common foreign and security policy, one of the objectives shall be “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”.

Article K.2.1, which later was deleted with the amendments of the Treaty of Amsterdam, stated that the matters of common interest enumerated in Article K.1 – concerning the field of justice and home affairs³⁰ – had to be dealt with in compliance with the European Convention of Human Rights and the 1951 Refugee Convention.³¹

All in all, Article F.2 could, indeed, provide a legal basis for the protection of fundamental rights in the European Union as a whole, including the second and third pillars. However, the importance of Articles F, J and K at the time was greatly diminished by Article L. According to that article, Article F.2, together with the other provisions referring to human rights in the context of the second and third pillars (Articles J.1.2 and K.2.1, respectively), is expressly excluded from the Court’s jurisdiction.³² As a result, the Court of Justice could, with support from the Treaty on European Union, only deal with human rights issues under the first pillar and was not allowed to interpret second and third pillar issues directly.³³

²⁸ Bernitz & Kjellgren: *Europarättens grunder*, p. 122.

²⁹ See Chapter 4.

³⁰ The subjects of JHA co-operation are e.g.: asylum and immigration policies and policy regarding nationals of third countries and police cooperation for the purposes of preventing international crime.

³¹ The Geneva Convention relating to the Status of Refugees of 28 July 1951.

³² Toth: ‘The European Union and Human Rights: The Way Forward’, at p. 494.

³³ Peers: *Human Rights and the Third Pillar*, p. 168.

3.3 The Treaty of Amsterdam

The Treaty of Amsterdam³⁴ brought about some institutional changes – the increased powers of the Parliament, the enlarged area for majority decision making in the Council and the widened jurisdiction of the Court of Justice being the most important ones – as well as new areas of co-operation.³⁵ These changes also brought about amendments of the former Community treaties. Thus, the Treaty of Amsterdam includes consolidated and revised versions of the two main treaties: The Treaty on European Union and the Treaty establishing the European Community.³⁶ The Treaty of Amsterdam established a more democratic Europe, emphasising the respect of human rights and of democratic principles by the Member States.³⁷

The amendments of the EC Treaty,³⁸ following the Amsterdam Treaty, lead to a stronger position in the struggle for gender equality as Article 2 now mentions that one of the tasks of the European Community is to promote equality between men and women. In doing this some changes in Article 141 EC Treaty (former Article 119) followed.³⁹ However, there is no reference to human rights as such in the preamble to the EC Treaty and furthermore the protection and promotion of such rights are not mentioned, in Article 2, as one of the tasks of the EC.⁴⁰

A significant extension to the EC Treaty can be seen in Article 13.1 (former Article 6 a) that sets out that:

“the Council [...] may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

The fact that the substantial scope of this article is wider than the non-discrimination provisions found under the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) is noteworthy.⁴¹ Notwithstanding the broadness of this mandate, action must be taken “[w]ithout prejudice to the other provisions of the

³⁴ Signed in Amsterdam on 17 June 1997 and entered into force 1 May 1999.

³⁵ Nergelius: Amsterdamsfördraget och EU:s institutionella maktbalans, p.35-36.

³⁶ *Ibid.* p.19.

³⁷ The website of Know Europe:

<http://www.knoweurope.net/cgi/toc/full_rec?action=byid&id=093/0000011>.

³⁸ As to the use of the terms ‘EEC Treaty’ and ‘EC Treaties’, the former is the original term from when the Treaty establishing the European Economic Community was signed in Rome in 1957. When the Treaty on the European Union was signed in 1992, in order to mark the widened objectives the ‘Treaty establishing the European Economic Community’ was renamed the ‘Treaty establishing the European Community’ (see art G, TEU (1992)).

³⁹ Nergelius: Amsterdamsfördraget och EU:s institutionella maktbalans, p. 142.

⁴⁰ Mc Goldrick: *The European Union after Amsterdam: An Organisation with General Human Rights Competence*, p. 253.

⁴¹ Mc Goldrick: *The European Union after Amsterdam: An Organisation with General Human Rights Competence*, p. 253.

Treaty and within the limits of the powers conferred by it upon the Community”, a factor that must be seen as limiting in this context.⁴²

The amendments of the TEU, following the Treaty of Amsterdam, added a first paragraph to Article 6 (former Article F), promulgating general principles underlying the European Union.⁴³ Article 6.1 now states that:

“The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”

This article specifies and makes more explicit the principles on which the legal orders of the Member States are based. In fact, it is more or less a repetition of the wording in the Statute of the Council of Europe, by which all Member States to the EU are bound.⁴⁴

New Article 7 TEU provides a mechanism for sanctioning Member States that are violating the principles mentioned in Article 6.1 in a grave and persistent manner. The article gives the possibility of suspending a Member State – violating these principles in a domestic context – and do not relate directly to the application of Community law.⁴⁵ So far this article has not been used.⁴⁶ Worth to note is that the Court of Justice has no role at all in this enforcement procedure (cf. Article 46 d which concedes jurisdiction to the Court of Justice with regard to actions of the institutions).⁴⁷

As to the Court’s jurisdiction, Article 46 d TEU (former Article L) has been amended so that the Court of Justice is formally authorised to examine, in the field of fundamental rights, the actions of the institutions within the entire EU. In principle this means also the second and the third pillar – with the limitation that it has to fall within the general competence of the ECJ.⁴⁸

As mentioned above, before the entry into power of the Treaty of Amsterdam, the powers of the Court of Justice under former Article L (now Article 46) did not extend to Article F.2 TEU (now Article 6.2 TEU), thus limiting its impact. Since ensuring respect for the law in the interpretation and application of the Treaty is the Court’s task, the scope of fundamental rights was correspondingly reduced. However, the amendments of Article 46 following the Treaty of Amsterdam, now makes sure that Article 6.2 is

⁴² Nergelius: Amsterdamsfördraget och EU:s institutionella maktbalans, p. 142.

⁴³ Spielmann: *Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities*, p. 759.

⁴⁴ Betten & Grief: *EU Law and Human Rights*, p. 133.

⁴⁵ *Ibid.* p. 133.

⁴⁶ Craig & de Búrca: *EU Law – Text, cases and materials*, p 318.

⁴⁷ Betten & Grief: *EU Law and Human Rights*, p. 133.

⁴⁸ Bernitz & Kjellgren: *Europarättens grunder*, p. 122.

applied. As a result, the Court now has the power to decide whether the institutions have failed to respect fundamental rights.⁴⁹

Nonetheless, there is no amendment of Article 6.2, where reference is made to the respect for fundamental rights. Thus, there is no change in the basis of the Court of Justice's jurisdiction concerning human rights protection. Consequently, the Court of Justice continues to base its human rights protection on the unwritten general principles of law, instead of the European Convention of Human Rights as such.⁵⁰

3.4 The Charter of Fundamental Rights

At the European Council of Nice (7-9 December 2000) a new treaty was adopted at the Intergovernmental Conference. The Treaty of Nice, which it is called, brings changes to some institutional matters in order to prepare the EU for the enlargement of ten new Member States in May 2004.⁵¹ As with the previous mentioned Treaties, the Treaty of Nice also brings amendments to the TEU and EC Treaty.

At the same meeting the presidents of the European Parliament, the Council and the Commission signed and proclaimed the European Union Charter of Fundamental Rights. This is the first single text in the history of the EU that sets out a range of civil, political, economical and social rights for the European citizens and all people resident in the EU.⁵²

These rights are divided into six sections: dignity, freedoms, equality, solidarity, citizens' rights and justice. They are based, especially, on the fundamental rights and freedoms recognised by the European Convention on Human Rights, the constitutional traditions of the EU Member States, the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers as well as other international conventions to which the European Union or its Member States are parties.⁵³

So far the Charter of Fundamental Rights is not legally binding.⁵⁴ However, already a good half of the Charter is *de facto* binding since it could be argued that the Charter represents a codification *in parte* of the general principles of law, which protects the fundamental rights within the Community legal order.⁵⁵

⁴⁹ The Amsterdam Treaty: a Comprehensive Guide. Fundamental rights and non-discrimination, at <<http://europa.eu.int/scadplus/leg/en/lvb/a10000.htm>>

⁵⁰ Betten & Grief: EU Law and Human Rights, p. 131.

⁵¹ Bernitz & Kjellgren: Europarättens grunder, p. 122.

⁵² The official website of the European Parliament:
<http://www.europarl.eu.int/charter/default_en.htm>.

⁵³ *Ibid.*

⁵⁴ Craig & de Búrca: EU Law – Text, cases and materials, p.317.

⁵⁵ Groussot: Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europaeum?, p. 170f.

The main advantage with having a written catalogue of rights would be to make the general principles doctrine and thus the fundamental rights protection within the Community legal order more visible.⁵⁶

3.5 Conclusion

The development of the protection of fundamental rights in the European Union has not been an instrumental process. Instead, it has been a gradual development, where the Court of Justice, by means of the general principles of law, has 'invented' a fundamental rights protection through the case law (see below). However, this gradual development is reflected in the amendments of the Community instruments.

The founding Treaty of 1957, the EEC Treaty, focused by large on economic integration and the creation of the common market. The rights and freedoms mentioned in this Treaty were only those necessary for the accomplishment of the common market, basically the four freedoms.

More than thirty years later and with the creation of the European Union in 1992, the Treaty on European Union introduced a codification of the general principles doctrine, which had been developed by the Court of Justice. However, the jurisdiction of the Court of Justice in this respect was limited, as it could only deal with human rights issues under the first pillar, i.e. the European Communities.

Following the amendments of the Amsterdam Treaty, an emphasis on a more democratic EU was made. The basis of the Union was spelled out, as the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law were introduced in a new article. Additionally, the jurisdiction of the Court of Justice was expanded, as the Court was now formally authorised to examine the institutions for human rights violations within all three pillars.

It was an historic event for the human rights protection within the European Union when, at the Nice summit in 2000, a written catalogue of human rights for the protection of European citizens and people resident within the EU, was proclaimed for the first time - the Charter of Fundamental Rights. The drawback of it is that the Charter, however, is not legally binding yet. So, still, the citizens of the European Union rely on the unwritten Bill of Rights that the Court of Justice has read into the Community legal order.

⁵⁶ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 891.

4 The protection of fundamental rights in the EU – Case law

4.1 The nature of fundamental rights as court-based general principles of law

The Court of Justice has decided to protect fundamental rights within the Community sphere as being part of unwritten general principles of law. Today these general principles of law are undisputed as a source of Community law and they have also found express recognition in the Treaty on European Union. What are these general principles of law then?

General principles of law are an important source of law within the Community legal order. They are fundamental unwritten principles of law that are derived by the Court of Justice primarily from the laws of the Member States. Their contents as sources of Community law, however, are determined by the distinct characteristics and needs of the Community legal order.⁵⁷ Although the general principles of law play an essential role in the jurisprudence of the Court of Justice, the Court did not create the notion of general principles of law itself. Instead the notion of general principles of law had already appeared in a broader context within public international law in the beginning of the 20th century.⁵⁸

As mentioned above general principles are unwritten. Some of the general principles are however codified after amendments of the Treaties, whereas others are only to be found in the case law of the Court of Justice.⁵⁹

General principles of law function both as a constitutional parameter and as a rule of interpretation. In other words, the general principles have a gap-filling function. For, the Community treaties are framework treaties and cannot possibly give an answer to every question that arises within their realm. Thus, recourse to general principles allows the Court of Justice to follow an evaluative interpretation.⁶⁰ The use of general principles is also an important expression of the convergence and interaction the Member States' different legal systems.⁶¹

⁵⁷ Tridimas: *The General Principles of EC Law*, p.3.

⁵⁸ For more information on the history of the concept of general principles of law, see: Toth: *Human Rights as General Principles of Law, in the Past and in the Future*, p. 73ff.

⁵⁹ Bernitz & Kjellgren: *Europarättens grunder*, p. 104.

⁶⁰ Tridimas: *The General Principles of EC Law*, p. 9-10.

⁶¹ Rodriguez Iglesias: *Reflections on the General Principles of Community Law*, p. 16.

Among some of the general principles that the Court of Justice has recognised we find: the principle of equal treatment or non-discrimination, the principle of proportionality, the principle of legal certainty, the principle of the protection of legitimate expectations and the protection of fundamental rights.⁶² These principles have constitutional status.⁶³

In the 1970's, with the case *Internationale Handelsgesellschaft*,⁶⁴ the Court of Justice recognised as a general principle of Community law the respect for human rights.

4.2 The development of the general principles case law on fundamental rights

4.2.1 The emergence of a general principle case law

4.2.1.1 Initial resistance by the ECJ

As the original Treaties did not contain any provisions on the protection of fundamental rights the Court of Justice refused to take fundamental rights protection into consideration in their early days. For, its task was to interpret the Treaties and as long as they were void of references to human rights the Court was unable to act.⁶⁵ Some of the early restrictive cases – also referred to as ‘the sins of youth’⁶⁶ – include *Stork*⁶⁷ joined cases *Geitling*⁶⁸ and *Sgarlata*.⁶⁹

These cases clarify the reasoning for the passive attitude of the Court of Justice. For instance, in the cases of *Stork* and *Geitling* the applicants claimed that decisions taken by the High Authority⁷⁰ violated certain fundamental rights that were protected by the German Constitution. The Court held in *Stork* that:

“the High Authority is only required to apply Community law. It is not competent to apply the national law of the Member States. (...) (T)he Court is only required to ensure that in the interpretation and application of the

⁶² Tridimas: The General Principles of EC Law, p.4.

⁶³ *Ibid.* p.4.

⁶⁴ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

⁶⁵ Betten, Lammy & Nicholas Grief: EU Law and Human Rights, p. 54.

⁶⁶ The reference is taken from Hilf, ‘*The Protection of Fundamental Rights*’ p. 148 in F. Jacobs (ed.): European Law and the Individual (North Holland, 1976)

⁶⁷ Case 1/58, *Friedrich Stork & Cie v. High Authority* [1958-9] ECR 17.

⁶⁸ Cases 36-38 & 40/59 *Präsident Ruhrkohlen-Verkaufsgesellschaft and others v. ECSC High Authority* [1960] ECR 423. As to avoid confusion it ought to be mentioned that *Geitling* is also known as the *Ruhr* cases.

⁶⁹ Case 40/64 *Sgarlata and others v. Commission EEC* [1965] ECR 215.

⁷⁰ The High Authority is the predecessor of the Commission in the ECSC.

Treaty, (...), the law is observed. It is not normally required to rule on provisions of national law.”⁷¹

Consequently, the High Authority could not examine complaints of violations of principles in the German Constitution. Moreover in *Geitling* the Court continued on the same line stating that:

“It is not for the Court (...) to ensure that rules of internal law, even constitutional rules, enforced in one or other of the Member States are respected. Therefore the Court may neither interpret nor apply (...) German basic law in examining the legality of a decision of the High Authority. Moreover Community law, as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights.”⁷²

In the *Sgarlata* case, a number of fruit growers in Italy applied for an annulment of two Commission regulations, fixing the price for citrus fruits, on the grounds of their incompatibility with fundamental rights under Italian constitutional law. The ECJ declared the application inadmissible. For, according to the Court, the restrictive wording of the Treaty provision could not be overridden by other principles – not even if those principles were of fundamental nature.⁷³

The emergence of a specific category of general principles of fundamental rights is widely deemed to have been a necessary mean for the Court of Justice to assert its supremacy of the Community legal order.⁷⁴ Concerns, as to the possible erosion of human rights in their national constitutions, were put forward principally by Germany and Italy, countries which both have jurisdictions that placed particular stress on the protection of human rights as a consequence of their recent history⁷⁵

In the years following the Second World War a principle emerged in Germany saying that all governmental acts could be reviewed by the Federal Constitutional Court with respect to their compatibility to the fundamental rights enshrined in the German Constitution.⁷⁶ For that reason, it became intolerable, from the German perspective, that sovereign powers transferred to the Community lay outside the reach of the fundamental rights

⁷¹ Case 1/58, *Friedrich Stork & Cie v. High Authority* [1958-9] ECR 17, at p. 26, para. 4.

⁷² Cases 36-38 & 40/59 *Präsident Ruhrkohlen-Verkaufsgesellschaft and others v. ECSC High Authority* [1960] ECR 423, at p.438-439.

⁷³ Case 40/64 *Sgarlata and others v. Commission EEC* [1965] ECR 215, at p. 227.

⁷⁴ For example; Shaw: *Law of the European Union*, p.344-345; Herdegen: *The Origins and Development of the General Principles of Community Law*, p. 9.

⁷⁵ Douglas-Scott: *Constitutional Law of the European Union*, p. 438, Herdegen: *The Origins and Development of the General Principles of Community Law*, p. 9.

⁷⁶ Herdegen: *The Origins and Development of the General Principles of Community Law*, p. 9.

protection in the German Constitution – thus outside the reach of any fundamental rights protection.⁷⁷

4.2.1.2 Reference to the general principles of Community law

An important step in the protection of fundamental rights was taken by the Court of Justice in the *Stauder*⁷⁸ case. For, with this case the ECJ's attitude began to change as it hinted at the fact that fundamental rights may be a part of the general principles of Community law⁷⁹

A beneficiary, Mr. Stauder, under a certain welfare scheme implemented by Community law claimed that the fact that he had to disclose his name, in order to receive Community surplus butter at a reduced price, violated his fundamental rights under the German Constitution. In this respect the ECJ stated that, as long as the beneficiaries' identities could be established in other ways:

“... the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.”⁸⁰

Thus, as opposed to its earlier reluctant attitude the ECJ now managed to interpret human rights into EC law by referring to human rights as “enshrined in the general principles of Community law”.⁸¹ However, the statement appeared only in the last paragraph of the judgment and the Court made neither any reference to its earlier contradictory case law nor did it provide any further comment on the nature, identity or extent of these general principles.⁸²

The Stuttgart court, who referred the case to the ECJ, issued a warning to the Community institutions in *Stauder*, saying that:

“... the Community Institutions were called upon to assume, in their field of jurisdiction, a responsibility for the protection of fundamental rights that had previously been guaranteed by the national courts of West Germany; for if the European Court of Justice would not constructively fulfil its duties, then the national courts of the Federal Republic of Germany would, in spite of the disruption of such result, feel compelled to reserve for themselves the ultimate power of examining the constitutionality of Community acts (...) according to the fundamental rights laid down in the West German constitution.”⁸³

⁷⁷ Herdegen: *The Origins and Development of the General Principles of Community Law*, p. 9.

⁷⁸ Case 29/69, *Erich Stauder v. City of Ulm - Sozialamt* [1969] ECR 419.

⁷⁹ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 867.

⁸⁰ Case 29/69, *Erich Stauder v. City of Ulm - Sozialamt* [1969] ECR 419, para. 7.

⁸¹ Betten & Grief: *EU Law and Human Rights*, p. 56.

⁸² Craig & de Búrca: *EU Law – Text, cases and materials*, p.321.

⁸³ The Stuttgart Court, cited in Douglas-Scott p. 439.

This warning – that national courts would review the compatibility of Community acts with national constitutional principles themselves – seriously threatened the principle of supremacy of Community law that was established in the *Costa v. E.N.E.L.*⁸⁴ case.⁸⁵

4.2.1.3 Confirmation of the general principles doctrine and inspiration from constitutional traditions common to the Member States

The fact that fundamental rights actually are a part of the general principles of Community law was confirmed in *Internationale Handelsgesellschaft*:⁸⁶

“[R]espect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.”⁸⁷

It should be observed is that the expression ‘general principles of Community law’ mentioned in *Stauder* has now become just ‘general principles of law’. The Court of Justice also added that it would draw inspiration from the constitutional traditions common to the Member States in shaping these general principles:

“The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.”⁸⁸

With this case the German Constitutional Court challenged the Court of Justice again. For, had the outcome of the ECJ’s ruling been that national courts could not set aside Community law violating German constitutional rights, the German Constitutional Court would have refused to accept that ruling.⁸⁹

4.2.1.4 Inspiration from international human rights instruments

In addition to drawing inspiration from the common constitutional traditions, the Court of Justice confirmed, a couple of years later, with the *Nold* case, that international human rights instruments could also provide inspiration in shaping the general principles of law:⁹⁰

“[I]nternational treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can

⁸⁴ Case 6/64, *Flaminio Costa v E.N.E.L.* [1964] ECR 585.

⁸⁵ Douglas-Scott: Constitutional Law of the European Union, p.439.

⁸⁶ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

⁸⁷ *Ibid.* para. 4.

⁸⁸ *Ibid.* para. 4.

⁸⁹ Betten & Grief: EU Law and Human Rights, p. 58.

⁹⁰ Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* [1974] ECR 491.

supply guidelines which should be followed within the framework of Community law.”⁹¹

Although the applicant in this case especially referred to the ECHR, the Court of Justice did not expressly mention that instrument in its judgment.⁹²

When France, finally, ratified the European Convention on Human Rights⁹³ on 3 May in 1974 the Court of Justice was free to expressly mention the ECHR among these international human rights instruments.⁹⁴ This was made for the first time in 1975 with the case *Rutili*.⁹⁵ The Court stated that restrictions imposed by regulation and directive of the Council on the right of a Member State to limit the movements of a national of another Member State were a ‘specific manifestation’⁹⁶ of a principle enshrined in provisions of the ECHR.⁹⁷

In the case of *Hauer*,⁹⁸ from 1979, the Court examined in detail the right to property according to national constitutions as well as article 1 of the First Protocol to the ECHR. The Court could not establish a precise answer *in casu* since it did not find the provision clear enough.⁹⁹ Therefore, it had to do a comparative analysis of the constitutional traditions of the Member States.¹⁰⁰ The Court considered, however, that a Community agricultural Regulation, which prohibited the planting of new vines for three years, did not violate the right to property.¹⁰¹ The fact that the ECJ did not find the reference to the ECHR satisfactory but considered an analysis of the Member States’ constitutions to be indispensable prompted comments that the Convention and its Protocols were used as pure “starting points”.¹⁰²

The pivotal case, in this respect, is *Johnston*, a case concerning the requirement of judicial control, in which the Court of Justice made clear that the Convention on Human Rights was of ‘special significance’¹⁰³ in the

⁹¹ Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* [1974] ECR 491, para.13.

⁹² Betten & Grief: EU Law and Human Rights, p. 59.

⁹³ Signed on 4 November 1950 and entered into force on 3 September 1953.

⁹⁴ Favreau: *Le renforcement de l’effectivité de la Protection des Droits du Particulier en Droit Communautaire – La Dimension de la Convention Européenne de Sauvegarde des Droits de l’Homme et des Libertés Fondamentales* p. 339.

⁹⁵ Case 36/75, *Rutili v. Ministre de l’intérieur* [1975] ECR 1219.

⁹⁶ *Ibid.* para. 32.

⁹⁷ Arnall: *The European Union and its Court of Justice*, p. 205.

⁹⁸ Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

⁹⁹ *Ibid.* para. 19.

¹⁰⁰ *Ibid.* para. 20.

¹⁰¹ Shaw: *Law of the European Union*, p.345-346.

¹⁰² Weiler: “The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes”.

¹⁰³ Case 222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para. 18.

Community legal order. This statement has been reiterated in the subsequent case law, e.g. *Hoechst*,¹⁰⁴ *ERT*¹⁰⁵ and *Kremzow*¹⁰⁶.

The reference to the ECHR prompted comments at that time whether the Convention had been incorporated into Community law as a direct formal source of law.¹⁰⁷ This was not the case, however. The EU is still not a party to the ECHR, which was adopted within the Council of Europe, and therefore it is not subject to its control mechanisms.¹⁰⁸

EC accession to the European Convention on Human Rights has long been under consideration though. In 1979 a new stage was initiated as the Commission formally proposed the accession of the European Community to the ECHR.¹⁰⁹ In 1994 the Council asked the Court of Justice, under Article 228.6 (now Article 300.6) EC Treaty,¹¹⁰ whether accession by the Community to the ECHR would be compatible with the EC Treaty.¹¹¹ The Community's competence to accede was in 1996 however considered and rejected by the Court of Justice in Opinion 2/94.¹¹²

Although the Convention on Human Rights is not a formal part of Community law, it is the most common source of reference for fundamental rights. Recently, the Court of Justice has made extensive reference to the case law of the Court of Human Rights.¹¹³

Furthermore, the Court of Justice expanded its expressly mentioned sources of international human rights instruments as it referred to the International Covenant of Civil and Political Rights in the *Orkem*¹¹⁴ case.

Although the ECJ uses different sources of inspiration it stresses that, like other general principles of law, the fundamental rights in the Community legal order become specific EU rights that are subject to interpretation "within the framework of the structure and the objectives of the Community".¹¹⁵

¹⁰⁴ Joined Cases 46/87 and 227/88, *Hoechst AG v. Commission of the European Communities* [1989] ECR 2859, at 2923, para. 13.

¹⁰⁵ Case 260/89, *Elliniki Radiophonia Tileorassi AE. v. Dimotiki Etaria Pliroforissis and Sotirios Kouvelas and others* [1991] ECR I-2925, para. 41.

¹⁰⁶ Case C-299/95 *Kremzow v. Republik Österreich* [1997] ECR I-2629, para.14.

¹⁰⁷ Craig & de Búrca: EU Law – Text, cases and materials, p. 324.

¹⁰⁸ Neuwahl: *The Treaty on European Union: A Step Forward in the Protection of Human Rights*, p. 18.

¹⁰⁹ Betten & Grief: EU Law and Human Rights, p. 111.

¹¹⁰ This article enables the Council, the Commission or a Member State to obtain the opinion of the ECJ on the compatibility with the Treaty of an agreement with a third State or an international organisation.

¹¹¹ Nergelius: Amsterdamsfördraget och EU:s institutionella maktbalans, p. 142.

¹¹² Opinion 2/94 (ECHR) [1996] ECR I-1759. Mc Goldrick: *The European Union after Amsterdam: An Organisation with General Human Rights Competence*, p. 255.

¹¹³ Craig & de Búrca: EU Law – Text, cases and materials, p. 337.

¹¹⁴ Case 374/87, *Orkem v. Commission* [1989] ECR 3283, para. 31.

¹¹⁵ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para 4.

4.2.2 The content of the fundamental rights protection

Briefly, we now touch upon the content of the fundamental rights protection developed by the Court of Justice. The rights that so far have been recognised by the ECJ as being part of the general principles of law are:¹¹⁶

- human dignity¹¹⁷
- equal treatment¹¹⁸
- non-discrimination¹¹⁹
- freedom of expression¹²⁰
- freedom of religion¹²¹
- freedom of association¹²²
- the right to privacy, family life and protection of the home¹²³
- the right to medical privacy¹²⁴
- the right to property¹²⁵
- inviolability of residence¹²⁶
- freedom to pursue one's trade and business¹²⁷
- freedom of industry¹²⁸
- freedom of competition¹²⁹

¹¹⁶ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights* p. 868; Lenaerts, & van Nuffel: *Constitutional Law of the European Union*, p. 548ff; European Parliament Fact Sheets: 2.1.1 Respect for fundamental rights in the EU – general development:

<http://www.europarl.eu.int/factsheets/2_1_1_en.htm>

¹¹⁷ Case 9/74, *Casagrande v. Landeshauptstadt München* [1974] ECR 773, at 778, para. 6; Case 36/02, *Omega Spielhallen – und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609 para. 41.

¹¹⁸ Joined cases 17 & 20/61, *Klöckner-Werke AG & Hoesch AG v. High Authority* [1962] ECR 325 at 344-346.

¹¹⁹ Case 43/75 *Defrenne v. Sabena* [1976] ECR 455, at 474, para. 24.

¹²⁰ Case C-260/89, *Elliniki Radiophonia Tileorassi AE. v. Dimotiki Etaria Pliroforissis and Sotirios Kouvelas and others* [1991] ECR I-2925, at 2964, para. 44.

¹²¹ Case 130/75, *Vivien Prais v. Council* [1976] ECR 1589, at 1599, para. 18 (a staff case).

¹²² Case C-415/93, *Union Royale Belge des sociétés de Football Association and Others v. Jean-Marc Bosman and Others* [1995] ECR I-4921, at 5065, para. 79.

¹²³ Case 136/79, *National Panasonic v. Commission* [1980] ECR 2033, at 2057, paras. 17-19; Case 249/86, *Commission v. Federal Republic of Germany* [1989] ECR 1263, at 1290, para. 10; Case C-4054/92P, *X v. Commission* [1994] ECR I-4737, at 4789, para. 17.

¹²⁴ Case C-62/90, *Commission v. Federal Republic of Germany* [1992] ECR 2575, at 2609, para 23.

¹²⁵ Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* [1974] ECR 491, at 508, para. 14; Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, at 3745, para 17.

¹²⁶ Joined cases 46/87 & 227/88, *Hoechst AG v. Commission* [1989] 2859, at 2924, para 17.

¹²⁷ Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* [1974] ECR 491 at 508, para. 14; Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, at 3750, para. 32.

¹²⁸ Case 78/83, *Union Sidérurique du Nord et de l'Est de la France (USINOR) v. Commission* [1984] ECR 4177.

- the principle of non-retroactivity of penal measures¹³⁰
- the right to a judicial remedy for the protection of one's right¹³¹
- a group of rights known as 'rights of defence',¹³²
- the principle of equality¹³³

However, this enumeration is not supposed to be viewed as closed for, other rights that are to be found in the ECHR and in national constitutions should arguably be added as well.¹³⁴ The ECJ normally does not have difficulties in recognising rights to be part of the general principles of Community law, but it has been more cautious when it comes to finding an actual violation of such a right.¹³⁵

4.3 The development of the scope of review

4.3.1 Original scope of review

The question of the scope of review concerns the reach of Community law and the extent to which national law is subject to scrutiny by reference to EC fundamental rights.¹³⁶ The general principles doctrine was originally created by the Court of Justice to fill in gaps in the legal protection of individuals against the actions of the Community institutions – and not against the Member States.¹³⁷ However, in the late 80's, the Court of Justice went further in its doctrine by assuming the power to assess the compatibility of certain national rules (and not just Community rules) with the general principles of Community law. Thus, the ECJ extended the exercise of its human rights jurisdiction to Member State measures in two types of situations: first, when national rules fall within the scope of the Community law, i.e. when the Member States implement Community rules (according to the Court's findings in *Wachauf*)¹³⁸ and second, when national

¹²⁹ Case 240/83, *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 531, at 548, para. 9.

¹³⁰ Case 63/83, *Regina v. Kent Kirk* [1984] ECR 2689, at 2718, para. 22.

¹³¹ Case 222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, at 1682, para. 18.

¹³² Case 374/87, *Orkem v. Commission* [1989] ECR 3283, at 3351, para. 32.

¹³³ Case 145/77, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* [1978] ECR 1365, at 1378, para. 27.

¹³⁴ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 868.

¹³⁵ *Ibid.* p. 868-869.

¹³⁶ Shaw: *Law of the European Union*, p. 350.

¹³⁷ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 870.

¹³⁸ Case 5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft Federal Republic of Germany* [1989] ECR 2609, at 2639, para 19; subsequently also in Case C-2/92, *The Queen v. Ministry of Fisheries, Agriculture and Food, ex parte D.C Bostock* [1994] ECR I-955, at 983; Case C-63/93, *Fintan Duff et al. v. Minister for Agriculture and Food, Ireland, and the Attorney General* [1996] ECR I-569, at 610.

rules restrict the exercise of one of the common market freedoms (according to the findings in the *ERT*¹³⁹ case).¹⁴⁰

4.3.2 ‘Offensive’ development in the 1980’s

4.3.2.1 Power to assess the compatibility of national rules falling within the scope of Community law (*Wachauf* type review)

The first situation, in which the Court of Justice has extended its exercise of fundamental rights jurisdiction to Member State measures, concerns national rules that fall within the scope of Community law, i.e. when Member States implement Community rules. The ECJ ruled that Member States, in implementing Community law, are bound by the same principles and rights that bind the Community in its actions. This was decided for the first time in *Wachauf*.¹⁴¹

The case concerned a tenant farmer who, under the rules of the Common Agricultural Policy (CAP), might be deprived of his livelihood, without compensation, on the expiry of his lease. The applicant requested compensation under German law (which was implementing Community law) for the discontinuance of milk production. Such compensation was conditioned, in that the landlord must have had given his tenant written consent – a condition that was not fulfilled in this case.

The ECJ held that Community rules of that sort:

“would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.”¹⁴²

This was repeated in a more recent case, which also concerned the CAP, where the Court of justice ruled that “the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules”.¹⁴³

¹³⁹ Case C-260/89, *Elliniki Radiophonia Tileorassi AE. v. Dimotiki Etaria Pliroforissis and Sotirios Kouvelas and others* [1991] ECR I-2925, at 2964, para. 43; subsequently also in Case C-159/90, *Society for the Protection of Unborn Children Ireland Ltd. v. Stephan Grogan and others* [1991] ECR I-4685, at 4741; Case C-23/93, *TV 10 S.A v. Commissariaat voor de Media* [1994] ECR I-4795, at 4833.

¹⁴⁰ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 870.

¹⁴¹ Case 5/88, *Hubert Wachauf v. Federal Republic of Germany* [1989] ECR 2609.

¹⁴² *Ibid.*, at 2639, para.19.

¹⁴³ Case C-292/97, *Kjell Karlsson and others* [2000] ECR I-2737, para.37.

Consequently, when a Member State is acting on behalf of the EU – as an agent – its actions should be subject to scrutiny under EU fundamental rights.¹⁴⁴

4.3.2.2 Power to assess the compatibility of national rules restricting the exercise of common market freedoms (ERT type review)

The second situation, in which the ECJ has extended its exercise of fundamental rights jurisdiction to Member States measures, concerns national rules that restrict the exercise of common market freedoms.

Here follows a short explanatory note of Community law in this respect.¹⁴⁵ According to the provisions of the EC Treaty, Member State measures that interfere with the four market freedoms are forbidden. There are, however, two exceptions to this prohibition. First, the national measure must be considered as an illegal interference to the common market. Due to vagueness of the EC Treaty, the Court of Justice has through its case law developed a rich flora of rules in deciding what measure is illegal and what is not. Second, even if the national measure is found to violate the free market it may be justified if it falls under one of the derogation provisions in the EC Treaty,¹⁴⁶ which mention *e.g.* public morality as a possible exception to discriminatory national measures.¹⁴⁷

Even when a Member State is not directly implementing Community law (as is the case under the *Wachauf* type review), its measures can still be considered to fall within the scope of Community law. For, after some initial hesitation – where the ECJ held that it had no power to examine the compatibility with fundamental rights protection of national rules which do not fall within the scope of Community law¹⁴⁸ – the Court of Justice decided in the *ERT* case that Member States invoking exceptions and derogation for which the common market rules provide, have to comply with the Community fundamental rights protection.¹⁴⁹

The case concerned the compatibility with some EC Treaty provisions of a national system of exclusive television rights. A Greek radio and television

¹⁴⁴ Shaw: Law of the European Union, p. 350.

¹⁴⁵ For a more extensive explanation on the common market rules (and notably the free movement on goods) see *e.g.*; Arnall: The European Union and its Court of Justice, chapter 7; Craig & de Búrca: EU Law – Text, cases and materials, chapters 14-15.

¹⁴⁶ Weiler: The Constitution of Europe – “Do the new Clothes have an emperor?” and other essays on European integration, p. 121.

¹⁴⁷ The justified grounds in *e.g.* article 30 EC Treaty are; public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; and the protection of industrial and commercial property.

¹⁴⁸ Joined cases 60 & 61/84 *Cinéthèque v. Fédération Nationale des Cinémas Français* [1985] ECR 2605, para. 25; Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd*, ECR [1987] ECR 3719, para. 28.

¹⁴⁹ Case C-260/89, *Elliniki Radiophonia Tileorassi AE. v. Dimotiki Etaria Pliroforissis and Sotirios Kouvelas et al.* [1991] ECR I-2925, para. 43.

company, ERT, had been granted exclusive rights by the Greek state. The company sought an injunction against the two respondents who had set up a television station and broadcasted programmes in violation of the exclusive rights of ERT. The respondents based their defence on the Community rules regarding free movement of goods and services, competition and monopolies as well as the provision of the ECHR on the freedom of expression.

The Court of Justice held that in examining the acceptability of national public policy derogations from the principle of free movement of services:

“such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 [now Articles 46 and 55] only if they are compatible with the fundamental rights the observance of which is ensured by the Court.”¹⁵⁰

The ruling of the ECJ represents, as stated above, an extension of the Court’s jurisdiction to review compliance with fundamental rights by the Member states when they rely upon derogations from basic Treaty rules.¹⁵¹

4.3.3 Reassessment in the 1990’s

4.3.3.1 Need of a link between the national measure and a rule of Community law

The Court of Justice reassessed the expansion of the scope of review with three judgments in the 90’s, by indicating that it continues to verify whether national measures, allegedly breaching Community fundamental rights, are in fact within the scope of Community law.¹⁵² In the cases *Kremzow*¹⁵³ and *Annibaldi*¹⁵⁴ the Court declined jurisdiction to review Member State measures in the light of Community fundamental rights.

In *Kremzov*, a convicted murderer, whose criminal proceedings had been held in violation of the ECHR, argued in an action for damages against the Austrian State, *inter alia*, that the prison sentence deprived him from exercising his right to free movement under the EC Treaty. The Court of Justice declined jurisdiction under Article 234 EC Treaty¹⁵⁵ since the situation of Kremzow was not “connected in any way with any of the situations contemplated by the Treaty provisions on freedom of movement

¹⁵⁰ *Ibid.*, para. 43.

¹⁵¹ Craig & de Búrca: EU Law – Text, cases and materials, p. 344.

¹⁵² De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 871.

¹⁵³ Case C-299/95, *Friedrich Kremzow v. Republik Österreich* [1997] ECR I-2629.

¹⁵⁴ Case C-309/96, *Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR I-7493.

¹⁵⁵ Article 234 EC Treaty regulates the Court of Justice’s jurisdiction to give preliminary rulings.

for persons.”¹⁵⁶ Moreover, the Court held that “[w]hilst any deprivation of liberty may impede the person concerned from exercising his right to free movement [...] a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of Community provisions.”¹⁵⁷ Consequently, the case could not be brought within the scope of Community law due to the lack of a sufficient connection to the free movement.

Furthermore, the ECJ stated that the provisions of national law under which Mr. Kremzow was sentenced for murder and illegal possession of firearms “were not designed to secure compliance with rules of Community law”¹⁵⁸ and that it followed that the national legislation did not fall within the field of application of Community law.¹⁵⁹

Consequently, the ECJ have two explanations to why the *Kremzow* case fell outside the scope of Community law: first, due to the fact that Mr. Kremzow did not actually seek to exercise his right to free movement and second, since the national legislation under which he was convicted and imprisoned was not implementing Community law or assuring compliance with it in any way.¹⁶⁰

In *Annibaldi*, jurisdiction was declined for an applicant who claimed that his right to property was violated since the local authorities refused him to plant an orchard in the vicinity of a nature and archaeological park. The ECJ held that, although the national measures related to agricultural activity, they did not affect the common organisation of the agricultural markets.¹⁶¹ Therefore, the national measures fell outside the scope of Community law.¹⁶²

This means that the fact that a national measure deals with a policy area (like the CAP in this case), in which the Community is actively involved, is not sufficient to bring that measure within the scope of EC law for the purpose of fundamental rights review. Instead a narrower link is required between the national measure and a Community rule. For, it is necessary that the national measure claim to implement a rule of Community law or to impinge on the effective application of such a rule.¹⁶³

¹⁵⁶ Case C-299/95, *Friedrich Kremzow v. Republik Österreich* [1997] ECR I-2629, para. 16.

¹⁵⁷ *Ibid.* para. 16.

¹⁵⁸ *Ibid.*, para. 17.

¹⁵⁹ *Ibid.* para. 18.

¹⁶⁰ Craig & de Búrca: EU Law – Text, cases and materials, p. 347.

¹⁶¹ Case C-309/96, *Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR I-7493, paras. 21 & 22.

¹⁶² *Ibid.* para. 24.

¹⁶³ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 872.

4.3.3.2 Justification by overriding requirements

In *Familiapress v. Bauer Verlag*,¹⁶⁴ however, the Court of Justice did exercise control over the respect of fundamental rights from the side of national authorities. In fact, the judgment of the case follows the *ERT* type review of Member State measures restricting the exercise of common market freedoms.

The Commercial Court of Vienna had referred to the ECJ the question whether a provision in Austrian law prohibiting the sale of periodicals containing prize competitions was compatible with the free movement of goods. For, the effect of the prohibition was that foreign publications, (in this case, publications by the German Heinrich Bauer Verlag) that were legal under the laws of their country of origin, now could be prohibited.

The ECJ held that in order to justify such restrictions of the free movement of goods, Austria must invoke ‘overriding requirements’.¹⁶⁵ Furthermore, in referring to the *ERT* case, the Court stated that:

“where a Member State relies on overriding requirements to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in the light of the general principles of law and in particular of fundamental rights”¹⁶⁶

Among those fundamental rights, the Court referred to, in this case, the freedom of expression, as enshrined in Article 10 of the ECHR. Accordingly, the validity of the overriding requirement referred to by the Austrian government – in this case press diversity – had not only to be assessed against the market rules but also against the general principles of law and fundamental rights. Thus, it had to pass two hurdles.

The case of *Familiapress* seemed to, at first sight, address the question of a trade restriction, but was transformed into a balancing act between two opposed aspects of the same fundamental right, the freedom of expression.¹⁶⁷

To sum up the reassessment made in the 90’s, the Court of Justice showed, with these three cases, all from 1997, that it would not go beyond the developments made in *Wachauf* and *ERT* and review fundamental rights protection of national measures not falling within the scope of Community law.¹⁶⁸

¹⁶⁴ Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag* [1997] ECR I-3689 (by some referred to as *Familiapress*, by others to *Bauer Verlag* – hereinafter referred to as *Familiapress*).

¹⁶⁵ *Ibid.* para. 13 & 18.

¹⁶⁶ *Ibid.* para. 24.

¹⁶⁷ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 872.

¹⁶⁸ *Ibid.* p. 873.

4.4 Conclusion

In the original Community Treaties there was no legal basis for the protection of human rights and it was only after the concepts of direct effect and the supremacy of Community law were asserted by the Court of Justice that it became imperative, legally and politically, to vindicate human rights at the Community level. So, in response to the threat that the national courts of the Member States should opt for the supremacy of their own constitutional provisions when it came to human rights, the Court of Justice 'invented' or 'discovered' the protection of fundamental rights as a general principle of Community law.

After being pressured from, in particular, Germany, the Court of Justice made the first reference to fundamental rights as enshrined in the general principles of Community law in *Stauder* and in a following case, *Internationale Handelsgesellschaft*, the general principles doctrine was confirmed. The sources of inspiration for the general principles that the Court invoked were the constitutional traditions common to the Member States (*Internationale Handelsgesellschaft*), as well as the international instruments for the protection of human rights (*Nold*), and in particular the European Convention on Human Rights (*Rutili*), which possesses a special significance in this respect.

As the general principles doctrine developed to protect individuals against the Community, the original scope of the fundamental rights protection applied only to actions taken by the Community institutions. The Court of Justice extended the exercise of its fundamental rights jurisdiction to actions taken by Member States as well. As a result, the same principles and rights that bind the Community in its actions bind the Member States, in two situations. The first situation is when the national rule in question falls within the scope of Community law. This means that when a Member State is acting as an agent – i.e. when a Member State implements Community rules – its actions fall under the Community fundamental rights scrutiny. The second situation regards national laws that restrict the exercise of the common market freedoms. For, when Member States invoke exceptions and derogation provisions for which the common market rules provide, they have to comply with the Community fundamental rights protection as well.

5 Access to justice in the ECJ – adequate mechanisms for litigating fundamental rights violations?

5.1 Access to justice

Access to justice is in essence a question of rule of law. All other rights are dependent upon this right. The rule of law is fundamental to all systems of constitutional law, where legal rules regulate governmental authority and the relations between citizens and the state.¹⁶⁹

The rule of law was recognised in the Preamble to the EEC Treaty and was confirmed by the signatories to the Treaty on European Union, thus demonstrating having a prominent position within the Community.¹⁷⁰ Consequently, the procedural right of access to justice is, arguably, ranked highly on the EC rights agenda.¹⁷¹

In the Community legal system private litigants have access to justice by means of two direct actions, *i.e.* the action for annulment (Art. 230 TEC) and the action for failure (Art.232 TEC), and one indirect action, *i.e.* the plea of illegality (Art. 241 TEC). Additionally, preliminary rulings on validity (Art. 234 TEC) and action for damages (Art. 235, 288.2 and 288.3 TEC) can also be used to challenge a Community act.¹⁷²

The action for annulment provision, in Article 230 EC Treaty, is attached with conditions of *locus standi* regarding private parties. Thus, individuals only have a restricted capacity to bring an action of annulment of allegedly unlawful Community measures.¹⁷³ It is up to the ECJ to interpret and apply these conditions through its case law. Although it has been hard to discern a consistent trend in the Court's approach to standing, it is, however, clear that their approach has been restrictive.¹⁷⁴

¹⁶⁹ Hartley: *The Foundations of European Community Law*, p. 327.

¹⁷⁰ Also see, Case 294/83, *Parti écologiste 'Les Verts' v. European Parliament* [1986] ECR 1339, para. 23: "The European Economic Community is a community based on the rule of law".

¹⁷¹ Harlow: *Access to Justice as a Human Right: The European Convention and the European Union*, p. 188.

¹⁷² Albers-Llorens: *Private Parties in European Community Law – Challenging Community Measures*, p. 6f.

¹⁷³ Ward: *Judicial Review and the Rights of Private Parties in EC Law*, p. 213.

¹⁷⁴ Albers-Llorens: *Private Parties in European Community Law – Challenging Community Measures*, preface.

The question in this chapter is whether the Community legal order provides citizens with a remedy in event of a legal dispute with the Community. More specifically whether a citizen, litigating fundamental rights violations, can access the Court of Justice, which is the institution in charge of reviewing the legality of actions taken by the Community authorities. For, criticism has been put forward by several commentators regarding the restrictive individual and group standing to challenge Community measures directly before the Court through means of Article 230 EC Treaty.

5.2 Standing before the ECJ

5.2.1 Article 230 EC Treaty

Article 230 EC Treaty¹⁷⁵ regulates review proceedings before the Court of Justice.¹⁷⁶ The article sets out three jurisdictional conditions; *ratione materiae*, *ratione personae* and *ratione temporis*. The first, *ratione materiae*, concerns the subject matter that can be brought before the Court and is regulated in the first paragraph of Article 230 EC Treaty. The second, *ratione personae*, also known as *locus standi*, relates to the person who is bringing the case before the court and is found in the second, third and fourth paragraphs of the article. The third jurisdictional condition, *ratione temporis*, is connected with the time of the proceedings and is specified in the fifth paragraph. In this chapter, focus is on *locus standi* – the right of an applicant to bring his case before a court.

¹⁷⁵ Article 230 EC Treaty reads:

”The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision, which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.”

¹⁷⁶ For the sake of clarity, the Court of First Instance has, since 1973 (when jurisdiction was transferred from the Court of Justice), jurisdiction in first instance regarding all annulment actions, all actions for a failure to act and all actions for damages brought by private parties. See Albors-Llorens: Private Parties in European Community Law – Challenging Community Measures, p. 12; Ward: Judicial Review and the Rights of Private Parties in EC Law, p. 218.

According to Article 230 there are three categories of standing. First, there are those who have privileged standing. This category includes the Member States, the Parliament¹⁷⁷, the Council and the Commission. These parties have a general right to act, whenever they want to and need not have any interest in the matter concerned.¹⁷⁸ No question of standing can arise since they always have *locus standi*, even when it comes to challenging a decision addressed to some other person or body. The reason for granting privileged applicants unlimited standing is that every Community act concerns them.¹⁷⁹

Second, there is a category, which originated through the ECJ's case law,¹⁸⁰ called the semi-privileged. This category now includes the European Central Bank and the Court of Auditors. These institutions have standing only to protect their own prerogatives.

The third category includes those who have non-privileged standing, *i.e.* any natural or legal person. It is apparent from the wording of paragraph 4 in Article 230 EC Treaty that the right of private parties to bring a case before the Court is restricted. First, they can only bring actions against one type of legal act, *i.e.* decisions.¹⁸¹ Second, the decision has to be addressed to the applicant or it has to be a decision that is of "direct and individual concern" to the former. This concept of being directly and individually concerned, has been widely debated, and is elaborated on below. First, however, the notion of decisions, and thus possible reviewable acts, is discussed.

5.2.2 Acts susceptible to review - Decisions

Not all Community acts are susceptible to review under Article 230 for those who have a non-privileged standing. Apart from the direct and individual concern test, which is discussed below, private litigants also must show that the measure they want to challenge is a "decision" or a "decision although in the form of a regulation".

Important to note is that there is a difference between the form of an act and its essential nature. The ECJ has emphasised that neither the form, in which an act is adopted, nor the designation, which it gives itself, is conclusive as to its essential nature.¹⁸² In this respect the Court states that:

¹⁷⁷ The Treaty of Nice revised article 230 EC Treaty in one aspect. For, the *locus standi* of the Parliament expanded to the category of those with privileged standing, while previously belonging to the semi-privileged.

¹⁷⁸ Bernitz & Kjellgren: *Europarättens grunder*, p. 140.

¹⁷⁹ Hartley: *The Foundations of European Community Law*, p. 349.

¹⁸⁰ For more information on this development, see Hartley: *The Foundations of European Community Law*, p. 349f; Craig & de Búrca: *EU Law – Text, Cases and Materials*, p. 487.

¹⁸¹ For more information on the different type of decisions, see Hartley: *The Foundations of European Community Law*, p. 350ff.

¹⁸² Hartley, T.C.: *The Foundations of European Community Law*, p. 350.

“A regulation shall have general application and shall be directly applicable in all Member States, whereas a decision shall be binding only upon those to whom it is addressed. The criterion for the distinction must be sought in the general ‘application’ or otherwise of the measure in question. The essential characteristics of a decision arise from the limitation of the person to whom it is addressed, whereas a regulation, being essentially of a limited number of persons, defined or identifiable, but to categories of persons viewed abstractly and in their entirety. Consequently, in order to determine in doubtful cases whether one is concerned with a decision or a regulation, it is necessary to ascertain whether the measure in question is of individual concern to specific individuals. In these circumstances, if a measure entitled by its author a regulation contains provisions which are capable of being not only of direct but also of individual concern to certain natural or legal persons, it must be admitted, without prejudice to the question whether that measure considered in its entirety can be correctly called a regulation, that in any case those provisions do not have the character of a regulation and may thereof be impugned by those persons under the terms of the [fourth] paragraph of Article [230].”¹⁸³

It often happens, however, that the Community acts that concern private parties are not decisions. As to the application of Article 230, the fact that an instrument has been labelled a regulation does not exclude that the very nature of the regulation is a decision addressed to the applicant.¹⁸⁴ In other words, it is a decision in disguise.

The case law of the Court of Justice in this respect is, however, very inconsistent. In some cases the Court does not bother to ensure whether the regulation amount to a decision or not, whereas in other cases this is done.¹⁸⁵

As regards regulations, the key barrier to the admissibility of individual applications has been the test of legal nature. When it comes to decisions the key barrier has been the test of individual concern.¹⁸⁶

5.2.3 Admissibility condition - Direct concern

The first requirement of admissibility is that of direct concern. If an applicant is not the addressee of the decision in question he must be directly concerned in order for the proceedings to be admissible before the Court.

According to the case law of the ECJ,¹⁸⁷ a measure is of direct concern if it directly affects the legal situation of the applicant and leaves no discretion

¹⁸³ Cases 16-17/62, *Confédération National des Producteurs de Fruits et Légumes v. Council*, ECR 471, p. 478f.

¹⁸⁴ Ward: Judicial Review and the Rights of Private Parties in EC Law, p. 214.

¹⁸⁵ *Ibid.* p. 221.

¹⁸⁶ Albers-Llorens: Private Parties in European Community Law – Challenging Community Measures, p. 44.

¹⁸⁷ See e.g. Case C-386/96, *Société Louis Dreyfus & Cie v. Commission* [1998] ECR I-2309, at para. 43. Craig & de Búrca: EU Law – Text, Cases and Materials, p. 518.

to the addressees of the measure, who are entrusted with its implementation. This implementation must be purely automatic and result from Community rules without the application of other intermediate rules.

Direct concern relates to causation. This means that there must be a direct link of cause and effect between the act and the impact the act has on the applicant. Consequently, if the applicant is not affected by the act or if the effect is caused by the act of another authority, the applicant will not be directly concerned.¹⁸⁸ Therefore, there should be a direct causal relationship between the decision and the damage or harm that is inflicted on the rights of the applicant.¹⁸⁹

5.2.4 Admissibility condition - Individual concern

The second requirement of admissibility is that of individual concern. If an applicant is not the addressee of the decision, apart from being directly concerned, in addition, he must be individually concerned by it otherwise the proceedings will be inadmissible.

The Court of Justice explains the concept of individual concern in *Plaumann v. Commission*:

”Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.”¹⁹⁰

Hence, the applicant must show that he possesses characteristics that distinguish him from the all other people and point him out just like the addressee in order to be individually concerned.¹⁹¹ In other words, the applicant must be individualised from all other persons to the extent that he becomes a kind of *de facto* addressee.¹⁹² Yet, the Court remains silent as to what those peculiar attributes or differentiating circumstances are.

However, before laying down this highly restrictive substantive test, the Court started out with a liberal approach saying: “the words and the natural meanings of [Article 230] justify the broadest interpretation. Moreover, provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively.”¹⁹³

¹⁸⁸ Hartley: The Foundations of European Community Law, p. 355.

¹⁸⁹ Albors-Llorens: Private Parties in European Community Law – Challenging Community Measures, p. 63.

¹⁹⁰ Case 25/62, *Plaumann v. Commission* [1963] ECR 95, at 107.

¹⁹¹ Craig & de Búrca: EU Law – Text, Cases and Materials, p. 503.

¹⁹² Albors-Llorens: Private Parties in European Community Law – Challenging Community Measures, p. 46.

¹⁹³ Case 25/62, *Plaumann v. Commission* [1963] ECR 95, at 106f.

The applicant in *Plaumann* failed because it practised a commercial activity which could be carried out at any time by any person.¹⁹⁴ The *Plaumann* test itself has, however, been given different meanings in various cases.¹⁹⁵ In cases concerning standing for anti-dumping, competition and state aids the criteria of individual concern is more liberal than in other cases.¹⁹⁶

Another question to consider is whether the applicant or applicants are affected as members of an open or closed category.¹⁹⁷ In order to be considered to be individually concerned the applicant needs to belong to the closed category.

The difference between these two categories is that the membership to the open category is not fixed or determined when the Community measure in question comes into force, whereas the membership to the closed category is already fixed and determined when the measure comes into force.¹⁹⁸ Thus, before coming into force, the measure, whether it is in whole or in part, must apply exclusively to a group of people that cannot be enlarged.

Additionally, the Court has recently emphasised that the criterion of being individually concerned “must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant individually”.¹⁹⁹

5.3 Criticisms of the restrictive standing

In the context of fundamental rights, criticism has been levelled against the standing provisions for private parties in Community law on several grounds.

First, the privileged institutional standing of the Member States is considered improper since the State, which traditionally is the defendant in human rights proceedings, thus has an advantage over the citizen.²⁰⁰ This is augmented by the fact that Member States, as well as the Community institutions, has an absolute right to intervene in proceedings between third parties before the ECJ.²⁰¹ No such absolute right exists for private parties, who have the right to intervene only when they are directly affected.

¹⁹⁴ *Ibid.* at 107.

¹⁹⁵ Craig, Paul & Gráinne de Búrca: *EU Law – Text, Cases and Materials*, p. 515.

¹⁹⁶ Craig, Paul & Gráinne de Búrca: *EU Law – Text, Cases and Materials*, (2nd ed.) p.473ff.

¹⁹⁷ See *e.g.* Cases 41-44/70, *NV International Fruit Company et al. v. Commission* [1971] ECR 411, para.21.

¹⁹⁸ Hartley: *The Foundations of European Community Law*, p. 356.

¹⁹⁹ Case C-50/00 P, *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677, at para. 44.

²⁰⁰ Harlow: *Access to Justice as a Human Right: The European Convention and the European Union*, p. 192f.

²⁰¹ *Ibid.* p. 193.

Additionally, the discrepancy between the rights of Member States and private parties is spelled out in Article 230.1, which allow review of “acts”, a term that includes general legislative and regulatory acts, as opposed to the restrictive wording in Article 230.4 for private parties, which allow review of “decisions”, a term that is interpreted by the Court of Justice as to exclude general regulatory measures.²⁰²

Second, many commentators²⁰³ are critical towards the restrictive individual and group standing to challenge Community measures directly before the Court through means of Article 230 EC Treaty. For, the “direct and individual concern” criteria, in practice, shut out most individual plaintiffs and groups representing individuals from direct challenges before the Court. This is considered particularly grave when alleged violations of fundamental rights by Community institutions or by Member States operating on behalf on the Community are involved.²⁰⁴

Moreover, in comparison, standing rules in national legal systems are generally more generous.²⁰⁵ Harlow, however, points out that the Community standing for individuals does not necessarily differ that much from individual standing before the Court of Human Rights, where the applicant needs to be a “victim of a violation”, which is interpreted as someone “directly affected”.²⁰⁶ Nevertheless, the attitude of the ECtHR seems to be more lenient. For, in the case of *Open Door and Dublin Well Woman v. Ireland*,²⁰⁷ women of a childbearing age were considered as potential victims of an injunction prohibiting abortion information in Ireland. Thus, it comes very close to an *actio popularis*.²⁰⁸

Third, the Plaumann test is criticised for a number of reasons. For instance, it is criticised for being economically unrealistic. For the argument that the commercial activity can be undertaken by any person, that the number of firms pursuing a certain trade might alter significantly and that the applicant therefore is not individually concerned, is unconvincing.²⁰⁹ Moreover, the Court’s reasoning, using the term “at any time”, renders it literally

²⁰² *Ibid.*, p. 193.

²⁰³ See e.g. Alston & Weiler: *An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights*, p. 53; Harlow: *Access to Justice as a Human Right: The European Convention and the European Union*, p. 193f; De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p.875.

²⁰⁴ Alston & Weiler: *An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights*, p. 53.

²⁰⁵ Harlow: *Access to Justice as a Human Right: The European Convention and the European Union*, p. 193; De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 877.

²⁰⁶ Harlow: *Access to Justice as a Human Right: The European Convention and the European Union*, p. 193.

²⁰⁷ *Open Door and Dublin Well Woman v. Ireland*, ECHR (1984) Series A no. 246-A.

²⁰⁸ Harlow: *Access to Justice as a Human Right: The European Convention and the European Union*, p. 193.

²⁰⁹ Craig & de Búrca: *EU Law – Text, Cases and Materials* (2nd ed.), p 462.

impossible for any applicant ever to succeed, except in very limited retrospective cases. Posing the test at some future, indeterminate date, the applicant would fail even if the applicant was the only commercial entity at the time of the challenge.²¹⁰

The complexity and apparent inconsistency of the ECJ in this regard, apart from the restrictive access *per se*, is criticised by AG Jacobs.²¹¹ Although both the CFI²¹² as well as the AG Jacobs²¹³ have opposed the Plaumann test and suggested new interpretations of the criterion of being individually concerned, the ECJ still applies the Plaumann test.

Fourth, there is practically no standing for groups or NGOs. While the ECHR, in Article 34, provide for petition by “non-governmental organisations or group of individuals” the EC Treaty discourages group standing. Especially in human rights litigation, lack of associational standing for NGOs is a noteworthy barrier, since they traditionally have played an important role within this field.²¹⁴

An explanation, commonly advanced for the restrictive standing before the ECJ, is that the Court of Justice uses its standing rules to regulate and limit its caseload (a justifiable objective and the key function of standing rules).²¹⁵ Hence, instead of favouring direct action through the means of Article 230 EC Treaty, the ECJ prefers individuals to go through the procedure of preliminary rulings under Article 234 EC Treaty.²¹⁶ However, the procedure of preliminary rulings is non-contentious in nature and based upon the principle of co-operation between the Member States’ national courts and the Court of Justice. Therefore, the individual has to rely on the willingness of the national court, which has the initiative to review, to make a reference to the ECJ.²¹⁷

²¹⁰ *Ibid.* p 462.

²¹¹ Opinion of AG Jacobs in Case C-50/00 P *Union de Pequeños Agricultores v Council* [2002] ECR I-6677, para 100.

²¹² See Case T-177/01, *Jégo-Quéré et Cie SA v Commission* [2002] ECR II-2365, para. 11, where the CFI states that “in order for individuals to be properly protected by the courts, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly, if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and the position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.”

²¹³ Opinion of AG Jacobs in Case C-50/00 P *Union de Pequeños Agricultores v Council* [2002] ECR I-6677, where he e.g. states that “[I]n my opinion, it should therefore be accepted that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests”, para. 60.

²¹⁴ Harlow: *Access to Justice as a Human Right: The European Convention and the European Union*, p. 194.

²¹⁵ *Ibid.* p. 194.

²¹⁶ *Ibid.* p. 194.

²¹⁷ Albors-Llorens: *Private Parties in European Community Law – Challenging Community Measures*, p. 7.

De Witte²¹⁸ considers that, in terms of effective access to justice, the preliminary reference procedure may not be the perfect alternative to a (non-available) direct action under Article 230. For, it is a waste of time, energy and money to force individuals to make a detour to the national courts when the underlying Community regulation or directive is the issue in question. Consequently, a direct action before the Court, which is the only competent authority to rule on the validity of the measure anyway, would be much easier.

Additionally, research studies indicate that the docket of the Court of Justice is at present largely dominated by corporate and commercial entities, an imbalance argued to depend less on rules of standing than on the limited competence of the EU.²¹⁹ As a consequence, litigants in the Community courts must generally show themselves to be economic actors, a status that, in modern society, is increasingly reserved for corporate entities.²²⁰ Despite the firmer commitment to human rights, after the Amsterdam amendments, Harlow predicts that opportunities for fundamental rights litigation by natural persons before the ECJ seem likely to remain limited, whereas corporate and commercial litigation is likely to remain the pattern for the foreseeable future.²²¹

5.4 How many applicants are successful in their fundamental rights claims?

One of the reasons for the criticism against the Court of Justice in its protection of fundamental rights is the low success rate of applicants. Several commentators have put forward this criticism.

A survey that was done in the late 1980's by Foster²²² showed that, out of 45 cases in which the Convention of Human Rights had been raised, the Court had referred to it in only 16 of its judgments. In most of those cases the ECJ merely repeated the claims made by the party or rejected them. In only two cases²²³ of those 16 had the Convention had been of any assistance to the party. Thus, Foster concluded that the ECHR had had little concrete practical effects so far for individuals.

²¹⁸ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights* p. 876.

²¹⁹ The economic aspect of the Community fundamental rights protection is further discussed below, see Chapter 8.

²²⁰ Harlow: *Access to Justice as a Human Right: The European Convention and the European Union*, p. 195.

²²¹ *Ibid.* p. 195f.

²²² Foster: 'The European Court of Justice and the European Convention for the Protection of Human Rights', p. 270.

²²³ The two cases are: Case 63/83, *R. v. Kent Kirk* [1984] ECR 2689 and Case 36/75, *Rutili v. Ministre de l'intérieur* [1975] ECR 1219.

In a comparison with national constitutional courts in countries such as Italy, Germany and Spain, where thousands of cases of alleged human rights violations are dealt with annually, de Witte considers that the role of the Court of Justice in the field of fundamental rights protection is, quantitatively speaking, incomparably more limited.²²⁴ Not only is it very few cases of alleged fundamental rights violations that are brought before the Court. But, the actual number of cases in which an actual breach of fundamental rights is found, is extremely low.²²⁵

A reason for this quantitatively more limited role is suggested to be the more limited scope of the fundamental rights review by the ECJ in comparison with the previously mentioned national constitutional courts. For, in its fundamental rights review the Court is allowed to scrutinise only Community institutions acts that fall within the framework of the EC Treaty (consequently, not acts that fall under the second and third pillar) and Member State acts that fall within the scope of Community law.²²⁶

Notwithstanding this structural difference, de Witte still considers the effective role of the Court of Justice in protecting fundamental rights to be very limited. Four possible explanations for the scarcity of fundamental rights cases before the ECJ are put forth: First, there are fewer occasions for the EU institutions than for national institutions to adopt acts in relation to human rights. Second, there is the problem of restrictive standing before the Court. Third, even when existing procedures would allow standing before the ECJ, private parties fail to raise fundamental rights issues due to the lack of visibility of the general principles case law of the Court of Justice. Fourth, the Court has not been very successful in enforcing fundamental rights so far in the cases that actually have reached the Court, thus discouraging future potential applicants.²²⁷

Making a quantitative observation, de Witte mentions that although the text of the ECHR is often cited by the ECJ, the actual case law of the ECtHR was not cited until recently.²²⁸ In only four of the Court of Justice's cases reference was made to the judgments of the ECtHR.²²⁹

However, Craig and de Búrca, writing four years after de Witte, state that the ECHR is the most common source of reference for fundamental Community rights. In addition they maintain that the ECJ frequently draw

²²⁴ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 869.

²²⁵ *Ibid.* p. 869.

²²⁶ *Ibid.* p. 869.

²²⁷ *Ibid.* p. 870.

²²⁸ *Ibid.* p. 878.

²²⁹ The four cases are: Case C-13/94, *P v. S and Cornwall County Council* [1996] ECR I-2143, at 2164, para. 16; Joined Cases C-74/95 and 129/95, *Criminal Proceedings against X* [1996] ECR-I 6609, at 6637, para. 25; Case C-368/95 *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag* [1997] ECR I-3689, at 3717, para. 26; Case C-249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd.* [1998] ECR I-621, at 647f, paras. 33 & 34.

on provisions of the ECHR and that the Court recently has made extensive reference to the case law of the ECtHR.²³⁰ Moreover, the success rate in claims alleging fundamental rights violations is higher for cases challenging administrative acts, like in staff cases and competition proceedings, rather than broad legislative measures.²³¹

Additionally, Alston and Weiler, express the same opinion as Craig and de Búrca, saying that the ECJ has commenced to rely more extensively on the jurisprudence of the ECtHR.²³²

5.5 Suggestions

5.5.1 Relaxation of standing rules

A relaxation of the standing rules has been forward by several commentators.²³³ Even the Court of Justice itself touched upon this issue at the IGC in 1996:

It may be asked [...] whether the right to bring an action for annulment under Article [230] of the EC Treaty [...], which individuals enjoy only in regard to acts of direct and individual concern to them, is sufficient to guarantee for them the effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions.²³⁴

A possibility for the Court of Justice could be to adopt a more liberal interpretation of the requirements of “direct and individual concern”.²³⁵ As mentioned above,²³⁶ in examining national standing rules of the Member States, which use similar expressions to direct and individual concern, their interpretation is invariably more liberal. Accordingly, by changing or bending its case law, the ECJ could allow for individuals to challenge normative acts, without amending Article 230 or crossing its formal limits. A means for reaching this result could be to interpret Article 230 in the light of Articles 6 and 13 of the ECHR, which necessitates that judicial remedy

²³⁰ Craig & de Búrca: EU Law – Text, cases and materials, p.337.

²³¹ *Ibid.* p. 332 & 333.

²³² Alston & Weiler: *An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights*, p. 53.

²³³ See e.g. De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 892; Douglas-Scott: *Constitutional Law of the European Union*, p. 462; Alston & Weiler: *An ‘Ever Closer Union’ in need of a Human Rights Policy: The European Union and Human Rights*, p. 52ff.

²³⁴ *Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union*, at 20.

²³⁵ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 892.

²³⁶ Chapter 5.3.

should be available for the protection of civil rights and for the rights granted by the Convention.²³⁷

Since the Court of Justice only can stretch the boundaries of the term ‘direct and individual concern’ to a certain extent, another option could be to amend the fourth paragraph of Article 230 and introduce a test of standing where the applicant should be ‘adversely affected’.²³⁸ Thereby, the standing rules would become more liberal as in French, English and American administrative law.²³⁹

Furthermore, in the *UPA* case,²⁴⁰ AG Jacobs suggests this new interpretation of the notion of individual concern. He considers that it should be accepted that:

“a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.”²⁴¹

The motive for this is that he thinks that there are no compelling reasons to read into the notion of individual concern a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee. For, the greater the number of persons affected by a measure the less likely it is that judicial review under the fourth paragraph of Article 230 EC will be made available. Because, in the end, AG Jacobs argue, a measure that adversely affects a large number of individuals, and thereby causing wide-spread rather than limited harm, provides a positive reason for accepting a direct challenge by one or more of those individuals.²⁴²

Taking it further, a third alternative could be to grant standing to associations and public interest groups.²⁴³ As mentioned above,²⁴⁴ NGOs have traditionally had an important role in human rights litigation and the lack of associational standing is a big obstacle for their work. A right of

²³⁷ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 892f.

²³⁸ A term proposed by Arnulf in *Private Applicants and Action for Annulment under Article 173 of the EC Treaty*, p. 49; see also De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights* p. 893 and Douglas-Scott: *Constitutional Law of the European Union*, p. 462.

²³⁹ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 892; Douglas-Scott: *Constitutional Law of the European Union*, p. 462.

²⁴⁰ Case 50/2000P *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677.

²⁴¹ Opinion of AG Jacobs in Case 50/2000P *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677, para. 60.

²⁴² Opinion of AG Jacobs in Case 50/2000P *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677, para. 59.

²⁴³ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 893; Alston & Weiler: *An ‘Ever Closer Union’ in need of a Human Rights Policy: The European Union and Human Rights*, p. 53.

²⁴⁴ Chapter 5.3.

intervention for public interests groups, who has a better position to inform the Court of sensitive societal concerns in the human rights area, would balance up the automatic right of intervention of Member States.²⁴⁵

The standing rules under Article 230 remained unaltered, however, by the Treaty of Amsterdam and the Treaty of Nice and there seems to be no likelihood that any alteration will occur in the near future.²⁴⁶ As an example, in the *UPA* case of 2002, the ECJ, although emphasising that the Community is based on the rule of law, left it up to the Member States to establish a system of legal remedies and procedures which ensure respect for the right of effective judicial protection when applicants fail to meet the individual concern test for a measure of general concern such as a regulation.²⁴⁷

5.5.2 Special individual fundamental rights complaint procedure

An alternative to a relaxation of standing rules, which has been voiced, is to create a special individual fundamental rights complaint procedure.²⁴⁸ A complaint procedure of this kind would exist only for alleged breaches of fundamental rights. Subsequently, this procedure would go beyond the protection offered for private parties, in Article 230, as regards their interests in general.²⁴⁹

The inspiration for the complaint procedure in question is found in the German and Spanish legal systems: *Verfassungsbeschwerde* and *recurso de amparo*.²⁵⁰ These two constitutional complaint procedures are slightly different but share some important common characteristics. First, both are subsidiary procedures. As a result, in order to make a direct complaint to the Constitutional Court, ordinary courts must have failed to uphold the applicant's constitutional rights. Second, the applicant must be directly and individually concerned. Thus, an *actio popularis* is not permitted. Notwithstanding these admissibility criteria, there are thousands of complaints brought within the *Verfassungsbeschwerde* and the *amparo*

²⁴⁵ Alston & Weiler: *An 'Ever Closer Union' in need of a Human Rights Policy: The European Union and Human Rights*, p. 54.

²⁴⁶ Douglas-Scott: *Constitutional Law of the European Union*, p. 462

²⁴⁷ Case 50/2000P *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677, paras. 35-41.

²⁴⁸ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 893ff; Douglas-Scott: *Constitutional Law of the European Union*, p. 462.

²⁴⁹ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 894.

²⁵⁰ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 894; Douglas-Scott: *Constitutional Law of the European Union*, p. 462.

every year. The complaints found admissible constitute the majority of the cases before the German and Spanish constitutional courts.²⁵¹

In conclusion, de Witte finds that, despite its appeal at first sight, the creation of an individual fundamental rights complaint procedure is not recommendable. For, apart from the risks that the workload of the ECJ would increase and that the relationships between national courts and European courts would be disturbed, the complaint procedure would be nothing more than a duplication of the procedure already provided for by the ECtHR.²⁵²

5.5.3 European Ombudsman

An alternative to the introduction of an individual fundamental rights complaint procedure could be the creation of a right of action for the European Ombudsman.²⁵³

The European Ombudsman²⁵⁴ is in charge of maladministration by Community institutions, which includes breaches of fundamental rights and breaches through individual administrative acts. The Ombudsman is, however, not allowed to lodge a case with the Court of Justice. As they stands today, the Ombudsman's mechanisms, when faced with a complaint, are to find amicable solutions, direct draft recommendations to the Community institution concerned and to make final recommendations to the European Parliament on the measures to be taken.²⁵⁵

Notwithstanding the lack of standing to sue, the action of the European Ombudsman seems to be respected and taken serious by the Community institutions.²⁵⁶ Hence, this could serve as a justification for granting the Ombudsman, in cases of alleged fundamental rights violations, the right to action before the ECJ after having extinguished his existing mechanisms.

The European Ombudsman has mandate to consider maladministration by Community institutions only – and not the actions of national authorities under Community law. A possible approach to remedy this problem, which was proposed by the Ombudsman himself, is to rely on national Ombudsmen or similar bodies, who are increasingly involved in dealing with matters that concern the implementation of Community law by national administrations.²⁵⁷ Granting these national ombudsmen the right to bring

²⁵¹ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 894.

²⁵² *Ibid.* p. 896.

²⁵³ *Ibid.* p. 896.

²⁵⁴ The powers of the European Ombudsman are described in Article 195 EC Treaty.

²⁵⁵ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 896.

²⁵⁶ *Ibid.* p. 896.

²⁵⁷ The European Ombudsman, Annual Report 1996, [1997] OJ C272/1, Chapter 5 at p. 46.

cases of alleged fundamental right violations by the Member State before the Court of Justice, might seem less threatening than allowing individuals to bring complaints against the Member States directly before the ECJ.²⁵⁸

In any case, the creation of a right of action, for alleged Community fundamental right violations, for the European Ombudsman and for the national ombudsmen would, in both cases, require an amendment of the EC Treaty.²⁵⁹

5.6 Conclusion

If the notion of ensuring respect for human rights is to be taken seriously, the mere provision of formal judicial remedies is not considered a sufficient and effective guarantee. Notwithstanding the fact that the Court of Justice, over the last couple of years, has increased its amount of references to the ECHR and to the case law of the ECtHR, still, the number of fundamental rights cases that actually reach the ECJ is limited and cases in which an actual breach of fundamental rights is found committed is extremely low.

Access to justice in fundamental rights issues within the Community legal order is not optimal. Citizens are, by all means, provided with a formal remedy. However, its efficiency can be criticised. For, Article 230 EC Treaty, the direct measure in question here, categorises the parties, who wants to access the ECJ and bring an action of annulment of allegedly unlawful Community measures, according to their standing status: as privileged or non-privileged. Any natural or legal person falls under the second category and is thereby limited in its action of annulment, not only regarding the type of legal act it wants to strike down, but also in that it has to pass the additional test of being directly and individually concerned by the act itself. These factors create a discrepancy, between the Member States as well as the Community institutions in respect to private parties and NGOs, that is improper.

Whereas the admissibility condition of direct concern is fairly easy to establish, the second admissibility condition, *i.e.* that of individual concern, creates more issues.

For, the Plaumann test, set out by the Court of Justice to explain the concept of individual concern, suffers from its complexity as well as from the inconsistency of the ECJ in its use thereof. Despite all criticisms and disapproval, the Court still applies the Plaumann test.

How can the low success rate for individuals litigating fundamental rights violations be explained then? There are multiple possible explanations to this question. The answer lies most likely in a combination of the

²⁵⁸ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 897.

²⁵⁹ *Ibid.* p. 897.

explanations. Apart from the restrictive standing of private persons to review an act before the Court of Justice, which in itself can be explained by the ECJ wanting to limit its caseload and thereby referring individuals to the preliminary rulings system instead, a possible explanation can be that there are fewer occasions for the Community to adopt acts that relate to human rights, than there is on a national level. Another contributing factor can be that lack of visibility of the fundamental rights protection that actually does exist in the Community. This relates to the fact that the Community still relies on the general principle doctrine and had no written human rights catalogue at all to refer to, until at least in 2000 when the Charter on Fundamental Rights was introduced. Although the Charter is not legally binding yet, one of its advantages is that it brings more visibility to the public. Another explanation can be that the low success rate for fundamental rights litigants so far actually discouraged future potential applicants. Finally, there is the factor that the Community originally was designed basically for economic purposes, whereby corporate and commercial actors dominate the legal system.

All in all, formal rights are not enough. Subsequently, in order to make them efficient positive actions are required. For, “[j]ustice without ‘access’ is justice denied”.²⁶⁰

²⁶⁰ Weiler & Fries: ‘A Human Rights Policy for the European Community and Union: The Question of Competences’, p 15.

6 The standard of protection – sufficient recognition of fundamental rights by the ECJ?

6.1 Diverging standards of protection

6.1.1 What rights should be protected?

The question in this chapter regards, basically, what rights the Court of Justice should protect as fundamental rights. Given the fact that the European Union does not have, and has never had, a legally binding Bill of Rights, the Court of Justice has determined the standard of protection of fundamental rights on a case-by-case basis. Basically, the problem is that the fundamental rights are protected only indirectly as general principles of law and not as well defined rights,²⁶¹ thereby creating issues inconclusiveness as well as unpredictability.

The reference to “constitutional traditions common to the Member States” and to “international treaties on which the Member States have collaborated or to which they are signatories” raises questions about the homogeneity of the Member States standards of protection. For, notwithstanding the unification, societal values vary between European states and thereby the view of which rights should be protected and how they should be protected.

Protection of fundamental rights is not always a unifying process. Within the Community legal order there is a problem of diverging standards of protection of fundamental rights. Originally, before the Court of Justice showed any sign of acknowledging human rights, this was very apparent, as there was one standard of protection at the national level but none at all on the Community level.²⁶² As previously mentioned, the Court of Justice recognised fundamental rights as general principles of law, the inspirations of which are drawn from the constitutional traditions common to the Member States and the international treaties on which the Member States have collaborated or to which they are signatories. However, the standard of protection of fundamental rights that was adopted by the Court of Justice has not resolved the issue of divergent levels of protection.²⁶³ For, both sources of the Community standard of protection of fundamental rights – constitutional traditions common to the Member States and international treaties – can cause diverging standards of protection.

²⁶¹ Besselink: ‘*Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*’, p. 633.

²⁶² *Ibid.* p. 629.

²⁶³ *Ibid.* p. 630.

The question of what fundamental rights should be protected within the Community legal order ultimately comes down to a discussion on whether adopting a minimalist or a maximalist approach. Should the Court of Justice opt for a lowest standard of protection or a highest standard of protection? However, before that question is discussed, the issues of the sources of the Community standard of protection as well as criticism of the standard of protection are treated.

6.1.2 Sources of the Community standard of protection

6.1.2.1 Constitutional traditions common to the Member States

The first source of the Community standard of protection of fundamental rights is the “constitutional traditions common to the Member States”. The obvious question that arises in this respect is: when are the Member States’ constitutional traditions considered to be ‘common’?

It could be argued that only fundamental rights that are protected by all Member States’ constitutional traditions can be deemed common. A more lenient approach is that only rights that are generally recognised can be considered as general principles.²⁶⁴ The Court of Justice has affirmed that a fundamental right, found in one national legal order, which diverges significantly in nature and degree of protection from that right in other legal orders cannot be regarded as being part of the constitutional traditions common to the Member States.²⁶⁵

Accordingly, if only fundamental rights that are common to all Member States’ constitutional traditions are protected, a number of fundamental rights, which have great importance within their respective national legal order, are excluded. Examples of such unique fundamental rights are the Irish formulation of the right to life that prohibits abortion, the Dutch provision on equal treatment of public and private education and the scope of the German right to one’s *gesetzliche Richter* (i.e. court established by law).²⁶⁶

The fact that fundamental rights at times can be divisive and disruptive, even between the Member States of the European Union, can be exemplified by the case *AM & S*,²⁶⁷ where the Court of Justice derived a principle of confidentiality between lawyer and client from a comparative survey of the laws of the Member States. Yet not all Member States were content with the conclusions of the Court as to this supposedly common principle. For, the French government argued that the case represented “an

²⁶⁴ *Ibid.* p. 636.

²⁶⁵ Joined cases 46/87 & 227/88, *Hoechst AG v. Commission*, [1989] ECR 2859, paras. 17-18.

²⁶⁶ Besselink: ‘Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union’, p. 637.

²⁶⁷ Case 155/79, *AM & S Europe Ltd v. Commission* [1982] ECR 1575.

attempt to foist on the Community what was no more than a domestic rule of English law”.²⁶⁸ The Advocate General in the case, however, considered that a general principle could be distilled from the various Member States even if “the conceptual origin” of the principle and “the scope of its application in detail, differ from Member State to Member State”.²⁶⁹ Finally, neither the Advocate General, nor the Court considered the differences between the Member States in this case so significant as to hinder a common principle that would represent the Community standard of protection.²⁷⁰

6.1.2.2 International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories

The second source of the Community standard of protection, from which the Court of Justice derives its fundamental rights principles, is the “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories”, according to the Courts judgment in *Nold*.²⁷¹

For obvious reasons, the European Convention of Human Rights, being the most common source of reference for fundamental Community rights, here requires particular attention among the treaties referred to in the second source. As stated earlier, the European Union has not acceded to the ECHR. Despite the fact that the ECJ draws inspiration from the Convention, it does not view the Convention as setting ‘the’ standard of protection for the Community.²⁷² This is the hitch when it comes to the diverging standards of protection of the second source. For, although the Court of Justice has never specified its position on the case law of the Court of Human Rights, it does not consider itself obliged to follow it,²⁷³ even if the Court is generally loyal to the ECHR.²⁷⁴ Consequently, there is the peril of two European Courts interpreting the same human rights document differently. Thus, if the ECJ interprets the Strasbourg case law differently than the Court of Human

²⁶⁸ AG Warner in Case 155/79, *AM & S Europe Ltd v. Commission* [1982] ECR 1575, at 1631.

²⁶⁹ *Ibid.* at 1631f.

²⁷⁰ Craig & de Búrca: *EU Law – Text, cases and materials*, p. 328f.

²⁷¹ Besselink: ‘*Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*’, p. 650. The wording, actually, discloses that the treaties referred to need not be formally binding. For, according to international law (more precisely Article 18 of the Vienna Treaty on the Law of Treaties), a signature of a treaty entails only a duty to not defeat the object and purpose of the treaty, whereas collaboration is an even weaker form of adherence.

²⁷² Weiler: *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, p. 62.

²⁷³ Lawson: *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, p.228.

²⁷⁴ Groussot: *Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europaeum?*, p. 111.

Rights then there is the risk of undermining either the authority of the ECJ or the ECtHR.²⁷⁵

Divergences between the judgments of the two Courts have occurred. For example, in *Hoechst*,²⁷⁶ the Court of Justice held that Article 8 ECHR, which protects the right to respect for a private life and the inviolability of the home, did not apply to companies, whereas the Court of Human Rights reached the opposite opinion in *Chappell*²⁷⁷ and *Niemietz*.²⁷⁸ Another example where the Luxembourg and Strasbourg Courts differed in their interpretation of the Convention regards the question of the right not to give self-incriminating evidence. In *Orkem*,²⁷⁹ the Court of Justice held that Article 6 ECHR did not include a right not to give evidence against oneself for, “neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself.”²⁸⁰ Since then, the Court of Human Rights has taken a conflicting decision in *Funke*,²⁸¹ reading a right to remain silent and not to contribute to self-incrimination into the autonomous meaning of Article 6 ECHR.²⁸²

It is emphasised that the ECHR constitutes a much more effective tool than the constitutional traditions of the Member States.²⁸³ For, through the reliance on the ECHR the presumption of commonality is automatic. As a result the ECJ need not endeavour into analyses of the Member States constitutions to find what is common.²⁸⁴

Noteworthy is that the European Convention of Human Rights only provides a minimum standard of protection.²⁸⁵ This means that the level of protection can vary between different states as long as no High Contracting Party fall below the level of protection offered in the Convention. Consequently, national authorities are free, and maybe even encouraged, to apply a higher level of protection than the one set out in the Convention.²⁸⁶

²⁷⁵ Lawson: *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, p. 229.

²⁷⁶ Joined Cases 46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR 2859. The case is further discussed below, Chapter 5.2.

²⁷⁷ *Chappell*, ECHR (1989), Series A, no. 152.

²⁷⁸ *Niemietz*, ECHR (1992), Series A, no. 251-B.

²⁷⁹ Case 874/87, *Orkem v. Commission* [1989] ECR 3283.

²⁸⁰ *Ibid.* at 3350 § 30.

²⁸¹ *Funke*, ECHR (1993), Series A no. 256-A.

²⁸² *Funke*, ECHR (1993), Series A no. 256-A, para. 44.

²⁸³ Groussot: *Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europaeum?*, p. 111.

²⁸⁴ *Ibid.* p. 111.

²⁸⁵ Article 53 ECHR (ex Article 60, amended by Protocol 11, which entered into force 1 November 1998) reads: “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.”

²⁸⁶ Weiler: *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, p. 54; Lawson: *Confusion and Conflict? Diverging*

6.2 Criticisms of the standard of protection

The criticisms of the standard of protection provided for by the Court of Justice basically come down to the diverging standards of protection as well as the unpredictability of the jurisprudential system developed by the Court. Some of the criticisms that have been voiced are dealt with here.

To begin with, a serious drawback with the Court of Justice autonomous concept of fundamental rights and its technique of deriving these rights from common constitutional traditions and international treaties for the protection of human rights seems to be the unpredictability of the Court's interpretation.²⁸⁷ For, although the sources of inspirations that the Court uses are relatively clear, the manner in which the ECJ derives particular rights from these is harder to conceptualise.²⁸⁸

Already in the beginning of the 1990's, criticism, regarding the common constitutional traditions, was put forward against the Court of Justice's method to "selectively distill common practices from 'some' Member States" and that these only offer "inspiration" or "guidelines".²⁸⁹ This criticism still remains today. It is argued that the ECJ is not genuinely interested in revealing whether there are common traditions among the Member States and that the references made to specific national legal systems are "perfunctory and haphazard".²⁹⁰ As an example of concrete examination of national constitutional law the *Hauer* judgment is mentioned. For, in its examination of the constitutional protection of the right to property, the Court only looked into three of the then nine Member States' constitutions and only briefly.²⁹¹

Another point of criticism is that the Community fundamental rights protection does not reach the same standard of protection as the level mandated by the European Convention of Human Rights or the Member States' constitutions.²⁹² Two aspects may be distinguished in this respect: first, when the unwritten Community catalogue of fundamental rights does not include a right recognised at the national constitutional level and second, when the rights that are included in the Community catalogue are not taken as seriously as they ought to be according to national constitutional traditions.²⁹³

Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg, p. 230.

²⁸⁷ Lawson: *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, p.228.

²⁸⁸ Craig & de Búrca: *EU Law – Text, cases and materials*, p. 337.

²⁸⁹ Clapham: *Human Rights and the European Community: A Critical Overview*, p. 50-51.

²⁹⁰ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 878.

²⁹¹ *Ibid.* p. 878, note 82.

²⁹² *Ibid.* p. 878.

²⁹³ *Ibid.*, p. 879.

As an example of the former point of criticism, in *Hoechst*,²⁹⁴ the Court refused to recognise the inviolability of business premises pronouncing that Article 8 ECHR, which protects everyone's right to respect for his private and family life, his home and his correspondence, does not apply to companies.²⁹⁵ Indeed, the Court recognised a fundamental right of the inviolability of the home, but added that:

“although the existence of such a right must be recognised in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.”²⁹⁶

In *Hoechst*, apart from being criticised for not protecting a right that under the German Constitution was considered as a fundamental right, criticism was levelled against the Court of Justice for applying the ECHR without properly taking into account the case law of the Court of Human Rights.²⁹⁷ For, according to the Court of Human Rights, in the case *Chappell*, Article 8 of the Convention extended to business premises.²⁹⁸ Additionally, in a later case, *Niemietz*, the ECtHR, once again, asserted the inviolability of business premises.²⁹⁹ Consequently, the Court of Justice disrupted the consistency between the interpretation of the Convention by its appropriate organ, the Court of Human Rights, and itself.³⁰⁰

In this context, Lawson states that: “the level of protection offered under Community law as interpreted by the ECJ in *Hoechst* is in danger of falling below the requirements of Article 8 ECHR”.³⁰¹ That the Court of Justice is aware of the risks of falling below the level of protection provided for a right in the Member States national legal systems became apparent however in *Al-Jubail*.³⁰² In the case, relating to the protection of the right to a fair hearing, the Court stated that:

²⁹⁴ Joined Cases 46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR 2859.

²⁹⁵ *Ibid.*, para. 18.

²⁹⁶ *Ibid.* para. 19.

²⁹⁷ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 879, Spielmann: *Human Rights Case law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities*, p. 767.

²⁹⁸ *Chappell*, ECHR (1989), Series A, no. 152. It should be emphasised, however, that in this case the applicant's business premises and home was in the same building.

²⁹⁹ *Niemietz*, ECHR (1992), Series A, no. 251-B, para. 29.

³⁰⁰ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 879.

³⁰¹ Lawson: *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, p 245.

³⁰² Case C-49/88, *Al-Jubail Fertilizer Co. and Saudi Arabian Fertilizer Co. v. Council* [1991] ECR I-3187.

“... with regard to the right to a fair hearing, any action taken by the Community institutions must be all the more scrupulous in view of the fact that, as they stand at present, the rules in question do not provide all the procedural guarantees for the protection of the individual which may exist in certain national legal systems.”³⁰³

Regarding the latter point of criticism, that the Community fundamental rights are not taken as serious as they would be in the national legal orders, the cases most often cited are the ‘Bananas’ cases, of which the most important judgment is that of *Germany v. Council*.³⁰⁴ The issue here is that the interpretation of the fundamental right differs.

The case concerns the common market organisation of bananas. The applicant government, Germany, argued that the Council Regulation in question was in breach of the principle of non-discrimination, the right of property and the freedom to pursue one’s business or profession. Although the Court of Justice accepted all those rights to be general principles of law, it denied that they had been violated. This has stirred up emotions among German commentators who compare the outcome of the judgment with how the German Constitutional Court would interpret the fundamental rights in question.³⁰⁵

This leads us to the discussion whether the ECJ should adopt a maximalist or minimalist approach.

6.3 Minimalist or maximalist approach?

Should the Court of Justice adopt a maximalist approach, searching for the highest standard of protection provided in the Member States’ national legal systems, or a minimalist approach, searching for a the lowest common denominator? A maximum standard would require the recognition of any right, protected by any single Member State or in any relevant international treaty for the protection of human rights on which the Member States have collaborated or of which they are signatories, as a fundamental right in the Community legal order. A minimalist approach would, on the other hand, entail the recognition of only those rights that are recognised by all Member States.

The Court of Justice has never expressly endorsed a maximalist nor a minimalist approach.³⁰⁶ However, certain judgments have been interpreted as favouring either of the two approaches. Here follows, first, some examples of cases that favour a maximalist approach and second, cases that seem to reject the maximum standard.

³⁰³ *Ibid.* para. 16.

³⁰⁴ Case C-280/93, *Germany v. Council* [1994] ECR I-4973.

³⁰⁵ See references in De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 878 note 91.

³⁰⁶ Craig & de Búrca: *EU Law – Text, cases and materials*, p. 337.

The outcome of *AM & S*, where a principle of confidentiality between lawyer and client was derived from a comparative survey of the laws of the Member States, despite the resistance from France, would suggest that there need not be any unanimity amongst the Constitutions of the Member States in order for a principle to be conceived as common.

The Advocate General in *IRCA*, a case concerning monetary compensatory amounts within the common organisation of the market in beef and veal, held, while discussing the possible retroactive application of Community acts, that “a fundamental right recognized and protected by the Constitution of any Member State must be recognized and protected also in Community law”.³⁰⁷ The reason for this lies in the fact that the very existence of Community law is based on the partial transfer of sovereignty by the Member States to the Community.³⁰⁸

However, in a recent case the Court appeared to dismiss the maximum standard:

“In the field of competition law, the national laws of the Member States do not, in general, recognise a right not to incriminate oneself. It is, therefore, immaterial to the result of the present case whether or not, as the applicant claims, there is such a principle in German law.”³⁰⁹

Another case in which the maximalist approach seems to be rejected is the already mentioned case of *Hoechst*.³¹⁰ In the relevant case, the Court of Justice refused to acknowledge the inviolability of business premises as a fundamental right although this right was protected under the German Constitution. The grounds for the rejection were that the divergences between the legal orders of the Member States were too considerable.

In *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephan Grogan et al.*,³¹¹ as well, the Court of Justice did not follow the maximalist approach.³¹² At the time, it was unclear whether the ECJ would protect a fundamental right that was proclaimed in the Constitution of only one Member State, in this case the protection of the right to life of the unborn in Ireland.

The Society for the Protection of Unborn Children Ireland Ltd. (SPUC) brought proceedings against Grogan and the fourteen other officers of

³⁰⁷ Case 7/76, *Industria Romana Carni e Affini S.p.A.(IRCA) v. Amministrazione delle Finanze dello Stato* [1976] ECR 1213, at 1237.

³⁰⁸ *Ibid.* at 1237.

³⁰⁹ Case T-112/98, *Mannesmannröhren-Werke v. Commission* [2001] ECR II-729, para. 84.

³¹⁰ See Chapter 5.2.

³¹¹ Case 159/90, *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephan Grogan et al.* [1991] ECR 4685.

³¹² Coppel & O'Neill: ‘The European Court of Justice: Taking Rights Seriously?’, p. 686; Douglas-Scott: *Constitutional Law of the European Union*, p. 454.

student associations, who issued publications that contained information about the availability of legal abortion in the United Kingdom, the identity and location of a number of abortion clinics in that country and how to contact them. Abortion has always been illegal in Ireland and Article 40, Section 3, of the Irish Constitution reads:

“The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right”.

Thus, SPUC sought a declaration that the distribution of such information was unlawful and an injunction restraining its distribution.

In *Grogan*, the Court ignored the wording of the Irish Constitution, which explicitly protects the right to life of the unborn as a human right. Instead it treated the claim to fundamental rights as a restriction on the Community freedom to provide and receive service.³¹³ The EC Treaty prohibits any restriction by a Member State on the freedom to provide service throughout the Community, except when the Member States make justified derogations.³¹⁴

In the relevant case, abortion is classified as a service, within the meaning of the EC Treaty and by this means, the ECJ considers the Irish constitutional protection of the right to life of the unborn as a restriction on the activity of the student associations, *i.e.* to provide and receive service. However, the restriction is not prohibited since the activities of the students' associations falls outside the scope of Community law.³¹⁵

Among scholars and commentators, the opinions regarding a minimalist or a maximalist approach are divided, as we have seen in the case law of the Court of Justice. Below follow some examples of their points of view.

First, Besselink is an advocate of a maximalist approach. He dismisses a common minimum standard – which he considers, looking at the substantive protection that is offered under Community law, is the standard adopted by the Court of Justice so far – since the common minimum standard excludes higher standards of protection that are found in some Member States only.³¹⁶

With regard to the fact that Community law has hierarchical primacy, the common minimum standard becomes the exclusive standard, once within the Community legal order. The dilemma is that the exclusive minimum standard is not necessarily the standard that provides the substantively

³¹³ Coppel & O'Neill: 'The European Court of Justice: Taking Rights Seriously?', p. 679

³¹⁴ Articles 49, 46 and 55 EC Treaty.

³¹⁵ This is further discussed below, see Chapter 7.1 and 7.2.

³¹⁶ Besselink: 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union', p. 664 & 678.

highest protection.³¹⁷ Consequently, according to Besselink, a major disadvantage in using the minimum standard, as the exclusive Community standard, is that the national courts will oppose it whenever it provides less protection than other standards would.³¹⁸

Instead, Besselink favours, as the Community standard, a universalised maximum standard, which is based on the sum total of relevant international and national standards that are binding upon the Member States.³¹⁹ It is a dynamic approach according to which the Court of Justice would apply the standard that offers the highest protection in every case.³²⁰ This means that fundamental rights that are only found in one or more Member States would be protected under Community law. Additionally, the aim would be the maximum standard, not some vague minimum or average standard of protection.³²¹ The reason for this preference is that the universalised maximum standard guarantees both the direct effect of Community law and the protection of fundamental rights.³²² Besselink acknowledges that the universalised maximum standard has its disadvantages. For, there is a risk of a fundamental rights spill over.³²³ A fundamental right that is recognised in at least one Member State becomes operative in all the other Member States, notwithstanding the fact that the particular right was not recognised in the other Member States as a fundamental right, or as a right at all for that matter. However, Besselink does not consider this disadvantage as an insurmountable hindrance to applying the universalised maximum standard. For, first of all, the spill over effect is limited to the sphere of Community law. Second, he cannot see why the phenomenon of spreading standards would be more unacceptable in the sphere of fundamental rights protection than in other spheres of Community law where similar effects occur.³²⁴

Second, although admitting that, from an idealist point a view, the Community should always opt for adopting the highest standard of human rights protection, Weiler completely rejects the maximalist approach asserting that it “does not work, cannot work and, for good reasons, has been rejected by the Court.”³²⁵ Additionally, he states that it would be unsatisfactory from both an individual Member State perspective as well as from a Community or Union perspective.³²⁶ For, Weiler considers it a fallacy that higher standards always are assumed desirable.³²⁷ To adopt a

³¹⁷ *Ibid.* p. 664.

³¹⁸ *Ibid.* p. 679.

³¹⁹ *Ibid.* p. 679.

³²⁰ *Ibid.* p. 670f.

³²¹ *Ibid.* p. 671.

³²² *Ibid.* p. 679.

³²³ *Ibid.* p. 673.

³²⁴ E.g. national courts now have a duty to apply proportionality tests, something that did not exist under national law. Besselink: ‘Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union’, p. 673.

³²⁵ Weiler: *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, p. 58.

³²⁶ *Ibid.* p. 58.

³²⁷ *Ibid.* p. 61.

maximalist approach would be the same as adopting the fundamental values of one particular Member State to the whole of the Community. Weiler points out two aspects of criticism in this regard. First, given that the Community is comprised of many Member States and peoples, its basic values should represent that mixture. With a maximalist approach, the core values of one Member State would be prevalent for all Member States.³²⁸ Second, a maximalist approach to human rights would result in a minimalist approach to Community government.³²⁹ For, in the national legal orders balancing would be done between different human rights – some privileging the individual, others privileging the public and the general interest. However, if a maximalist approach would be adopted by the ECJ, that balancing, on the Community level, would be very restrictive on the public and general interest.³³⁰

For Weiler, the question of which standard of protection to adopt, a minimalist or a maximalist, is not a question of high or low standards. Instead, he considers it a “call to acknowledge the Community and Union as a polity with its own separate identity and constitutional sensibilities which has to define its own fundamental balances – its own core values”.³³¹ Accordingly, the Court of Justice’s method to solve this issue can be found in *Hauer*,³³² where the Court maintains that the right to property is guaranteed in the Community legal order in accordance with the ‘ideas’ common to the constitutions of the Member States.³³³ In other words, it is not the constitutions as such that are setting the standards, but the ideas common to them.

Third, Tridimas is of the opinion that the ECJ should support neither a maximalist, nor a minimalist approach, but instead aim to the most suitable solution to the Community polity.³³⁴ As Weiler finds the solution to the standard of protection matter in *Hauer*, so does Tridimas, pointing out the Court’s reasoning that:³³⁵

“the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself, the introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community”.

³²⁸ *Ibid.*, p. 61.

³²⁹ *Ibid.* p. 61.

³³⁰ *Ibid.* p. 61.

³³¹ *Ibid.*, p. 66.

³³² Case 44/79, *Liselotte Hauer v. Land Rheinland Pfalz* [1979] ECR 3727 at para. 17.

³³³ Weiler: *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, p. 62.

³³⁴ Tridimas: *The General Principles of EC Law*, p. 213f.

³³⁵ Case 44/79, *Liselotte Hauer v. Land Rheinland Pfalz* [1979] ECR 3727 at para.14.

Fourth, de Witte argues that “[i]t is not the proper role of the European Court of Justice to enforce the combined and consolidated constitutions of the Member States, but rather to observe a European standard of protection which is ‘inspired’ by the common constitutional traditions of those Member States”.³³⁶ The judgment in *Hoechst*, concerning the inviolability of business premises, is seen as “the clearest affirmation, so far, of the fact that the common constitutional standard does not comprise the rights protected in each country separately.”³³⁷

Fifth, Judge Mancini, a member of the Court of Justice, has pronounced extra-judicially:

“[T]he Court does not have to go looking for maximum, minimum or average standards. The yardstick by which it measures the approaches adopted by the various legal systems derives from the spirit of the Treaty and the requirements of a Community which is in the process of being built up.”³³⁸

Sixth, Hartley’s point of view in this respect is that it all depends on the policy of the European Court.³³⁹ If the right at hand is generally accepted throughout the Community and it does not prejudice fundamental Community aims, it is probable that the Court would, as a matter of policy, accept it as a fundamental right under Community law, even if it was constitutionally protected in only one Member State. However, he considers that the position would be different if it was controversial right, e.g. abortion,³⁴⁰ which has already been seen in *Grogan* above.

6.4 Conclusion

The principal problem to the Community standard of protection is that fundamental rights are protected only indirectly as general principles of law and not as well defined rights. The sources of inspiration – the constitutional traditions common to the Member States and the international treaties for the protection of human rights – that the ECJ uses in defining the fundamental rights are not conclusive, in that they can create diverging standards and there is also the matter of the unpredictability of the rights system developed by the Court of Justice.

³³⁶ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 881 [my emphasis]. See also, Douglas-Scott, Sionaidh: *Constitutional Law of the European Union*, p. 452.

³³⁷ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 879.

³³⁸ Mancini, ‘Safeguarding Human Rights: The Role of the Court of Justice of the European Communities’ (Johns Hopkins University, Bologna, Occasional Paper 62, March 1990), quoted in Hartley: *The Foundations of European Community Law*, p. 136.

³³⁹ Hartley: *The Foundations of European Community Law*, p. 136.

³⁴⁰ *Ibid.* p. 136.

As to the constitutional traditions common to the Member States, the question as to what can be considered common is at issue. The case law of the Court of Justice is to some extent confusing here. For, although the ECJ states that a national fundamental right that diverges significantly in nature and degree of protection from the same right in other Member State is not to be considered as common, there are examples from the case law where Member States feel like rights have been forced upon them. There is also the question of what happens with unique fundamental rights, which only exists in one or few Member States. The ECJ succeeded in avoiding this issue in *Grogan*, where the Irish constitutional protection of right to life is transformed into a matter of restriction on one of the Community market freedoms.

The reference to international treaties for the protection of human rights is not without disadvantages. However, using the Convention on Human Rights as a source of inspiration can be advantageous in one respect, since the presumption of commonality is automatic. However, there is a risk of the Court of Justice interpreting the ECHR differently from the Court of Human Rights, the proper monitoring organ, thus creating two diverging European standards.

The answer to the question whether the Court of Justice favours a lowest standard of protection or a highest standard of protection is not clear, since the ECJ has never expressly endorsed a minimalist or maximalist approach. Nonetheless, judging from the statement of Judge Mancini,³⁴¹ the Court of Justice does not put any effort into developing a minimum, maximum or average standard. Its focal point is to ensure that the fundamental rights correspond to spirit of the Treaty as well as the requirements of the Community. So, it appears as the theories of maximalistic and minimalistic approaches have been put aside by the Court who instead applies a functional technique that concentrates on the objectives of the Community.

Likewise, it appears as if a majority of the commentators favours neither a minimum nor a maximum standard of protection. Instead, what, by some, is referred to as a 'European standard of protection' is preferred. What this means is that the ECJ should adopt the most suitable solution for the Community legal order.

As a consequence, the fact that the Court of Justice has acknowledged the constitutional traditions common to the Member States as a source of its standard of protection does not mean that the Court has incorporated the fundamental rights standards of the Member States integrally into a European standard.

Thus, as to whether or not a specific right is to be accepted as a fundamental right under Community law seems to be an issue of policy. For, as long as the right is generally accepted in the Member States and the right in

³⁴¹ See above, Chapter 6.3.

question does not interfere with fundamental Community aims it would in all probability be accepted by the Court. This would apply as well for a unique fundamental right that is constitutionally protected in only one Member State. However, this argument is not valid for rights that are controversial in some aspect.

In short, the standard of protection offered by the Court of Justice appears to be all about flexibility. The case law reveals *e.g.* neither any fixed rules as to commonality of the Member States' constitutional traditions, nor to the discussion of minimalist or maximalist standards. Instead, the Court of Justice has developed a standard of protection of fundamental rights that has been modelled according to the Community legal order, its aims and goals as well as policies. Thus, the flexibility of the standard of protection is a method to find the optimal solution from the point of view of the necessities of the European Union.

7 What is the status of the general principles of law?

7.1 How has the ECJ proceeded in identifying general principles of law?

The general principles of law have been described by the, then, President of the European Court of Justice as being “one of the main tools of judicial development of Community law”.³⁴² He underlines that the principles are not taken from nowhere, but are to be found in international law as well as in the system of the Treaty. Thus, the judges’ task in elaborating the principles is “strictly judicial” and cannot be termed “judicial activism”.³⁴³

The Court of Justice holds a unique position when it comes to the general principles of law. For, as opposed to primary and secondary legislation, which fall within the competences of the Member States and the political institutions, the definition and application of the general principles of law fall completely within the hands of the Court of Justice.³⁴⁴ This is because only a process of interpretation can establish the general principles of law and the Court of Justice has exclusive power to interpret the law with binding authority.³⁴⁵

What is the legal basis for the Court in applying unwritten general principles in a codified legal system? Nowadays we can find a textual justification for the notion of general principles of law in Article 6.2 TEU,³⁴⁶ although recourse to this principle was originally limited.³⁴⁷ However, there are in the Treaties some justifications for the recourse to general principles as a source of law. The Court of Justice derives these mainly by reference to its general duty to ensure that “the law is observed”.³⁴⁸ This article is argued to be the most important provision of the founding Treaties in that it mandates the Court to build up a system of legal principles in accordance with which the legality of Community and Member State action must be determined.³⁴⁹

How are the general principles of law drawn from other sources? General principles are derived from various sources, but the two main sources are on

³⁴² Rodriguez Iglesias: *Reflections on the General Principles of Community Law*, p. 15f.

³⁴³ *Ibid.* p. 16.

³⁴⁴ Toth: *Human Rights as General Principles of Law, in the Past and in the Future*, p. 76.

³⁴⁵ *Ibid.* p. 76.

³⁴⁶ See chapter 3.2.

³⁴⁷ Arnall: *The European Union and its Court of Justice*, p.190.

³⁴⁸ Article 220.1 EC Treaty reads: “The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.” Shaw, Jo: *Law of the European Union*, p.332.

³⁴⁹ Tridimas: *The General Principles of EC Law*, p.11.

one hand the Community treaties and, on the other, as stated above, the legal systems of the Member States.³⁵⁰

In the first case, when the Court of Justice looks to Community treaties for inspiration, it declares that a specific provision in one of the Treaties is an application of some more general principle that is not itself laid down in the Treaty. That provision is thus applied, in its own right, as a general principle of law.³⁵¹ As an example, Article 12 EC Treaty, prohibiting discrimination on grounds of nationality, can be mentioned. This article has been used by the Court to develop a general doctrine of equality, forbidding discrimination on any ground.³⁵²

In the second case, where the Court is inspired by the legal system of the Member States, there is no need that all the legal systems of the Member States should accept the principle. Hence, it is sufficient with a general acceptance of that principle or even with a trend within the national legal orders that show that there is a tendency in the Member States to accept the principle in question.³⁵³

7.2 What is the position of general principles of law in the Community hierarchy of norms?

The Community is based on a system of hierarchy of norms, under which norms of a lower tier derive their validity from norms of higher tiers. Lower ranked norms are obliged to respect higher ranked norms. At the national level, fundamental rights, which usually take the form of constitutional provisions, are treated as the highest criteria of validation. In the Community level, fundamental rights are part of the general principles of law, which are unwritten, and as a result it becomes more problematical to define their position in the Community hierarchy of norms.³⁵⁴

The Community Treaties and the protocols annexed to them constitute the primary Community law whereas regulations, directives and decisions form the secondary Community law. General principles possess a very distinct position in the EU system of hierarchy of rules. The general principles of law take a superior position in regard to other rules and may most likely be linked to the primary rules of Community law.³⁵⁵ Hence, fundamental rights, as general principles of law, provide a standard against which

³⁵⁰ Hartley: *The Foundations of European Community Law*, p.130.

³⁵¹ *Ibid.*, p.130.

³⁵² *Ibid.* p.130.

³⁵³ *Ibid.* p.131.

³⁵⁴ Kyriakou: 'The impact of the EU Charter of Fundamental Rights on the EU systems of protection of rights: much ado about nothing?'

³⁵⁵ Bernitz & Kjellgren: *Europarättens grunder*, p.104; Opinion of AG Stix-Hackl in *Case 36/02, Omega Spielhallen – und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609, para. 49.

secondary Community law is assessed.³⁵⁶ Accordingly, if a secondary rule conflicts with a general principle then the former has to give way for the general principle.³⁵⁷ Although that the general principles of law are regarded as a primary source of law, it is important to note that Court's sources of inspiration, i.e. the Member States common constitutional traditions and the international treaties for the protection of human rights, are only sources of recognition of law and are therefore not considered as primary sources of law in the Community legal order.³⁵⁸

However, the relationship between general principles and primary Community law is uncertain.³⁵⁹ The question is whether all norms of primary Community law are of equal rank or whether there is some prioritisation between them. Different commentators put forward different theories. Some argue that although general principles do not technically override the Treaties they may influence their interpretation in a decisive manner.³⁶⁰

Others argue that since the Court ultimately bases its power to apply general principles of law on the abstract concept of the 'law' and the 'rule of law', which governs the application and interpretation of the Treaties, the status of these general principles of law is necessarily superior to the basic Community Treaties.³⁶¹

“Strong arguments point to the conclusion that elemental legal principles which are based on the ultimate concept of law itself and which therefore constitute the fundamental pillars of any society take precedence even over the Community Treaties; it would appear to be inconsistent with their nature as an ethico-juridical guarantee of a fundamental, prepositive and supra-positive type if positive law of whatever type were to be given priority.”³⁶²

The AG in *Omega Spielhallen* is of the opinion that, since general principles are to be considered as part of the primary legislation they should therefore also rank in hierarchy at the same level as other primary legislation, particularly fundamental freedoms.³⁶³

³⁵⁶ Kyriakou: ‘The impact of the EU Charter of Fundamental Rights on the EU systems of protection of rights: much ado about nothing?’.

³⁵⁷ Bernitz & Kjellgren: *Europarättens grunder*, p.104; Opinion of AG Stix-Hackl in *Case 36/02, Omega Spielhallen – und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609, para. 62.

³⁵⁸ Kyriakou: ‘The impact of the EU Charter of Fundamental Rights on the EU systems of protection of rights: much ado about nothing?’.

³⁵⁹ Tridimas: *The General Principles of EC Law*, p.33.

³⁶⁰ *Ibid.* p.35.

³⁶¹ Toth: *Human Rights as General Principles of Law, in the Past and in the Future*, p. 78.

³⁶² Dausès: ‘The Protection of Fundamental Rights in the Community Legal Order’, p. 407.

³⁶³ Opinion of AG Stix-Hackl in *Case 36/02, Omega Spielhallen – und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609, para. 49.

Nonetheless, the Court of Justice has not given a comprehensive theoretical account of the hierarchical position of the general principles of law.³⁶⁴

7.3 How do general principles operate within the EC – as binding rules or as guidelines?

The solution of the Court of Justice to protect fundamental rights as unwritten general principles of law poses some crucial problems. One of them concerns their status, which has been found to be uncertain: do the general principles of law operate as binding rules, or as something vaguer, as guidelines?

In this respect, it is important to separate the general principles of law from their two extraneous sources, i.e. the constitutional traditions common to the Member States and the international treaties for the protection of human rights. For, to apply, for example, the ECHR as general principles of law must probably be distinguished from applying the Convention *per se*. Otherwise one could ask why the substantive provisions of the ECHR had not yet been incorporated as such into the Treaties.³⁶⁵

A problem with protecting fundamental rights as general principles is based on the fact that within legal theory, apart from being considered as having a fundamental, important status, principles are regarded as possessing a certain amount of generality and vagueness.³⁶⁶ Dworkin, for example, considers that the law consists not only of rules but of principles as well. He describes principles as “a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality”.³⁶⁷ According to Dworkin, rules and principles differ in the character of the direction that they give. For, rules are applicable in an all-or-nothing fashion³⁶⁸ – they conclusively determine the legal result or outcome, or in other words, either they apply or they do not – whereas principles have a dimension of weight³⁶⁹ – they give a reason for deciding a case in a certain way, but not conclusively.³⁷⁰ As a result, if two rules conflict one is valid and the other is not.³⁷¹ Conflicting principles, on

³⁶⁴ Kyriakou: ‘The impact of the EU Charter of Fundamental Rights on the EU systems of protection of rights: much ado about nothing?’.

³⁶⁵ Fischbach & Krüger, Council of Europe observers, ‘Comments on document Convent 13 CHARTE 4178/00 cb 2 JUR EN 16.3.2000’ cited in Douglas-Scott: Constitutional Law of the European Union, p 453.

³⁶⁶ Douglas-Scott: Constitutional Law of the European Union, p. 452.

³⁶⁷ Dworkin: Taking Rights Seriously, p. 22.

³⁶⁸ *Ibid.* p. 24.

³⁶⁹ *Ibid.* p. 26.

³⁷⁰ *Ibid.* p. 35.

³⁷¹ *Ibid.* p. 27.

the other hand, have to be weighed against one another and this balancing decides which principle takes precedence over the other.³⁷²

Although it has been attempted to establish a terminological distinction between non-obligatory principles of law, on the one hand, and binding rules of law, on the other, it is today generally accepted that both fall under the general category of norms.³⁷³

As regards the use of the Member States' constitutional traditions and international human rights instruments *per se*, Lawson holds that "it cannot be maintained that the Community as such is *bound* by the human rights provisions in national constitutions or by treaties like the ECHR, despite assertions otherwise".³⁷⁴ De Witte is of the same opinion stating that it is "abundantly clear that international human rights treaties and national constitutions [...] do not bind the European Court of Justice".³⁷⁵

It is clear that the Court of Justice allows itself considerable freedom when applying fundamental rights. According to its case law, the Court considers itself to be bound to draw 'inspirations'³⁷⁶ from the constitutional traditions common to the Member States whereas international human rights treaties can supply 'guidelines'.³⁷⁷ As a result the Court does not apply human rights as they have been interpreted by national courts, nor by international supervisory bodies. Instead the ECJ uses these interpretations as assistance in its task of re-creating or defining fundamental rights as general principles.³⁷⁸ The advantage of proceeding in this way is that the ECJ can model the human rights requirements as to fit the Community legal order – a legal order with its own unique characteristics.

Concerning the Community general principles of law, Dausès points out that there are indications that the principles applicable to fundamental rights amount to more than a conceptual guide. For, even though principles are of very general nature and are highly abstract they represent directly applicable norms from which the Court of Justice may derive rights.³⁷⁹ Further, he argues that the general principles of law constitute a primary source of directly binding law, a view that is supported by the opinion that the function of the judges is merely to identify the law in force. Consequently,

³⁷² *Ibid.* p. 26f.

³⁷³ Kyriakou: 'The impact of the EU Charter of Fundamental Rights on the EU systems of protection of rights: much ado about nothing?'

³⁷⁴ Lawson: *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, p. 231.

³⁷⁵ De Witte: *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, p. 878.

³⁷⁶ See *Internationale Handelsgesellschaft*, chapter 4.2.1.3.

³⁷⁷ See *Nold v. Commission*, chapter 4.2.1.4.

³⁷⁸ Lawson: *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, p. 227.

³⁷⁹ Dausès: "The Protection of Fundamental Rights in the Community Legal Order", p. 406.

the decisions of the judges are simply a source of recognition of law and do not create law.³⁸⁰

Craig and de Búrca are of the opinion that, in the approach to the sources of the Community fundamental rights, the Court of Justice stresses that the importance of the ECHR and other international declarations of rights lies not in their character as direct sources of Community law, but in the fact that they represent basic principles and common values to which all of the Member States signatories to the Conventions have committed themselves.³⁸¹

Grossot agrees and asserts that the ECHR is not a direct source of Community law, but a guideline. Thus, the Convention constitutes a kind of “soft law” within the Community legal order. Although the ECHR is not binding on the Community institutions and the ECJ is not legally bound by the case law of the ECtHR, the Convention itself may, however, produce legal effects. For, even if the ECJ is generally loyal to the interpretations of the ECHR, as earlier mentioned, the ECJ is not obliged to follow the Convention. However, as soon as reference is made to the ECHR, the Convention is transformed as to produce legal effects through the binding norm (*i.e.* the general principle).³⁸²

Consequently, the general principles constitute legally binding norms that are justiciable for the Community and its institutions and, within the sphere of Community competence, for the Member States and individuals.³⁸³

7.4 Conclusion

Principles do not fall from heaven³⁸⁴ and neither do the general principles of law for the protection of fundamental rights in the Community legal order. Noteworthy, in this case, is that the Court of Justice has exclusive power and binding authority over the definition and application of the general principles. The Court derives the legal basis for applying the unwritten general principles in the codified Community legal system from its general duty to make sure that the law is observed, in Article 220.1 TEC and Article 288 TEC.

³⁸⁰ *Ibid.* p. 406.

³⁸¹ Craig & de Búrca: EU Law – Text, cases and materials, p. 324.

³⁸² The recourse to the ECHR as a source of inspiration for the creation of a particular general principle is an example of a legal effect that may be produced. Grossot: Creation, Development and Impact of the General Principles of Community Law: Towards a *Jus Commune Europaeum?*, p. 110f.

³⁸³ Bernitz & Kjellgren: *Europarättens grunder*, p. 105; Grossot: Creation, Development and Impact of the General Principles of Community Law: Towards a *Jus Commune Europaeum?*, p. 171.

³⁸⁴ Grossot: Creation, Development and Impact of the General Principles of Community Law: Towards a *Jus Commune Europaeum?*, p. 40.

The Court of Justice has attempted to legitimise its development of the unwritten general principles of law by grounding them in positive legal sources, namely the constitutional laws of the Member States and international instruments for the protection of human rights.

Due to the fact that general principles are unwritten their hierarchical position in the Community legal order is problematic to define. The Court of Justice has not given a comprehensive theoretical account on this issue. Still, the reasoning of the Court, as well as other commentators, makes it quite clear that the general principles of law are to be regarded as primary Community law. Whether, the general principles are considered to be superior to the Treaties is harder to say, as opinions regarding this question differ. On the other hand, the sources of inspiration to which the ECJ resorts, *i.e.* the common constitutional traditions of the member states and the international treaties for the protection of human rights, do not constitute a primary source of law in the Community legal order, but are mere sources of recognition of law.

When it comes to defining the general principles of law as binding rules or as guidelines it is paramount to distinguish the use of general principles *per se*, from the use of their sources of inspiration. For, the Court of Justice expressly states, in its case law, that the constitutional traditions common to the Member States and the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories constitute ‘inspirations’ and ‘guidelines’, respectively. Thus, these are no direct source of Community law, but may instead be considered as some kind of “soft law”.

As a result, as long as the Community does not accede to the ECHR, the Convention remains a mere guideline for the ECJ, in the elaboration of the general principles of Community law. However, the ECHR starts to produce legal effects for the Community, once it has been ‘filtered’ through the general principles by the ECJ. Thereby, the Court creates an end result that is, by large, the same as if the Community was formally bound by the ECHR.

Hence, the general principles, as such, constitute legally binding norms. The fact that the very content of these principles are derived from various national and international sources does not affect the autonomy of the general principles from their sources since “the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself.”³⁸⁵

³⁸⁵ Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, paras. 14 and 15.

Hence, by interpreting rights, derived from extraneous sources, “within the framework of the structure and objectives of the Community”³⁸⁶ the Court of Justice creates autonomous general principles for the protection of fundamental rights that are binding for the Community and its institutions and, within the sphere of Community competence, for the Member States and individuals.

³⁸⁶ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para. 4.

8 Has the ECJ privileged economic integration at the expense of fundamental rights?

8.1 Economic integration in conflict with fundamental rights

8.1.1 A marketisation of the concept of fundamental rights in the EU

Considering that the EC Treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary union, it is not surprising that economic interests are so prominent within the Community, although the purpose of integration is not purely economic. First, historically, the fundamental impulse of the Community was primarily economic. Second, the main litigants before the ECJ have been companies with economic interests, something that is reflected in the case law of the Court.³⁸⁷ However, to stress free markets rights and interests can seem offensive in regard to fundamental rights since most constitutions and international human rights documents give priority to civil and political rights.³⁸⁸

The eminent position of the market is demonstrated *inter alia* in the Treaties. Article 2 TEU and Article 2 TEC illustrate that the common market still towers over all other objectives. As a trivia, it can be mentioned that the most important scientific Community journals are the 'Common Market Law Review' in the area of law and the 'Journal of Common Market Studies' when it comes to policy.³⁸⁹

There is no doubt that the market freedoms, and particularly the free movement of goods, have been highly developed by the Court of Justice. Until recently, free movement of persons had not been given such a broad scope. Regarding EU citizenship, the most highly developed aspects are market citizenship and the right to economic activity, whereas political and social rights are less developed.³⁹⁰

The case law of the Court of Justice also show signs of the influence of the market and the economical Community structure. It follows from the

³⁸⁷ Douglas-Scott: Constitutional Law of the European Union, p. 455.

³⁸⁸ *Ibid.*, p. 456.

³⁸⁹ Von Bogdandy: 'The EU as a Human Rights Organisation? Human Rights and the Core of the European Union', p. 1308.

³⁹⁰ Douglas-Scott: Constitutional Law of the European Union, p. 456.

Court's judgment in *Internationale Handelsgesellschaft* that the protection of fundamental rights "must be ensured within the framework of the structure and objectives of the Community".³⁹¹ The meaning of this is argued to be that human rights values will have to be interpreted in the light of the demands of European integration and further that fundamental rights are not considered the highest law within the Community legal order.³⁹²

Further, in *Grogan* the Court of Justice defined abortion as a "service" within the meaning of the EC Treaty³⁹³ and thus, part of the free market rights and not as a fundamental right. The Court held that "termination of pregnancy, as lawfully practised in several Member States, is a medical activity which is normally provided for remuneration and may be carried out as part of a professional activity".³⁹⁴

The fact that abortion is defined in terms of the possible commerce and profit resulting from it only, although defended by some commentators,³⁹⁵ is criticised by others. For, in this way, the Court ignores the moral and symbolic aspect of the, in this case, non-availability of abortion in a particular Member State as an expression of that state's fundamental choices about the type of society that the state in question represents.³⁹⁶ Disregarding the constitutional protection that the right to life of the unborn possesses in Ireland, the ECJ turns what on national level is a fundamental right into, on Community level, an economical activity.

8.1.2 The need of an economic nexus

The EC Treaty is mostly connected with economic matters. Accordingly, social questions are dealt with only to the extent that they are relevant to the attainment of economic objectives. It has been argued that the successive amendments of the Treaty have introduced new competencies, with the result that the original economic focus has been diluted. Nonetheless, the interpretation of fundamental rights takes place in the light of the objectives of the Community, which are still principally economic. Therefore, it appears as if the Community Treaties, with their constitutional character, are

³⁹¹ Case 11/70, *Internationale Handelsgesellschaft Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para. 4.

³⁹² Clapham: Human Rights and the European Community: A Critical Overview, p. 47.

³⁹³ Case 159/90, *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephan Grogan et al.* [1991] ECR 4685, para. 21. Article 50 EC Treaty (ex. Article 60) reads: "Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. "Services" shall in particular include: (a) activities of an industrial character; (b) activities of commercial character; (c) activities of craftsmen; (d) activities of the professions."

³⁹⁴ Case 159/90, *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephan Grogan et al.* [1991] ECR 4685, para. 18.

³⁹⁵ E.g.: O'Leary: *Aspects of the Relationship between Community Law and National Law*, p. 29.

³⁹⁶ Coppel & O'Neill: 'The European Court of Justice: Taking Rights Seriously', p. 687.

structured as to protect individuals only when they can establish some kind of economic nexus.³⁹⁷

Once again the case of *Grogan* can be used as an illustration. For, *Grogan*³⁹⁸ exemplifies how an economic connection must be asserted in order to fall within the protection of Community law. The conflict of the case was between the economic right of freedom to provide service and the right to life of the unborn, the latter being constitutionally protected in Ireland. In this case, the Court of Justice starts off by classifying abortion as a service, within the meaning of the EC Treaty,³⁹⁹ and continues, stating that the link between the activity of the students associations in Ireland and the clinics in United Kingdom is “too tenuous” for the prohibition on the distribution of information to be regarded as a restriction on services.⁴⁰⁰ For, the students associations are “not in cooperation” with the clinics and their publications are “not distributed on behalf of an economic operator established in another Member State”.⁴⁰¹ In other words, the Irish constitutional protection of the right to life of the unborn, although a restriction on the activity of the students associations, is not a prohibited restriction since the activity of the students associations fall outside the scope of Community law because it lacks an economic nexus.

The conclusion drawn from this is that Community fundamental rights are only offered to those who are part of the production and circulation process.⁴⁰² The Court holds that information provided by the students associations constitutes a “manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics established in another Member State.”⁴⁰³ Had the clinics in the United Kingdom, as an economic agent, advertised in the publications of the students associations they would have received protection against the Irish constitutional provision.⁴⁰⁴ Consequently, it seems as if Community law protects commercial advertising, but not the liberty of information through non-profit

³⁹⁷ Kyriakou: ‘The impact of the EU Charter of Fundamental Rights on the EU systems of protection of rights: much ado about nothing?’.

³⁹⁸ Case 159/90, *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephan Grogan et al.* [1991] ECR 4685.

³⁹⁹ *Ibid.* para.21.

⁴⁰⁰ *Ibid.* para. 24.

⁴⁰¹ *Ibid.* para. 25 & 26.

⁴⁰² Kyriakou: ‘The impact of the EU Charter of Fundamental Rights on the EU systems of protection of rights: much ado about nothing?’. However, see Case 413/99, *Baumbast and R v. State for the Home Department* [2002] ECR I-7091.

⁴⁰³ Case 159/90, *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephan Grogan et al.* [1991] ECR 4685, para. 26.

⁴⁰⁴ Cf. with Case C-362/88, *GB-INNO-BM v Confédération du Commerce Luxembourgeois* [1990] I-667, in which the Court held that a prohibition on the distribution of advertising was capable of constituting a barrier to the free movement of goods.

organisations, which are not economic operators within the common market.⁴⁰⁵

8.1.3 Limitations to the protection of fundamental rights

It is not uncommon in legal systems to introduce restrictions on the exercise of fundamental rights, in order to protect other fundamental values. The restrictions are usually based on regard for general interest, public order *etc.* Important to note is that any restriction must be based on and justified by the constitution in order to safeguard a greater cause.⁴⁰⁶ As far as regards the ECHR, restrictions on human rights in the Convention must be prescribed by law and be necessary in a democratic society.⁴⁰⁷

Under the case law of the Court of Justice there are limits to the protection of fundamental rights as well. A person's rights may be restricted, as long as the restrictions, firstly, "correspond to objectives of public interest pursued by the Community" and, secondly, "do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference impairing the very substance of those rights."⁴⁰⁸ However, these restrictions are not prescribed by law and consequently, concerns are raised regarding the legal certainty of the decisions of the Court in this respect.⁴⁰⁹

An ECJ approach of subjecting the fundamental rights to the objectives of the Community has been interpreted from the *Nold* case.⁴¹⁰ Apart from limitations in accordance with the public interest, the Court here adds that:

"[w]ithin the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights are left untouched."⁴¹¹

As a result from this statement, the Court has made clear that fundamental rights need to be fitted into the Community framework in order to have a meaning in EC law.⁴¹²

⁴⁰⁵ Kyriakou: 'The impact of the EU Charter of Fundamental Rights on the EU systems of protection of rights: much ado about nothing?'

⁴⁰⁶ *Ibid.*

⁴⁰⁷ See *e.g.* Article 18 and paras. 2 of Articles 8-11 ECHR.

⁴⁰⁸ Case 5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft Federal Republic of Germany* ECR [1989] 2609, para.18.

⁴⁰⁹ Kyriakou: 'The impact of the EU Charter of Fundamental Rights on the EU systems of protection of rights: much ado about nothing?'

⁴¹⁰ *Ibid.*

⁴¹¹ Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* [1974] ECR 491, at 508, para.14.

⁴¹² Kyriakou: 'The impact of the EU Charter of Fundamental Rights on the EU systems of protection of rights: much ado about nothing?'

The problem at hand is not that the Court of Justice puts restrictions on the fundamental rights, but the fact that the Court justifies restrictions on fundamental rights with reference to the objectives of the Community and, especially, the organisation of the common market. As a result, where national constitutional orders and the ECHR allows restrictions on fundamental rights provided that they are considered to be necessary in a democratic society and thereby connected with what counts as common good, the Community legal order replaces the common good with the good of the common market. Hence, the market is effectively the substitute for democracy.⁴¹³

8.2 Elevation of EC market rights to the status of fundamental rights

Since the Court of Justice does not present an abstract definition of the scope of protection for individual basic rights, problems arise in particular in distinguishing one fundamental right from another and distinguishing them from the fundamental freedoms explicitly covered by the EC Treaty.⁴¹⁴ This raises the issue whether there is hierarchical relationship between fundamental rights and market freedoms.

The Court of Justice is criticised for having confused the terminology in relation to fundamental rights and elevated the free market rights that are guaranteed in the Treaties to a status equivalent of that of fundamental rights.⁴¹⁵ For, in *ADBHU* the Court stated that:

“[i]t should be borne in mind that the principles of free movement of goods, and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance.”⁴¹⁶

Here, the Court puts the free movement of goods, one of the four market freedoms, on the same conceptual level as a fundamental right.⁴¹⁷

Further, the Court continued on the same line by stipulating, in *Heylens*, that “free access to employment is a fundamental right”.⁴¹⁸ In this respect, some commentators argue that if the free market rights are indeed elevated to the status of fundamental rights, there can be no hierarchical relationship between the free market rights, arising out from the Community Treaties,

⁴¹³ Kyriakou: ‘The impact of the EU Charter of Fundamental Rights on the EU systems of protection of rights: much ado about nothing?’.

⁴¹⁴ European Parliament Fact Sheets: 2.1.1 Respect for fundamental rights in the EU – general development.

⁴¹⁵ Coppel & O’Neill: ‘The European Court of Justice: Taking Rights Seriously’, p. 689.

⁴¹⁶ Case 240/83, *Procureur de la République v. Association de défense des brûleurs d’huiles usagées* (ADBHU) [1985] ECR 531, at 548, para 9.

⁴¹⁷ Coppel & O’Neill: ‘The European Court of Justice: Taking Rights Seriously’, p. 689

⁴¹⁸ Case 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (UNECTEF) v. Georges Heylens et al.* [1987] ECR 4098, at 4117, para. 14.

and the basic human rights, as known in national constitutions and the ECHR.⁴¹⁹

8.3 Fundamental rights not taken seriously

Concerns that the Court of Justice has manipulated the rhetorical force of the language of rights have been voiced. Hence, in reality, the Court is merely advancing the commercial goals of the common market, by being biased towards market rights, instead of protecting values that are genuinely fundamental to the human condition.⁴²⁰

In the beginning of the 1990's, a debate as to whether the Court of Justice took fundamental rights seriously started between Coppel and O'Neill, on the one hand, and Weiler and Lockhart, on the other.⁴²¹ Coppel and O'Neill argue that the Court of Justice uses the language of fundamental rights to accelerate the process of legal integration in the Community. Thus, fundamental rights are not protected for their own sake. Accordingly, rights are not taken seriously.⁴²²

Coppel and O'Neill conclude their criticisms of the Court of Justice by stating that:

“At times the Court has seemed willing to apply human rights as if they were superior to (and hence grounds for invalidating) the acts of Member States. However, at the same time, it clearly subordinates human rights to the end of closer economic integration in the Community. In doing so, the Court has treated human rights, and in particular their place in any normative hierarchy, in a confused and ambiguous way.

Evidently it is economic integration, to be achieved through the acts of Community institutions, which the Court sees as its fundamental priority. In adopting and adapting the slogan of protection of human rights the Court has seized the moral high ground. However, the high rhetoric of human rights protection can be seen as no more than a vehicle for the Court to extend the scope and impact of European law.

By using the term ‘fundamental right’ in such an instrumental way the Court refuses to take the discourse of fundamental rights seriously. It thereby devalues the notion of fundamental rights and brings its own standing into disrepute”.⁴²³

⁴¹⁹ Kyriakou: ‘The impact of the EU Charter of Fundamental Rights on the EU systems of protection of rights: much ado about nothing?’; Coppel & O'Neill: ‘The European Court of Justice: Taking Rights Seriously’, p. 690.

⁴²⁰ Craig & de Búrca: EU Law – Text, cases and materials, p. 363.

⁴²¹ Coppel & O'Neill: ‘The European Court of Justice: Taking Rights Seriously’; Weiler & Lockhart: ‘”Taking Rights Seriously” Seriously: The European Court and its Fundamental Rights Jurisprudence’

⁴²² Coppel & O'Neill: ‘The European Court of Justice: Taking Rights Seriously’, p. 670.

⁴²³ Coppel & O'Neill: ‘The European Court of Justice: Taking Rights Seriously’, p. 691f.

This criticism was met in a lengthy rebuttal by Weiler and Lockhart. The authors, claiming not to act as defenders of the Court, base their critique of Coppel and O'Neill on a lack of empirical basis for their criticism.⁴²⁴ Weiler and Lockhart maintain, after reviewing at least some of the Court's case law, that the Community rule or objective does not always prevail in the cases where the Court of Justice adopt the discourse of fundamental rights.⁴²⁵

Weiler continues on this subject, some years later, and this time writing with Alston, claiming that “[t]here is something terribly wrong with a polity which acts vigorously to realize its economic ambitions, as it clearly should, but which, at the same time, conspicuously neglects its parallel ethical and legal obligations to ensure that those policies result in the fullest possible enjoyment of human rights.”⁴²⁶

8.4 Conclusion

The economic origins of the Community seem hard to escape. Due to the prominent position of the common market and economic integration, to a certain extent, there seem to be a marketisation of the concept of fundamental rights. As a consequence of the status of the economic aspect of the Community and the marketisation of the concept of fundamental rights, it seems like there is a need to establish an economic nexus in certain cases in order to fall within the Community fundamental rights protection.

Subjecting human rights to limitations is fully legitimate. However, for reasons of legal certainty, limitations cannot be done in just anyway. In comparison with the Convention on Human Rights, which in this case may serve as the standard that the Community fundamental rights protection has to meet, the Community protection falls short. For, the ECHR stipulates that restrictions on human rights must be prescribed by law and be necessary in a democratic society. The shortcomings of the Community system, in this respect, are twofold. First, limitations on fundamental rights are not prescribed by law, but developed through the case law of the Court of Justice. Second, limitations on fundamental rights are justified by reference to the objectives of the Community. As a consequence, where national and international instruments measure the restrictions on human rights against what is legitimate in a democratic society, it appears as the Community uses the organisation of the common market as the basis for this procedure.

As previously stated, the Court of Justice assesses its fundamental rights protection within the framework of the structure and objectives of the Community. Therefore, in view of this and the above-mentioned

⁴²⁴ Weiler & Lockhart: ‘ ”Taking Rights Seriously” Seriously: The European Court and its Fundamental Rights Jurisprudence’, p. 52 & 57.

⁴²⁵ *Ibid.*, p. 84.

⁴²⁶ Alston & Weiler: An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Rights.

observations, it seems accurate to say that the Court of Justice has privileged economic integration at the expense of fundamental rights, if not conclusively, at least to some extent.

Regarding the elevation of free market rights to the status of fundamental rights it seem as the Court of Justice has put these more or less on the same hierarchical position. Only that the free market rights are expressly referred to in the Treaties, whereas the fundamental rights are found in the unwritten general principles.

9 Summary Conclusion and concluding remarks

The Court of Justice's ability to enforce a satisfactory system of human rights protection for the European Union has been questioned over the years and still is today. For, despite the changing and increasingly improved status of fundamental rights within the Community legal order, the development of the general principles doctrine and fundamental rights are subject to a number of criticisms. On the basis of these criticisms, the aim of this thesis is to make an evaluation of the performance of the European Court of Justice in the protection of fundamental rights within the Community legal order to see whether it provides for a satisfactory system of human rights protection. The concerns are rooted in the organisation's initial lack of a standard of human rights protection as well as the original focus on economic integration and the creation of the common market. For, these two circumstances have over time compelled the Court of Justice to judicially develop a fundamental rights protection through its case law. This formula of general principles of law has later been codified, however, there still does not exist a written Community corpus of rights.

In the course of this thesis, we have come across a variety of subject matters that are criticised and pointed out as a weaknesses in the ECJ's fundamental rights protection. Here follows a recapitulation of the most striking ones.

As the judicial power of the European Union, the Court of Justice must provide effective legal protection to individuals for the rights awarded to them under Community law. For, the Community is based on the rule of law and a requirement of this rule is providing effective legal protection and access to justice. So, if the notion of ensuring respect for human rights is to be taken seriously, the mere provision of formal judicial remedies is not considered a sufficient and effective guarantee.

Within the Community legal order, formal remedies for access to the Court of Justice are certainly there. Citizens are provided with direct actions, indirect action, and access through preliminary rulings as well as action for damages. Nevertheless, when it comes to direct action, the mechanism provided for is not satisfactory. For, private litigants are placed in a non-privileged category, under which any natural or legal person falls, limiting them regarding the type of Community act they want to strike, as well as placing an additional test – which have proved to be virtually impossible to meet - of being directly and individually concerned by the act itself upon them. Apart from the highly restrictive standing for individuals, the inadequacy of the direct action mechanism is to be found in the discrepancy between the Community institutions and the Member States, on one hand, and private parties, on the other.

Considering the restrictive standard and the criterion of individual concern, it seems somewhat absurd and contradictory that the ECJ in the same breath first can assert that the standing rules in Article 230 EC Treaty justify the broadest interpretation and that the rights of private parties to bring an action against the Court must not be interpreted restrictively, and then lay down the restrictive Plaumann test regarding the criterion of being individually concerned.

Additionally, it seems odd that the ECJ can question the efficiency of its judicial protection of individuals in fundamental right cases and be levelled with criticisms, not only from various scholars but also from the Court of First Instance and Advocate Generals, regarding the restrictive access, as such, as well as the complexity and inconsistency in the application of the Plaumann test, and still make no efforts in trying to change.

So, whereas the criticisms towards the access to justice issue appear legitimate and the mechanisms for litigating fundamental rights violations before the ECJ leaves room for improvement, the Court of Justice maintains the *status quo*, thus, denying adequate access to justice for individuals seeking to vindicate their fundamental rights.

As to the Community standard of protection the basic question is how do EU citizens know what rights are protected by the ECJ as fundamental rights, considering that the EU do not have a written code of rights. The main problem of this question is that fundamental rights are protected only indirectly as general principles of law and not as well defined rights. The two sources of inspiration, i.e. the constitutional traditions common to the Member States and the international treaties for the protection of human rights, which the ECJ uses in defining the fundamental rights are not conclusive. For, these sources can create diverging standards. Additionally, there is also the matter of the unpredictability of the rights system developed by the Court of Justice.

The sources of inspirations that the ECJ applies to define its standard of protection are just that, inspirational sources. This means that the rights protected under constitutional traditions common to the Member States and the international treaties for the protection of human rights are not incorporated integrally into an EU standard of protection. Instead the ECJ, disregarding all theories of minimal and maximal standards, opts for the most suitable solution for the Community legal order.

Thus, as to whether or not a specific right is to be accepted as a fundamental right under Community law seems to be an issue of policy. For, as long as the right is generally accepted in the Member States and the right in question does not interfere with fundamental Community aims it would in all probability be accepted by the Court.

So, straining the line of reasoning, it can be argued that an EU citizen cannot really know what fundamental rights are protected under Community

law, at least not just by looking at and comparing with the sources of inspirations. For, although a right may be protected in most Member States and by the ECHR, the ECJ can decide that it does not fit under the objectives of the Community.

Instead, focusing on the objectives of the Community, its aims and goals as well as policies, the Court of Justice has developed a standard of protection of fundamental rights that has been modelled according to the Community legal order. Using a flexible approach, the ECJ can find the most suitable solution to its standard of protection of fundamental rights.

When it comes to the status of the unwritten general principles of law three issues are at hand, first, their legal basis, second their hierarchical position in Community law and third, their ability to function as binding rules or guidelines.

In the case of the legal basis of general principles of law, the exclusive power and binding authority of the ECJ over the definition and application of the general principles is striking. For, usually primary and secondary legislation fall under the competences of the political institutions as well as the Member States. Nevertheless, recourse to using the general principles as a source of law is found in the reference to the Court's general duty to make sure that the law is observed.

The issue as to the position of the general principles in the Community hierarchy of norms is due to their unwritten character. With all certainty, the general principles are to be regarded as primary law. However, whether they out-rank the Treaties is difficult to determine as opinions to this matter differ and the ECJ has not given a comprehensive theoretical account in this regard. However, it is important to separate the general principles from their sources of inspiration, i.e. the constitutional traditions common to the Member States and the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. For, the sources of inspiration do not constitute primary law, but are just sources of recognition of law.

This distinction between the general principles *per se* from their sources of inspiration is equally important in the matter of defining whether the general principles are binding rules or guidelines. For, whereas the general principles as such are binding rules and a direct source of Community law, their sources of inspirations are mere inspirations and guidelines. Hence, the general principles, *per se*, constitute legally binding norms; their sources of inspirations do not, although the rights protected under the two may be the same. In order for a right to become legally binding within Community law it has to be filtered through the general principles of law by the ECJ.

Subsequently, by interpreting rights, derived from extraneous sources, within the framework of the structure and objectives of the Community the Court of Justice creates autonomous general principles for the protection of

fundamental rights that are binding for the Community and its institutions and, within the sphere of Community competence, for the Member States and individuals.

Concerning the issues of the ECJ potentially privileging economic integration at the expense of fundamental rights it is hard to disregard the prominent position of economic interests since the European Communities were created in order to combat the threat of the economical deterioration of the continent in the aftermath of the Second World War. This is enhanced by the aims of the EC Treaty to achieve economic integration leading to the establishment of an internal market and economic and monetary union.

The search for economic integration appears to have entailed a marketisation of the concept of fundamental rights. As an example, it seems unlikely that the Court of Human Rights would determine abortion as an economic right of freedom to provide service, as was done by the ECJ, instead of as a right to life of the unborn. Furthermore, it seems like the search for economic integration has entailed a need to establish an economic nexus in certain cases in order to fall within the Community fundamental rights protection.

From an economic integration versus fundamental rights point of view, one aspect that becomes particularly interesting is when fundamental rights are limited by the ECJ. Subjecting human rights to limitations is fully legitimate; however, this must be done under certain restrictions. National constitutional orders and the ECHR allows restrictions on fundamental rights provided that they are considered to be necessary in a democratic society and thereby connected with what counts as common good. The Community legal order, in contrast, replaces the common good with the good of the common market. Hence, the market effectively becomes the substitute for democracy. Since democracy is one of the founding principles, set out in Article 6 TEU, of the European Union, it fits ill to substitute it with the internal market. The common market is not a founding principle of the Union; it is an objective that is set out to be established in achieving economic integration.

As a result of the jurisprudential nature of the Community fundamental rights protection, the free market rights, which are referred to in the Treaties, seem to enjoy a stronger, or at least a visually stronger, degree of protection than the fundamental rights, which are found in the unwritten general principles. This is despite of the ECJ seemingly having put them on the same hierarchical position.

Considering that the Court of Justice assesses its fundamental rights protection within the framework of the structure and objectives of the Community, it seems accurate to say that there are tendencies that economic integration is privileged at the expense of fundamental rights.

The general thought summing up the different aspects that have been under examination in this thesis is that the Court of Justice allows itself considerable freedom and flexibility when applying fundamental rights. The advantage of flexibility, which the jurisprudential nature of the general principles of law protection offers, also entails a number of uncertainties. Throughout this thesis various characteristics of the Community rights system have been pointed out as inconsistent, unpredictable, inconclusive and lacking in legal certainty. Furthermore, it has been pointed out that the ECJ enjoys powerful control over the fundamental rights protection and to a certain point appears to be lacking in democratic legitimacy. Therefore it seems as the Court of Justice fails to offer the European citizens a Community right corpus that is coherent and definite.

Concerning the issue of principles versus policy, which is presented in chapter two, the conducting of this thesis has led the author to the following conclusion: the moral basis for the Community protection of rights is principles, but the problem is that the Court of Justice actually deals with policy.

In other words, while the high rhetoric of the Community fundamental rights protection is anchored in the individual and the rights of individuals, in practice it is the collective goals of the Community and the general interest of the society as a whole that steer the Court of Justice in its decisions.

Illustrations of the policy driven approach from the part of the ECJ can be seen in its case law. For example, in the judgments of *Internationale Handelsgesellschaft* and *Hauer*, the Courts maintains that the protection of fundamental rights “must be ensured within the framework of the structure and objectives of the Community” as well as that “the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself”. Accordingly, the Court of Justice’s adjudication in fundamental rights cases considers first and foremost the consequences of the specific fundamental right on the unity of the common market and the cohesion of the Community. Thereby, the human right values are interpreted in the light of the demands of the European integration. This means that the fundamental rights, which the EU claims to be founded upon in Article 6 TEU, are not considered the highest law within the Community legal order. The conclusion to draw from this is that principles are subordinate to policy.

As a result, this approach of the Court of Justice, to rest their judgments on arguments of political policy, conflicts with the opinion of Dworkin, according to whom adjudication should characteristically be a matter of principle rather than policy.

Summing up all information presented above and answering the question set out in the subtitle of this thesis, it can be concluded that the Court of Justice offers a satisfactory fundamental rights protection for Community purposes.

However, it does not offer a satisfactory system for the protection of human rights.

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