

Protecting Human Rights Within the European Union: Who Is Better Qualified to Do the Job—the European Court of Justice or the European Court of Human Rights?*

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I. INTRODUCTION

This Article will deal with the question of human rights in the context of the European Union, in particular what approach should be followed to protect and implement them most efficiently.

In order to find out what *should* be done in the future, it is necessary as a first step to clarify what *is* the *status quo* at the present time. The EC Treaty¹ does not *per se* protect human rights,² apart from the four freedoms³ and the prohibition of discrimination.⁴ The question of why the framers of the Treaties⁵ did not incorporate a fully fledged human rights system has to remain speculative. Pure forgetfulness on the framers' side does not seem convincing; the possible reasons must be more subtle.⁶

For the Coal and Steel Community the explanations are very obvious: the addressees of the High Authority (the lawmaking power) were first and foremost the Member States and large industrial undertakings, rather than the individual. Additionally, at the end of World War II when reconstruction was the "top priority", there was neither a developed system of social and economic rights nor was the need to develop such rights perceived as a primary goal.⁷

As to the European Economic Community (EEC), the explanation is more complex. "The Treaty of Rome, which contains chapters on social policy, movement of migrants, right of establishment, and the like, could hardly have been regarded as immune to violations of fundamental human rights, even if only the traditionally recognized rights were considered."⁸ Thus the explanation must be found elsewhere. From the very beginning Member States seemed to be concerned not to lose control over the *homunculus* (EEC) they had created.

1. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, O.J. (C 325) 33 (2002)—consolidated text [hereinafter EC Treaty].

2. Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in *THE EU AND HUMAN RIGHTS* 859, 860 (Philip Alston ed., 1999); Seja Parmar, *International Human Rights and the EU Charter*, 8 MAASTRICHT J. 351, 355-56 (2001).

3. INGOLF PERNICE, *GRUNDRECHTGEHALTE IM EUROPÄISCHEN GEMEINSCHAFTSRECHT* 52-53 (1979).

4. Article 6 EC Treaty, *supra* note 1.

5. *Treaty Establishing the European Coal and Steel Community (1951)*—expired in 2002, *Treaty Establishing the European Economic Community (1957)*, and *Treaty Establishing the European Atomic Energy Community (1957)*.

6. Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights within the Legal order of the European Communities*, 61 WASH. L. REV. 1103, 1111 (1986).

7. *Id.* at 1111.

8. *Id.*

The judicial review provisions of the Treaty were intended in large measure to protect against encroachments by the Community of the rights of the Member State, rather than the rights of individuals. . . . If that was the spirit of the original system of judicial review it is little wonder that a bill of rights would not have seemed particularly necessary. But even if not necessary what harm could be created? It may be that in the political climate prevailing in 1957 at least some of the Member States were fearful of any expansion of powers to be granted to the Community's central organs. In ratifying the Treaty of Rome, the Member States, no longer as idealistic as in the immediate postwar era, were committing themselves to 'an unprecedented experiment in international history. But if they were worried about expansion of competences, would not a bill of rights offer means of curtailing Community organs even further?

Paradoxically as it may sound, the Member States might have feared that the very listing of rights that *must not* be encroached upon might have become an invitation to extend enumerated powers and competences to the limits of those rights.⁹

However, on December 7, 2000, the Intergovernmental Conference of Nice "solemnly proclaimed" a Charter of Fundamental Rights.¹⁰ In June 2003 the Convention¹¹ finished its work on Europe's Constitution¹² and incorporated the EU Charter.¹³ What happened between the times of Adenauer/de Gaulle and Schröder/Chirac?¹⁴ Between the decisions of *Stork*¹⁵ and *Geitling*¹⁶ in the 1950s and *Konstantinidis*¹⁷ in the 1990s, fundamental changes in the "architecture of the Community legal order

9. *Id.* at 1111-12.

10. Bruno de Witte, *The Legal Status of the Charta: Vital Question or Non-Issue*, 8 MAASTRICHT J. 82, 81 (2001); Charter of Fundamental Rights of the European Union, 2000 O.J. (C364) 1 [hereinafter EU Charter].

11. An allusion to the Philadelphia Convention?!

12. TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, O.J. (C 310) 1 (2004) [hereinafter EU Constitution]. However, at the time of writing this article the future of the EU Constitution is uncertain following its rejection in referenda by the people of France and the Netherlands. Currently the Heads of State are discussing whether the process of ratification should be continued. According to the "Declaration on the ratification of the Treaty Establishing a Constitution for Europe" (2004 O.J., 364) the matter of difficulties in proceeding with ratification will be referred to the European Council if four-fifths of the Member States have ratified the EU Constitution. In my opinion this demands continuation of ratification.

13. BULL.EU 6/2003, I.1.

14. Although it seems that Schröder and Chirac do not have visions for the Union to the extent that Germany's foreign minister Joschka Fischer does: see Fischer's speech "Vom Staatenverbund zur Föderation—Gedanken über die Finalität der europäischen Integration" (May 12, 2000), available at <http://www.auswaertiges-amt.de/www/de/infoservice/> (Feb. 10, 2005).

15. Case 1/58, *Stork v. High Authority*, English Special Edition 1959 E.C.R. 17.

16. Case 13/60, *Geitling v. High Authority*, English Special Edition 1962 E.C.R. 83.

17. Case 168/91, *Christos Konstantinidis v. Stadt Altensteig-Standesamt*, 1993 E.C.R. I-1119 [hereinafter *Christos Konstantinidis*].

[have taken place]. In 1957, neither the doctrine of direct effect nor the doctrine of supremacy had emerged.”¹⁸

Thus the self-perception of the European Court of Justice [hereinafter ECJ] changed. Weiler argues that the sudden interest of the Court in human rights was less of a benevolent interest than a product of the

new constitutional configuration of the Community—a configuration to the evolution of which the Court itself contributed. . . . Through its own decision the “new legal order” was fashioned and the Treaty became a surrogate constitution. In the Court’s own self-perception another profound metamorphosis had taken place. No longer did the Court see itself as an international tribunal determined to preserve the *autonomy* of the system it oversaw, but rather a constitutional court of a supranational order determined to preserve the *integrity, unity, and uniformity* of the system it had evolved.¹⁹

As I will examine in the course of this article, the doctrine of primacy²⁰ of EU law over national laws guarantees uniformity, which is necessary for a smoothly functioning Union; however, this doctrine has a severe impact on the Member States. What Kelsen predicted in his book *Pure Theory of Law* as a future development in international law has at least taken place within the EU system.

The entire legally technical movement, as outlined here, has—in the analysis—the tendency to blur the border line between international and national law, so that as the ultimate goal of the legal development directed toward increasing centralization, appears the organizational unity of a universal legal community, that is, the emergence of a world state. At this time, however, there is no such a thing.²¹

Having established these doctrines, the ECJ was challenged by national courts, most prominently by the German *Bundesverfassungsgericht*

18. Weiler, *supra* note 6, at 1113.

19. *Id.* at 1118-19. Engel argues that the self-vision of the ECJ is less one of a fundamental human rights protector and is more of an integrative body (“motor of integration”). The Court is more concerned about overcoming institutional blockages and sees itself therefore more as a political body. Christoph Engel, *The European Charter of Fundamental Rights*, 7 EUR. L.J. 151, 156 (2001).

20. Peter Pernthaler, *Die neue Doppelverfassung Österreichs*, in STAAT UND RECHT. FESTSCHRIFT FÜR GÜNTHER WINKLER 773, 779 (Herbert Haller et al. eds., 1997): “*Anwendungsvorrang*” citing Case 14/64, *Costa v. Ente Nazionale per l’Energia Elettrica (Enel)*, English Special Edition 1964 E.C.R. 585 [hereinafter *Costa v. Enel*].

21. HANS KELSEN, *PURE THEORY OF LAW* 328 (Max Knight trans., University of California Press 2d ed. 1967) (1960).

with its *Solange I*²² decision. The *Bundesverfassungsgericht* questioned the doctrine of supremacy if a rule of secondary EU law does not meet certain human rights standards.²³ This pending threat was certainly an additional incentive for the ECJ to remain on the path it had started to take with *Stauder*²⁴ in 1969 and to continue developing a human rights case law by applying an *unwritten* “Community Bill of Rights.”²⁵

In *Stauder* the ECJ reasoned that “fundamental rights might be part of the general principles,”²⁶ and this was followed by the judgment of *Internationale Handelsgesellschaft*²⁷, “where the ECJ added that it would draw inspiration from the common constitutional doctrines in shaping its general principles of Community law.”²⁸ This emerging “Bill of Rights” was enriched in 1974 (*Nold*²⁹) where the Court held that it can also be inspired by international human rights.³⁰ In *Hauer*³¹ the Court “considered the ECHR [European Convention] and the national constitutional law in some detail.”³²

This practice by the Court was later approved by the Member States when establishing Article F TEU³³ (Treaty of Maastricht in 1992)³⁴ and Art 6 TEU³⁵ (Treaty of Amsterdam in 1997).³⁶

Around 1990 the Court held in the cases *Wachauf*⁶⁷ and *Elliniki Radiophonia*³⁸ “that its review powers also extended to *Member States*’

22. BVerfGE 37, 271; contemporary settled with the *Solange II—Beschluss* of the German Constitutional Court (BVerfGE 73, 339 (340)), which basically says that as long as the ECJ offers effective protection of Fundamental Rights—comparable to the level of protection by the German Constitutional Court—the national court will refrain from judging EC law, whenever it is applied by the German Authority, whether it meets certain Fundamental Rights criteria or not.

23. Thomas Giegerich, *Luxemburg, Karlsruhe, Straßburg—Dreistufiger Grundrechtsschutz in Europa?*, 50 ZAöRV, 836, 855-56 (1990).

24. Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419.

25. de Witte, *supra* note 2, at 864 & 867 n.27 (for further examples dealing with the EU and Human Rights).

26. *Id.* at 867.

27. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125.

28. de Witte, *supra* note 2, at 867.

29. Case 4/73, *Firma J. Nold KG v. E.C. Commission*, 1977 E.C.R. 1.

30. de Witte, *supra* note 2, at 867.

31. Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727.

32. de Witte, *supra* note 2, at 867.

33. TREATY ON EUROPEAN UNION, O.J. (C 191), 1 (1992).

34. THE EU CHARTER OF FUNDAMENTAL RIGHTS. TEXT AND COMMENTARIES 79 (Kim Feus ed., 2000).

35. TREATY OF AMSTERDAM, O.J. (C 340), 1 (1997).

36. de Witte, *supra* note 2, at 866; see Philip Alston & Joseph H. H. Weiler, *An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights*, in THE EU AND HUMAN RIGHTS 3, 17-18 (Philip Alston ed., 1999), available at <http://www.jeanmonnetprogram.org/papers/papers99.html> (Feb. 10, 2005).

acts, but only to the extent that those acts came within the sphere of Community law.”³⁹

With its famous *Opinion 2/94* the ECJ blocked the EC’s accession to the *Convention for the Protection of Human Rights and Fundamental Freedoms*.⁴⁰

The ECJ hastened to add, in its *Opinion 2/94*, that accession to the ECHR could be made possible by way of an amendment of the EC Treaty. . . . Therefore, until a new IGC for the revision of the Treaties is convened, the accession of either the EU or the EC to the Convention is no longer under consideration.⁴¹

This—in the Court’s eyes—necessary revision of the Treaties has now been performed as Article I-9 of the EU Constitution spells out:

1. *The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.*
2. *The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Constitution.*⁴²

37. Case 5/88, *Hubert Wachauf v. The State* (Bundesamt für Ernährung und Forstwirtschaft) (Federal Office for Food and Forestry), 1989 E.C.R. 2609.

38. Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and Others*, 1991 E.C.R. I-2925.

39. de Witte, *supra* note 2, at 867.

40. Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No.: 005), Rome 4, Nov. 1950, Art 19 [hereinafter European Convention]. For more details on this issue, see generally SEBASTIAN WINKLER, *DER BEITRITT DER EUROPÄISCHEN GEMEINSCHAFTEN ZUR EUROPÄISCHEN MENSCHENRECHTSKONVENTION* (2000).

41. de Witte, *supra* note 2, at 890.

42. These questions are likely to trigger again the hotly disputed question about the “end point” (*Finalität*) of the EU. Some Member States might be concerned that the EU could mutate step by step into a state (see Engel, *supra* note 19, at 159; see Jean-Claude Piris, *Does the European Union have a Constitution? Does it need one*, 24 EUR. L. REV. 557, 566-70 (1999)). Elaborating this question in more detail goes beyond the scope of this paper. Moreover, it seems to be foremost a dispute about terminology and definition. Clearly, the EU could become a state if the Member States wanted it to; but for now this seems unlikely (Stefan Griller, *Der Anwendungsbereich der Grundrechtscharta und das Verhältnis zu sonstigen Gemeinschaftsrechten, Rechten aus der EMRK und zu verfassungsgesetzlich gewährleisteten Rechten*, in *GRUNDRECHTE FÜR EUROPA. DIE EUROPÄISCHE UNION NACH NIZZA* 131, 132 (Alfred Duschaneck & Stefan Griller eds., 2002)). Thus, the result is an entity between an international organization and a state. Given the emotions involved in the issue of the “final destiny” of the Union it does not seem that Member States will solve this question *uno acto*. What could happen one day is that the international community might raise doubts about the “self-qualification” of the Union as a non-state actor (Stefan Griller, *Der Anwendungsbereich der Grundrechtscharta und das Verhältnis zu sonstigen Gemeinschaftsrechten, Rechten aus der EMRK und zu*

The Constitution paves the way for two possible mechanisms to protect human rights: one is the implementation of the EU Charter, the other is the accession of the Union to the Convention.⁴³ I will scrutinize these options free from the constraints put on political leaders by *Realpolitik*.

According to de Witte, many authors considered accession to the European Convention and the European Social Charter⁴⁴ to be more important than the drafting of a new Charter of fundamental rights for the EU.⁴⁵ The *status quo* unfolds a Constitution that embraces both of these concepts rather than choosing one over the other. However, the thesis of this paper is to show that the first and foremost consideration of the Union must be the establishment of its own human rights regime and eventually—in a second step—to consider joining the system of the European Convention (but only if the Union has established a solid internal human rights system).

II. THREE EXEMPLARY CASES (CASE STUDIES)

The following Part will focus on three cases in depth. Each case will highlight different problems concerning the relationship between the ECJ and the European Court of Human Rights (hereinafter ECHR).⁴⁶

A. *Matthews v. United Kingdom*⁴⁷

1. The Facts

In this case the European Court of Human Rights⁴⁸ decided the question whether a British Citizen residing in Gibraltar is eligible to vote in European Parliamentary elections.

Gibraltar is a dependent territory of the United Kingdom. It forms part of Her Majesty the Queen's Dominions, but not part of the United Kingdom. The United Kingdom parliament has the ultimate authority to legislate for Gibraltar, but in practice exercises it rarely. . . .

verfassungsgesetzlich gewährleisteten Rechten, in GRUNDRECHTE FÜR EUROPA. DIE EUROPÄISCHE UNION NACH NIZZA 132 (Alfred Duschanek & Stefan Griller eds., 2002)).

43. Zuleeg reasons that the current level of protection by the ECJ is sufficient and that therefore no change of the *status quo* is necessary (*see generally* Manfred Zuleeg, *Zum Verhältnis nationaler und europäischer Grundrechte*, 27 EUGRZ, 511 (2000)).

44. European Social Charter (CETS No.: 035), Turin 18, Oct. 19, 1961.

45. de Witte, *supra* note 10, at 83 n.10.

46. The author is aware, however, that neither the selection of the cases and questions posed are complete, nor is the decision concerning what a particular case stands for absolute.

47. *Denise Matthews v. The United Kingdom*, App. No. 24833/94, 20 HUM. RTS. L.J. (1999), 4 [hereinafter *Matthews*]

48. Not the ECJ!

Relevant EC legislation becomes part of Gibraltar law in the same way as in other parts of the Union: regulations are directly applicable, and directives and other legal acts of the EC which call for domestic legislation are transposed by domestic primary or secondary legislation.⁴⁹

Of particular interest for this article is the question of “whether Article 3 of Protocol No. 1 [of the European Convention] is applicable to an organ such as the European Parliament.”⁵⁰ Because the European Convention is a living instrument it is of little concern that the body of the European Parliament (hereinafter EP) was not explicitly envisaged by the drafters of the Convention.⁵¹ The Court has always endeavored to develop the meaning of the Convention in line with present-day demands.⁵² In order to show how EU law works (namely similar to domestic law), in its judgment the Human Rights Court refers to case law of the ECJ that deals with the application of EU-law (*Costa v. ENEL*⁵³ etc.).⁵⁴ The Court further elaborated that

[i]n the present case, there has been no submission that there exist alternative means of providing for electoral representation of population of Gibraltar in the European Parliament, and the Court finds no indication of any.

The Court thus considers that to accept the Government’s contention that the sphere of activities of the European Parliament falls outside the scope of Article 3 of Protocol No. 1 would risk undermining one of the fundamental tools by which “effective political democracy” can be maintained.⁵⁵

Although the UK government offered two valid arguments against the assessment of the EP as a legislator—it lacks “the power to initiate legislation and the power to adopt it”⁵⁶—the Court nevertheless underlined the new vital role of the EP in the legislative process. The Court acknowledged the *sui generis* character⁵⁷ of the EU⁵⁸ when it stated:

49. Matthews, *supra* note 47, ¶¶ 8, 13.

50. *Id.* ¶¶ 35-36.

51. *Id.* ¶ 39.

52. *Id.*; Hans Christian Krüger & Jörg Polakiewicz, *Vorschläge für ein kohärentes System des Menschenrechtsschutzes in Europa*, 28 EUGRZ 92, 94 (2001).

53. *Costa v. Enel*, *supra* note 20.

54. Matthews, *supra* note 47, ¶ 41.

55. *Id.* ¶¶ 42-43.

56. *Id.* ¶ 45; Pernthaler *supra* note 20, at 780-81 (with further references). But see Ress who argues that currently, on most occasions the Council cannot make any decisions without the consent of the EP (Georg Ress, *Das Europäische Parlament als Gesetzgeber* 2 ZEUS, 219, 226-29 (1999)).

57. See generally Jürgen Bröhmer, *Das Europäische Parlament: Echtes Legislativorgan oder bloßes Hilfsorgan im legislativen Prozess?*, 2 ZEUS 197 (1999).

58. Matthews, *supra* note 47, ¶ 48.

[T]he European Community does not follow in every respect the pattern common in many States of a more or less strict division of powers between the executive and the legislature. Rather, the legislative process in the EC involves the participation of the European Parliament, the Council and the European Commission. . . . Since the Maastricht Treaty, the European Parliament's powers are no longer expressed to be "advisory and supervisory". The removal of these words must be taken as an indication that the European Parliament has moved away from being a purely consultative body, and has moved towards being a body with a decisive role to play in the legislative process of the European Community.⁵⁹

2. The "Coming Closer" of the Two Courts and the Resulting Question of Hierarchy Between the Two Courts

It is not without irony that it was the *European Court of Human Rights* that described the EP as an important factor of the democratic political system within the EU.⁶⁰

The question addressed in the *Matthews* case was whether it is possible for a State to escape into international law in order to free itself from the obligations imposed on it by the European Convention.⁶¹ The German *Bundesverfassungsgericht* addressed a similar question in its *Solange I* and *II* decisions; however, they addressed it from the perspective of a *national* Supreme Court.

A comparison with the Court's judgment in *Waite and Kennedy v. Germany*, which was delivered on the same day as *Matthews*, makes this point clear. The applicants, who had worked for the European Space Agency, sought to bring proceedings concerning the termination of their employment contracts against the Agency before the German courts. These actions were declared inadmissible by the German courts, as the Agency enjoyed immunity from the jurisdiction of the German courts under the European Space Agency Convention. The applicants argued that their right of access to a court under Article 6(1) of the Convention had been violated. In rejecting this application, the Court repeated that it would be incompatible with the Convention for the Contracting States to be

59. *Id.* ¶¶ 48-50.

60. Sebastian Winkler, *Der Europäische Gerichtshof für Menschenrechte, das Europäische Parlament und der Schutz der Konventionsgrundrechte im Europäischen Gemeinschaftsrecht*, 28 EUGRZ 18, 19 (2001).

61. *Id.* at 24: the author is referring to a common practice of states called *Flucht ins Privatrecht* (escape into private law), which means that the state tries to act not as the sovereign but rather as a private person in order to avoid, for example, being held responsible for violations of human rights.

absolved from their responsibility under the Convention when they transferred powers to an international organization.⁶²

To draw a conclusion from this decision: “When no other tribunal is competent to review an agreement between the Contracting Parties or acts adopted thereunder, the Court will consider complaints that these acts violate the Convention.”⁶³ With the ECJ the EU-system seems to have a competent tribunal. “It is not clear, however, whether the Court will scrutinise the decisions of such bodies to ensure that they do in fact safeguard Convention rights.”⁶⁴ Ress argues that if the ECJ misinterprets rights vested by the European Convention a complaint should be admissible to the ECHR.⁶⁵

The question raised in *Matthews* addresses an area in which the ECJ cannot operate; according to Article 220 EC Treaty, the ECJ cannot interpret the Treaty itself. “Indeed, the 1976 Act⁶⁶ [primary law]⁶⁷ cannot be challenged before the European Court of Justice for the very reason that it is not a ‘normal’ act of the Community, but is a treaty within the Community legal order.”⁶⁸ Very difficult questions regarding the liability of the Member States result from this judgment. Are all of them responsible for a breach of the European Convention or can a single Member State be singled out?⁶⁹

Furthermore, the dissenting judges in *Matthews* highlighted another problem, which was also underlined by the UK: It would have been impossible for the United Kingdom to make the necessary modification of the Treaty unilaterally in order to fulfill the Court’s ruling as this would have required a unanimous decision by all Member States.⁷⁰

Another issue related to the EP that might arise when considering the willingness to decide *Matthews* on its merits: it is doubtful that the

62. Toby King, *Ensuring human rights review of intergovernmental acts in Europe*, 25 EUR. L. REV. 79, 84-85 (2000).

63. *Id.* at 85

64. *Id.*

65. Georg Ress, *Menschenrechte, europäisches Gemeinschaftsrecht und nationales Verfassungsrecht*, in STAAT UND RECHT. FESTSCHRIFT FÜR GÜNTHER WINKLER 897, 920-21 (Herbert Haller et al. eds., 1997).

66. Decision of the representatives of the Member States meeting in the council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage, O.J. (L 278) 1 (1976) [hereinafter 1976 Act].

67. Brid Moriary, *EC Accession to the ECHR*, 3 HIBERNIAN L.J. 13, 27 (2002).

68. *Matthews* *supra* note 47, ¶ 33; see also Georg Ress, *Die Europäische Grundrechtscharta und das Verhältnis zwischen EGMR, EuGH und den nationalen Verfassungsgerichten*, in GRUNDRECHTE FÜR EUROPA. DIE EUROPÄISCHE UNION NACH NIZZA 183, 199 (Alfred Duschaneck & Stefan Griller eds., 2002).

69. Winkler, *supra* note 60, at 23-26.

70. *Matthews*, *supra* note 47, ¶ 9 (dissenting opinion).

current election system for the parliament is compatible with Art 3 of Protocol No. 1.⁷¹ The ECHR could even “intervene” concerning the hotly disputed political question of how many representatives in Parliament is one Member State entitled. In terms of the equality of votes,⁷² the current election system is disproportionate. Austria can send seventeen representatives whereas Germany, which has ten times more inhabitants, can only send ninety nine.⁷³ Ironically the ECHR could become a “motor” for reform where the ECJ is excluded by the Heads of State for political reasons.

“Until this decision [Matthews] the supranational and international legal orders had maintained a cease fire under which they regarded themselves as separate, but, most probably, equal. There was no hierarchical subordination or supraordination between both legal orders.”⁷⁴

Although in this particular case the ECJ could not have challenged the 1976 EC Act, it is nevertheless not hard to imagine that the question under dispute could also have reached the ECJ by other means. Ms Matthews could have asserted on the national level that the Electoral Registration Office in Gibraltar had violated her rights vested in the EC Treaty by not allowing her to register to vote in the election; accordingly she could have requested that the national court ask for a preliminary ruling on this issue by the ECJ.⁷⁵

“The relevance of deciding about the relations between the different jurisdictions which might influence the human rights’ standard of protection in European law is increasing rather than declining in recent years. Who should, in the end, be the final arbiter of protection of human rights in Europe?”⁷⁶ Although the cobweb of protection is becoming denser, a cobweb may become entangled in itself, especially if it becomes too dense.

71. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 009), Paris 20 Mar. 1952; Winkler, *supra* note 60, at 21 (concerning the various different election systems which apply for the EP).

72. Winkler, *supra* note 60, at 22.

73. Protocol of the Enlargement of the European Union, EC Treaty, *supra* note 1, art. 2.

74. Iris Canor, *Primus inter pares. Who Is the Ultimate Guardian of Fundamental Rights in Europe?*, 25 EUR. L. REV. 3, 3 (2000).

75. *Id.* at 7 n.25 (see for further possibilities).

76. *Id.* at 20.

B. *Firma Eugen Schmidberger Internationale Transporte und Planzüge v. Republik Österreich*⁷⁷

1. The Facts

Although Austria is a very small country, some of the most important European transit routes (north-south) pass through it. As a result, Austria and the EU have always had a tense relationship concerning transit-traffic issues.⁷⁸ Recently the ECJ decided a case on this exact subject matter: *Firma Eugen Schmidberger Internationale Transporte und Planzüge v. Republik Österreich*. In this case, however, the ECJ found that the Austrian authorities had committed no breach of the applicable norms of the EC Treaty when they gave permission for a blockade demonstrating against the burden of traffic.⁷⁹

On 15 May 1998, Transitforum Austria Tirol, an environment protection association, gave notice to the competent Austrian authorities in accordance with the applicable Austrian legislation of its intention to hold a demonstration on a stretch of the Brenner motorway adjacent to the Italian border, which would block the route between 11 am on Friday 12 June and 3 pm on Saturday 13 June 1998. It has been pointed out that in addition Thursday 11 June was a public holiday in Austria that year, and normal weekend restrictions were of course in force on Saturday 13 and Sunday 14 June. . . .

The relevant local authorities found no legal reason to ban the proposed demonstration—although they do not appear to have examined in depth the possible Community-law dimension to the question—and thus allowed it to go ahead. . . .⁸⁰

The focus for the purpose of this article shall be directed to the question concerning the clash of rights, particularly between the European Convention and the EC Treaty. Moreover, some light will be shed on the question of the “hierarchy of norms”, as this was an issue brought up by the parties and the Advocate General.

The OLG Innsbruck referred (among other questions) the following two issues to the ECJ: First, is a Member State “obliged under Article 28 EC to keep major transit routes open to ensure free movement of goods

77. Case C 112/00, *Eugen Schmidberger Internationale Transporte Planzüge v. Republik Österreich*, 2003 *E.C.R. I-5659* [hereinafter *Schmidberger*].

78. See, e.g., Homepage of the “Transitforum Austria-Tirol”, available at <http://www.transitforum.at> (Feb. 10, 2005).

79. *Schmidberger supra* note 77, ¶¶ 93-95.

80. Opinion of Advocate General Jacobs, *Schmidberger, supra* note 77, ¶¶ 7-9.

and to what extent it may be required to prohibit political demonstrations blocking these routes?”⁸¹

Secondly, the Innsbruck court asked for a ruling on the question of “whether the environmental-protection aim of a demonstration may be of a higher order than the Community rules on free movement of goods.”⁸² Both questions are related to the issue of hierarchy of norms.

Concerning the first question, the Austrian Government was of the opinion that the free movement of goods can only be restricted by a norm which is on the same level of hierarchy (Article 30 EC Treaty), or on a higher level, for example “basic rights”.⁸³ The Italian Government also saw a problem of hierarchy between the free movement of goods and the right to assemble. It concluded that because of Article 6(2) TEU, a state which invokes fundamental rights (either based on national constitutional law or Community law) is justified in curtailing other rights.⁸⁴

The Commission, on the contrary, argued that this was less a question of hierarchy than of proportionality.⁸⁵ In any event the case touched new ground, as the Advocate General pointed out:

This appears to be the first case in which a Member State has invoked the necessity to protect fundamental rights to justify a restriction of one of the fundamental freedoms of the Treaty. Such cases have perhaps been rare because restrictions of fundamental freedoms of the Treaty are normally imposed not to protect the fundamental rights of individuals but on the ground of broader general interest objectives such as public health or consumer protection. It is however conceivable that such cases may become more frequent in the future: *many of the grounds of justification currently recognized by the Court could also be formulated as being based on fundamental rights considerations* [emphasis added].⁸⁶

On the issue of proportionality the Advocate General rejected the plaintiff’s argument that the demonstration could also have been held beside the motorway because “the demonstrators could not have made their point nearly as forcefully if they had not blocked the motorway long enough for the demonstration to ‘bite;’”⁸⁷ or as the ECJ phrased it: this

81. *Id.* ¶ 51.

82. *Id.* ¶ 51.

83. Gerichtshof der Europäischen Gemeinschaften (EuGH), Luxemburg, Laufende Verfahren, 29 EUGRZ 292, 296 (2002).

84. *Id.* at 298.

85. *Id.* at 299.

86. Opinion of Advocate General Jacobs, Schmidberger, *supra* note 77, ¶ 89.

87. *Id.* ¶ 110. But see the Austrian Constitutional Court (*Verfassungsgerichtshof*) decision based on almost identical facts: a blockade of the *Inntalautobahn* (highway), for several hours. The Court in that instance decided that the prohibition of the demonstration was legal. The Court relied in its decision on the justification exemption offered in Article 11(2)

would have been an “excessive restriction, depriving the action of a substantial part of its scope.”⁸⁸ The Member State did not overstep the *margin of discretion*.⁸⁹ Interestingly, at the end of his opinion the Advocate General balanced the free movement of goods against the right to protest and came to the conclusion: “[T]he permanent flow of trade through the Brenner corridor was not compromised in the same way as would have been the case for the protesters’ freedoms if they had never been allowed to demonstrate.”⁹⁰

Concerning the second question of whether the environmental-protection aim of a demonstration is of a higher order than the Community rules on free movement of goods the ECJ pointed out that:

... [i]f the protection of the environment and public health, especially in that region, may, under certain conditions, constitute a legitimate objective in the public interest capable of justifying a restriction of the fundamental freedoms guaranteed by the Treaty, including the free movement of goods, it should be noted, as the Advocate General pointed out at paragraph 54 of his Opinion, that the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger, which seek to establish the liability of a Member State in respect of an alleged breach of Community law, since that liability is to be inferred from the fact that the national authorities did not prevent an obstacle to traffic from being placed on the Brenner motorway.⁹¹

This might be true, but still one could ask whether raising awareness of an environmental problem is not covered by Article 37 of the EU Charter⁹² and has therefore to be reflected in the “balancing test”. Be that as it may, even if one accepts this idea the same problems concerning the application of Article 11 and 12 of the EU Charter⁹³ remain unsolved. The following section will highlight some of these problems.

Convention. The Court reasoned that, given that this street is a major traffic route, closing the road would endanger public security, and would lead to a break down of the traffic, which would negatively affect a large number of persons not participating in the blockade. Considering these facts the Court held that the prohibition of the demonstration was justified (Erk VfGH 26. Feb. 1990, B 1093/89-7, 17 EuGRZ 424 (1990)).

88. Schmidberger, *supra* note 77, ¶ 90.

89. *Id.* ¶ 93.

90. Opinion of Advocate General Jacobs, Schmidberger, *supra* note 77, ¶ 111.

91. Schmidberger, *supra* note 77, ¶ 93.

92. Environmental protection: A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development. Now Article II-97 of the EU Constitution, *supra* note 12.

93. Now Article(s) II-71, II-72 of the EU Constitution, *supra* note 12.

2. About Balancing Rights, Hierarchy of Norms and the Charter of Fundamental Rights

Merkel and Kelsen, the framers of the Austrian Constitution, developed the system of a “hierarchy of norms” (*Stufenbau der Rechtsordnung*). At the top of the pyramid there is constitutional law, followed by statutory law etc.⁹⁴ Above the general constitutional law there are the so-called *Baugesetze* (“structural principles”).⁹⁵ The idea behind the system is that the higher norm conditions and defines the scope of the lower norm.

When Austria joined the EU the supremacy of EU law over national law (including constitutional law⁹⁶) was already part of the *aquis communautaire*,⁹⁷ however, this supremacy does not seem to apply unrestrictedly: “First, EC law can only be accorded primacy as long as the European Union guarantees a comparable standard of protection of human rights to that of the Austrian Constitution.”⁹⁸

The above mentioned basic principles of the Austrian Constitution are another barrier to further integration.⁹⁹ “This point of view, however, has also met with criticism, partly because of its merely theoretical character, and partly because such a Community Act going beyond the ‘conferred powers’ under the basic Treaties could be challenged under Article 230(2) (ex 173(2)) EC Treaty.”¹⁰⁰

94. HERBERT HAUSMANINGER, *THE AUSTRIAN LEGAL SYSTEM* 22 (2d ed. 2000). The Austrian Constitution dates back to the year 1920 and was amended in 1929; *Hans Kelsen* was the framer of the constitution. (Peter Fischer & Alina Lengauer, *The Adaptation of the Austrian Legal System Following EU Membership*, 37 COMMON MKT. L. REV. 763, 763 (2000). Compared to the US for example, Austria does not have a constitutional tradition. The Austrian Constitution is very flexible, which can be seen by the fact that the original document (*Bundes-Verfassungsgesetz, B-VG*)—the Federal Constitutional Act—has been amended more than 40 times. Furthermore, more than 1000 constitutional provisions can be found outside the core document (*Bundesverfassungsgesetz, BVG*) (HAUSMANINGER, *supra*, at 20). Therefore *Hans Klecatsky*, former Minister of Justice of Austria called, the Austrian Constitution a “ruin”: “The form of constitutional law is also chosen (or misused) in order to immunize a provision against nullification by the Constitutional Court. This has even occurred after the Court had declared an ordinary statute unconstitutional. The Parliament simply re-enacted it with a two-thirds majority and labeled it ‘constitutional,’ law, thus withdrawing it from judicial control of constitutionality.” (HAUSMANINGER, *supra*, at 23).

95. HAUSMANINGER, *supra*, at 22.

96. *Id.* at 23-24.

97. Peter Fischer & Alina Lengauer, *The Adaptation of the Austrian Legal System Following EU Membership*, 37 CML. REV. 763, 772 (2000)—quoting the basic judgment Case 14/64, *Costa v. Enel*, *supra* note 20.

98. *Id.* at 772, referring to the famous *Solange II-Beschluss* of the German Constitutional Court (see *supra* note 22).

99. See *id.* at 773, referring to *Griller* who talks about *integrationsfester Verfassungskern* (a constitutional core immune to further integration).

100. See *id.*

It is important to decide the position of a norm in the hierarchy because one has to be aware that there is “[n]o conflict possible between a higher norm and a lower norm. . . .”¹⁰¹ If there is a conflict between two different norms on the same level and, e.g., “two norms are only partly contradictory, then the one norm can be understood to be limiting the validity of the other.”¹⁰² Consequently, one has to balance the rights against each other.

The Irish Supreme Court held in *The Attorney General, Plaintiff v. X and Others, Defendants*: “In *The People v. Shaw* [1982] . . . I.R. Kennedy J. stated that there was a hierarchy of constitutional rights and, when a conflict arises between them, that which ranks higher must prevail.”¹⁰³

This statement becomes more complex as soon as EU law comes into play. As already mentioned above, it ranks even higher than national constitutional law therefore it cannot be influenced directly by it. However, Article 6(2) TEU refers to the *constitutional traditions common to the Member States*.

A fundamental right found in the national legal order which diverges significantly in nature and degree of protection from rights in other legal orders, can therefore not be granted the status of being part of the *common constitutional traditions of the Member States*. That excludes a number of fundamental rights which have a great importance within Member States where they exist.¹⁰⁴

Thus Article 6(2) TEU lifts common constitutional provisions up to the rank of Community law.

Article 6(2) EU confirms that the Union must respect fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to Member States. Article 10 of the European Convention on Human Rights guarantees freedom of expression, including “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”. Article 11 of the Convention similarly guarantees freedom of peaceful assembly and association.¹⁰⁵

101. KELSEN, *supra* note 21, at 208.

102. *Id.* at 207.

103. *The Attorney General (Plaintiff) v. X and Others (Defendants)* [1992 No 846P, Mar. 5, 1992], 1 IR 1, ¶ 184.

104. Leonard F.M. Besselink, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, 35 COMMON MKT. L. REV. 629, 637 (1998).

105. Opinion of Advocate General Jacobs, Schmidberger, *supra* note 77, ¶ 101.

Considering the status of human rights in particular one has to consider that:

Human Rights are seen as claims of a higher order than claims of other legal relationships, such as contract rights or statutory entitlements. Religion, natural law, law and economics, utilitarianism, sociology, and other theories have been invoked to explain the higher status of human rights. . . .

The assertion of the primacy of human rights law has far-reaching implications in international law. It suggests that there is no *lex specialis* for trade or other fields where states can claim to be free from human rights obligations.¹⁰⁶

In the present case we have to balance the free movement of goods against the right to demonstrate. *Pernice* argued early that the four freedoms of the Union have also the content of fundamental rights.¹⁰⁷ Therefore there is no hierarchy between the four freedoms and fundamental rights.

The Advocate General pointed out that the case *Firma Eugen Schmidberger Internationale Transporte und Planzüge v. Republik Österreich* seemed to be the first case in which a Member State did not justify a restriction by invoking Article 30 of the EC Treaty, but rather invoked the protection of a fundamental right.¹⁰⁸ The Advocate General stressed that although there is a respect for these domestic fundamental rights, especially those of the European Convention, they are nevertheless often a reflection of the particular history and culture of a Member State.¹⁰⁹ “It cannot therefore be automatically ruled out that a Member State which invokes the necessity to protect a right recognized by national law as fundamental nevertheless pursues an objective which as a matter of Community law *must be regarded as illegitimate* [emphasis added].”¹¹⁰

In the course of his arguments the Advocate General also referred to the Charter of Fundamental Rights.¹¹¹

106. Dinah Shelton, *Human Rights and the Hierarchy of International Law Sources and Norms: Hierarchy of Norms: Of Trumps and Winners*, 65 SASK. L. REV. 299, 303-06 (2002).

107. PERNICE, *supra* note 3, at 52-53; Giegerich, *supra* note 23, at 855; Christine Langenfeld and Andreas Zimmermann, *Interdependenz zwischen nationalem Verfassungsrecht, Europäischer Menschenrechtskonvention und Europäischem Gemeinschaftsrecht*, 52 ZAÖRV 259, 294 n.172 (1992).

108. Opinion of Advocate General Jacobs, *Schmidberger*, *supra* note 77, ¶ 89.

109. *Id.* ¶ 97.

110. *Id.* ¶ 98.

111. See generally for the Status of the Charter, Lord Goldsmith Q.C., *A Charter of Rights, Freedoms and Principles*, 38 COMMON MKT. L. REV. 1201, 1214-15 (2001) and de Witte, *supra* note 10.

More recently, the rights of freedom of expression and assembly have been reaffirmed in *Articles 11 and 12 of the Charter of Fundamental Rights of the European Union* [emphasis added]. In my view where a Member State seeks to protect fundamental rights recognised in Community law the Member State necessarily pursues a legitimate objective. Community law cannot prohibit Member States from pursuing objectives which the Community itself is bound to pursue.¹¹²

The document of the EU Charter was “welcomed” by the European Council in Biarritz on 13-14 October 2000 and “solemnly proclaimed” by the Parliament, the Council and the Commission.¹¹³ The EU Charter brings a lot of different kinds of rights under one roof. “[T]he Praesidium of the Convention ordered the rights concerned under six headings: dignity, freedoms, equality, solidarity, citizenship and justice.”¹¹⁴ It is striking that these rights are guaranteed at first sight without any limitation or condition.¹¹⁵ It is possible to think that the US Bill of Rights was the role-model for this EU Charter.

Textual ambiguity and straightforwardness, as the experience of the US Bill of Rights suggests, may be valuable features allowing for greater flexibility and scope in the interpretation of provisions to suit the ideas and needs of the time. Nevertheless, the US story also shows that simplicity can lead to conservative interpretation through excessive formalism.¹¹⁶

It is important to mention that according to Article II-111(2) the EU Charter does not create new powers for the Union,¹¹⁷ thus some of the rights mentioned in the EU Charter seem far fetched.¹¹⁸ Lenaerts and Smitjer cite the right to education as an example, although it seems possible to construct a linkage even in this field, when we consider that the ECJ indirectly influenced educational systems in *Gravier v City of Liège*.¹¹⁹ In that case “[t]he ECJ considered that access to vocational

112. Opinion of Advocate General Jacobs, Schmidberger, *supra* note 77, ¶¶ 101-102.

113. Jonas Bering Liisberg, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?*, 38 COMMON MKT. L. REV. 1171, 1180 (2001).

114. Koen Lenaerts & Eddy de Smijter, *A “Bill of Rights” for the European Union*, 38 COMMON MKT. L. REV. 273, 279-80 (2001).

115. *Id.* at 281-82. But see Article 52(2) of the Charter for rights based on the EC Treaties and *id.* at 282.

116. Sejal Parmar, *International Human Rights and the EU Charter*, 8 MAASTRICHT J. 351, 362 (2001).

117. Lenaerts & de Smijter, *supra* note 114, at 286-87.

118. *Id.* at 288.

119. C 293/83, *Gravier v. City of Liège*, 1985 E.C.R. 593; however, as Eeckhout correctly points out, the “case law clearly shows that the scope and reach of general principles of EC law is indeed more limited than that of the principle of non-discrimination on grounds of nationality.” (Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 COMMON MKT. L. REV. 945, 969 (2002).

training policy was referred to in the treaty and that access to vocational training is likely to promote free movement of persons.”¹²⁰ Another right mentioned in the EU Charter that does not necessarily fall in the “heartland” of EU law is the right to freedom of thought, conscience and religion (Article II-70). This right could possibly play a role where the competence of the EU in agricultural matters is considered in relation to a hypothetical case of Moslems or Jews wishing to practice ritual slaughtering.¹²¹ The ECJ has been very creative over the years in order to promote integration and there is no reason to question why this should change when it comes to human rights.¹²²

What can be concluded from this is that it is not always clear where the EU ends and where the influence of the nation starts. The laws of the Union and that of its Member States intermingle and are not easily separated.¹²³ This is a consequence of the structure of the EU:

With some exceptions, such as competition policy, implementation and application have always been left largely to the Member States [“agents of the EU”¹²⁴], even in fields as densely regulated as agricultural policy or commercial policy. This is one of the main reasons why EU law and national law are so intertwined and mutually integrated, a phenomenon which is as it were embodied in the directive as a legal instrument. Their relationship is the opposite of a “watertight compartments” approach, to use an expression which has been used in other federal contexts. The interlinkage and mutual integration is probably stronger than in many mature federal systems, where federal State powers are well defined, and federal and State law mostly deal with different issues.¹²⁵

120. *Id.* at 959, referring also to Case C-274/96 Criminal proceedings against Horst Otto Bickel and Ulrich Franz, 1998 E.C.R. I-07637 when the ECJ decided that they were allowed to use German language for criminal proceedings before an Italian Court—as German is a constitutionally protected minority language in the Province of Bolzano.

121. *Cf.* Council Directive 93/119/EC of 22 December 1993 *On the Protection of Animals at the Time of Slaughter or Killing*, 1993 O.J. (L340) 21—however one has to admit that according to Article 5(2) slaughter required by certain religious rites is not covered by the directive (but this may change one day). Eeckhout describes the possibility of a wider application of the EU Charter through the link with movement as done by the Advocate General in *Kostandinidis* (Opinion of Advocate General Jacobs, Christos Konstantinidis, *supra* note 17) and stresses the tendency of Member States to avoid reverse-discrimination; therefore, the application of the Charter could become broader (Eeckhout, *supra* note 119, at 969-73. *But see also id.* at 973-75). *See* Case 130/75, Vivien Prais v. Council of the European Communities, 1976 E.C.R. 1589.

122. *See generally* Zuleeg, *supra* note 43, at 511.

123. PERNICE, *supra* note 3, at 221.

124. Eeckhout, *supra* note 119, at 952 (quoting Joseph H.H. Weiler & Nicolas J.S. Lockhart, “*Taking Rights Seriously*”: *The European Court of Justice and Its Fundamental Rights Jurisprudence—Part I*, 32 COMMON MKT. REV. 51, 73 (1995)).

125. Eeckhout, *supra* note 119, at 952-53.

The abovementioned EU Charter has the ability to become a genuine source of human rights for the EU: “It [the EU Charter] will, most probably become a favorite ‘source of inspiration’ for the ECJ in future fundamental rights cases. . . . References to international human rights conventions and to common constitutional traditions . . . may even be entirely replaced by references to the Charter, on the assumption that these other sources are now incorporated in the text of the Charter.”¹²⁶ This approach can bring EU citizens closer to a “civis europeus”, which I will deal with in the next Chapter.

C. The Queen v. Maurice Donald Henn and John Frederick Ernest Darby¹²⁷—*Two Courts and Two Different Tasks*

1. The Facts

In *Henn and Darby*¹²⁸ the ECJ had to decide if the UK was able to prevent the importation of pornographic films and magazines (one has to admit that in the immediate case the materials seemed particularly tasteless) based on Article 30 EC Treaty?

The Advocate General pointed out that “[t]he concept of ‘public morality’ is not one that can be made the subject of objective assessment, or of a Community-wide definition. It is a matter of individual opinion rather than of expert opinion.”¹²⁹ In his opinion he referred to the ECHR and *Handyside v. United Kingdom*¹³⁰:

In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirement of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them. The Court notes at this juncture that . . .

126. de Witte, *supra* note 10, at 84-85.

127. Case 34/79, Regina v Maurice Donald Henn and John Frederick Ernest Darby, [1980] 1 C.M.L.R. 246 [hereinafter Henn and Darby].

128. *Id.*

129. Opinion of Advocate Warner, *id.* at 255.

130. *Handyside v. United Kingdom*, App. No. 5493/72, available at <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=414174147&Notice=0&Noticemode=&RelatedMode=0> [hereinafter *Handyside v. UK*].

the adjective “necessary” within meaning of Article 10 para. 2, is not synonymous with “indispensable”. . . .¹³¹

The ECHR operates under the doctrine of *margin of appreciation*.¹³² The reason for the necessity of this doctrine is based on the way the European Convention and the ECHR are organized.¹³³

[T]he margin of appreciation is generally wider where the measure aims at the protection of morals The Court has generally accepted a wide margin of appreciation where the measure was taken in pursuance of economic, social or environmental policies . . . but a wide margin is also allowed under Article 10 in matters relating to unfair-competition practices or commercial advertising. . . .¹³⁴

*Henn and Darby*¹³⁵ can be seen as a warning signal concerning what happens if the ECJ applies the *margin of appreciation*. The Court allowed the United Kingdom to ban the import of certain goods “on grounds of public morality.”¹³⁶ By definition “[t]he doctrine introduces an element of relativity into the uniform interpretation of the Convention, resulting in differences in scope and emphasis depending on the circumstances of the case.”¹³⁷ Having too much relativity in areas which are very sensitive for the *internal market* means nothing less than the end of the existence of the internal market as we know it. It opens a flood gate to protectionism in areas that are crucial for the wellbeing of the internal market.¹³⁸ The Court reasoned in *Henn and Darby* that the prohibition on the import of these goods does not amount to unlawful discrimination as there is no lawful trade of such within the United Kingdom.¹³⁹ Nevertheless it stops the free flow of goods and divides the

131. Advocate General Warner, *Henn and Darby*, *supra* note 127, at 256 (quoting *id.* ¶ 48).

132. *Handyside v. UK*, *supra* note 130, ¶ 48—a case which can be compared to the case in question concerning the facts.

133. “[T]he machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights The Convention leaves to each Contracting State, in the first place the task of securing the rights and liberties it enshrines. The institutions created by it make their own contributions to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (art. 26)” [*id.* ¶ 48].

134. Jeroen Schokkenbroek, *The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 19 HUMAN RIGHTS L.J. 30, 34-35 (1998).

135. *Henn and Darby*, *supra* note 127.

136. *Id.* at 272, ¶ 15.

137. Ronald St. J. Macdonald, *The Margin of Appreciation*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 83, 83 (Ronald St. J. Macdonald et al. eds., 1993).

138. However, this doctrine is acceptable for the system of the Council of Europe, which has by now 46 very different Member States (Council of Europe, *available at* <http://www.coe.int/portalT.asp> [Feb. 10, 2005]).

139. *Henn and Darby*, *supra* note 127, at 274, ¶ 21.

single market into fragments. Every exemption from the rule that goods lawfully manufactured in a Member State are admissible to the single market deprives the market of its effectiveness.

The approach which should be followed—irrespective of human rights—is the one taken by the Advocate General in the Pure Beer case.¹⁴⁰ In this case the Advocate General argued that “a product lawfully made and marketed in one member-State, or traditionally made there, may *prima facie* be sold in other Member States”¹⁴¹ In other words, he stated a general rule that what is good for the market in one Member State is also good for the market in another Member State.¹⁴² If there is a divergence from this general rule it is up to the respective State to prove this (“[t]he onus is on the member-State setting up the justification of necessity to prove it”¹⁴³). The General Advocate continued further:

On the evidence, accordingly, I do not consider that the Federal Republic has made out on solid grounds a “serious risk” or “real danger” to public health which justifies this absolute restriction; . . . the restriction must be seen in *the light of the principle of the free movements* [emphasis added]. . . . [I]t seems to me that in deciding whether such a blanket restriction can really be necessary some regard must be had (a) to the *standards accepted in other member-States* [emphasis added] . . . (b) to what is regarded as tolerable by the Community’s committees on food and by other international health organizations.¹⁴⁴

This approach—although taken in connection with goods—must also be adopted in all other fields if the internal market is to be complete. I do not see any reason why the area of human rights should be handled differently; thus, EU citizens could say “*cives europeus sumus*.”¹⁴⁵

2. “*Civis Europeus Sumi*”¹⁴⁶

At the heart of the internal market there are the so-called four freedoms: the free movement of persons, goods, capital¹⁴⁷ and services.¹⁴⁸

140. Opinion of Advocate General Sir Gordon Slynn, Case 178/84, *Commission of the European Communities v Federal Republic of Germany*. Failure of a State to fulfill its obligations—Purity requirement for beer, [1988] 1 C.M.L.R. 780 [hereinafter *Pure Beer*].

141. *Id.* at 787-88.

142. See also Case 120/78, *REWE-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, [1979] 3 C.M.L.R. 494; Langenfeld & Zimmermann, *supra* note 107, at 289-91.

143. *Pure Beer*, *supra* note 140, at 790.

144. *Id.* at 799.

145. See Opinion of Advocate General Jacobs, Christos Konstantinidis, *supra* note 17, ¶ 46.

146. *Id.*

147. I will not deal with this freedom in the course of this paper.

148. Europe, <http://europa.eu.int/scadplus/leg/en/lvb/l70000.htm> (Feb. 10, 2005)

The free movement of persons has been a cornerstone of the European Community since its inception. That freedom was not, initially, an entitlement for citizens of Member States to move anywhere in the Community for any purpose, but was linked to a number of specific economic activities (Arts 39-42 (workers), Arts 43-48 (rights of establishment)¹⁴⁹ and Arts 49-55 (services)^{150, 151}).

The freedom of movement of persons, in particular, developed significantly with the establishment of an EU citizenship (Article 17-22 EC Treaty). So far it seems unclear where the boundaries of this EU citizenship lie. The Court held in a judgment dealing with the question of citizenship

that an EU citizen who had been *permitted* by the host state to remain there . . . was entitled, as an EU citizen, to equal treatment in relation to welfare and other benefits in line with nationals of the host state. It left open the question of whether a person who is no longer engaged in the activities of a worker or self-employed person might still enjoy an independent right of residence as an EU citizen (*Sala v Freistaat Bayern* (Case C-85/96)).¹⁵²

This issue was addressed again and clarified in a later judgment called *Baumbast and R v Secretary of State for the Home Department*, where the ECJ explicitly held that “as a national of a Member State, and consequently a citizen of the Union, Mr Baumbast . . . has the right to rely on Article 18(1) EC.”¹⁵³ This is an important step forward as the Court allowed an EU citizen for the first time to rely directly on Article 18 EC Treaty, which deals with citizenship, and so consequently broadened Article 39, which deals with their right of free movement.

In the 1970s the ECJ developed the *Dassonville*-formula concerning the free flow of goods and adopted a broad scope of Article 30 EC Treaty. “All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.”¹⁵⁴ This broad approach was modified with the *Keck* judgment:

149. See CHRISTOPHER VINCENZI & JOHN FAIRHURST, *LAW OF THE EUROPEAN COMMUNITY* 262-89 (2d ed. 2002).

150. See *id.*

151. *Id.* at 223.

152. *Id.* at 224. For the free movement of persons in the pre-Maastricht era, see generally David O’Keeffe, *The Free Movement of Persons and the Single Market*, 17 *EUR. L. REV.* 3 (1992).

153. C-413/99, *Baumbast and R v Secretary of State for the Home Department*, 2002 E.C.R. I-07091, ¶ 84.

154. Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville*, 1974 E.C.R. 837, ¶ 1.

National legislation imposing a general prohibition on resale at a loss is not designed to regulate trade in goods between Member States. Such legislation may, admittedly, restrict the volume of sales, and hence the volume of sales of products from other Member States. . . . Restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between member States within the meaning of Dassonville . . . so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.¹⁵⁵

It is very obvious that the existence of open markets improves the wealth of participating nations. All nations involved in the project took advantage of the open markets, but all of them tried at the same time to protect their own markets and producers, and introduced hurdles to the free flow of goods. However, the establishment of a common market requires integration of law.¹⁵⁶ Pernice further argues that integration of fundamental rights is a consequence of integration of law and a precondition for continuing integration of the economy.¹⁵⁷

It seems that—at least in the Advocate General’s opinion in *Konstantinidis v. Stadt Altensteig*—we have reached this level. In his opinion Advocate General Jacobs argued as follows:

In my opinion, a Community national who goes to another member-State as a worker or self-employed person under Articles 48, 52 or 59 EEC is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say ‘civis europeus sum’ and to invoke that status in order to oppose any violation of his fundamental rights.¹⁵⁸

The Advocate General is clearly referring here to the concept of Roman citizenship, which protected its bearer all over the Roman Empire.¹⁵⁹ “They [Romans] extended the status of Roman citizenship to

155. Cases 267-268/91, Criminal proceedings against Bernard Keck and Daniel Mithouard, 1993 E.C.R., I-6097, ¶¶ 12-16. For the free movement of goods, see generally Niamh Nic Shuibhne, *The Free Movement of Goods and Article 28 EC: An Evolving Framework*, 27 EUR. L. REV. 408 (2002). For Post-Keck case law, see Vincenzi & Fairhurst, *supra* note 149, at 380-81.

156. PERNICE, *supra* note 3, at 209.

157. *Id.* at 209-10.

158. Opinion of Advocate General Jacobs, *supra* note 17, ¶ 46.

159. See Acts of the Apostles 16, 37-39 and 22, 25-29.

residents of parts of the Empire taken by conquest. Thus St. Paul, declaring himself a citizen of Tarsus when arrested in Jerusalem, was able to claim also his Roman citizenship and to demand a trial under the Roman, not local system of justice.”¹⁶⁰ The Advocate General promotes the idea of a “*civis europeus*” for the Union.¹⁶¹ I have already mentioned briefly the concept of EU citizenship and shall develop it here further. The concept of EU citizenship¹⁶² was introduced in 1993 as an amendment to the EC Treaty by the Treaty of Maastricht¹⁶³ and put in place a rather novel section on citizenship (now Articles 17-22 EC Treaty).¹⁶⁴ However, one should not draw the wrong conclusions from the term *EU citizenship*. The nature of EU citizenship is subordinate to the nationality or citizenship of the Member States.¹⁶⁵ The question is why did the Member States open a Pandora’s Box with the introduction of the citizenship?¹⁶⁶ One reason is the never-ending attempt to bring citizens “closer to the Union”.¹⁶⁷ Article I-10 of the EU Constitution (ex Article 19 EC Treaty) reads:

1. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Constitution. They shall have:
 - a) the right to move and reside freely within the territory of the Member States;
 - b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their

160. ELIZABETH MEEHAN, *CITIZENSHIP AND THE EUROPEAN COMMUNITY* 7 (1993).

161. However, one has to admit that the judgment was drafted in a less emotive style (Rick Lawson, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights*, in *THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN SRASBOURG AND LUXEMBURG* 219, 248 (Rick Lawson & Matthijs de Blais eds., 1994)).

162. See on this topic: JOSEPH. H.H. WEILER, *THE CONSTITUTION OF EUROPE* 324-56, and further suggested readings 356-57 (1999); Josephine Shaw, *Citizenship of the Union: Towards Post-National Membership* (6/97), available at <http://www.jeanmonnetprogram.org/papers/97/97-06-.html> (Feb. 10, 2005); Helen Toner, *Judicial Interpretation of European Citizenship—Transformation or Consolidation?*, 7 *MAASTRICHT J.* 158 (2000); Carlos Closa, *Citizenship of the Union and Nationality of Member States*, 32 *COMMON MKT. L. REV.* 487 (1995); Roy W. Davis, *Citizenship of the Union . . . Rights for All?*, 27 *EUR. L. REV.* 121 (2002).

163. *TREATY ON EUROPEAN UNION*, *supra* note 33.

164. Josephine Shaw, *Citizenship of the Union: Towards Post-National Membership* (6/97), available at <http://www.jeanmonnetprogram.org/papers/97/97-06-.html> (Feb. 10, 2005).

165. Helen Toner, *Judicial Interpretation of European Union Citizenship—Transformation or Consolidation?*, 7 *MAASTRICHT J.* 158, 165 (2000).

166. WEILER, *supra* note 62, at 333.

167. *Id.*

- Member State of residence, under the same conditions as national of that State;
- c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
 - d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Constitution's languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Constitution and by measures adopted thereunder.

Scrutinizing these latest developments, it seems that the current stage of citizenship is “one of consolidation and repetition of established principles. Perhaps this mixed and somewhat slow start to the judicial interpretation and of EU Citizenship is not unexpected, but there remains progress to be made if the full potential of Citizenship of the Union is to be developed through judicial interpretation.”¹⁶⁸

III. WHERE DO WE GO FROM HERE?

A. *The Issue of Uniformity and Supremacy*

As was stated several times throughout this article, the *supremacy* of EU law over national law is very important to the proper functioning of the Union. One consequence of this necessity is that “[t]he hierarchical principle implies that the Community law standard must apply even if it provides less protection than national or international fundamental rights standards.”¹⁶⁹ A second issue mentioned is *uniformity*. “The idea of uniformity of Community law runs deep into the jurisprudence of the Court.”¹⁷⁰ The worst case scenario is that a national court is unwilling to follow the ECJ; that would amount to a “veritable constitutional crisis.”¹⁷¹

The question of who the ultimate guardian is must be clearly solved. The shortcoming of the ECHR is its strong European consensus-based approach, which “may lead to conservatism, and may retard the evolutive interpretation of the Convention: if a consensus of national law and practice does not exist by the time a claim reaches Strasbourg, the Court

168. Torner, *supra* note 165, at 182.

169. Besselink, *supra* note 104, at 632.

170. Weiler, *supra* note 6, at 1122.

171. *Id.* at 1123; Giegerich, *supra* note 23, at 850-51.

will not create it from above.”¹⁷² By this I mean that the ECHR is just looking for consensus among Member States but—by definition¹⁷³—does not go beyond this already existing consensus. This is contrary to the ECJ, which has always “acted as a motor of integration. . . . It has seen its main task in breaking institutional blockages and by these means fostering the growing together of the Member States to form a uniform Europe.”¹⁷⁴ A result of the European Convention’s and the ECHR’s approach is the doctrine of *margin of appreciation* under which the ECHR is operating.

The dilemma facing the Court, evident in recent cases on the margin of appreciation, is how to remain true to its responsibility to develop a reasonably comprehensive set of review principles appropriate for application across the entire Convention, while at the same time recognizing the diversity of *political, economic, cultural* and *social* situations [emphasis added] in the societies of the Contracting Parties.¹⁷⁵

Traditionally the ECHR takes the characteristics of the Member States seriously into account, particularly in the areas of political, economic and social affairs;¹⁷⁶ however, these areas are keys to achieving an efficient internal market. The case law of the ECJ tells the story of Member States trying to protect their markets. These attempts, however, become increasingly difficult or even impossible in areas where the law has already been harmonized or uniformed. Therefore Member States dodge these areas and look for those where no unification or real harmonization has taken place in order to take advantage of this situation.¹⁷⁷ Human rights standards (in a broader sense) particularly invite Member States to invoke cultural exceptionalism, as states seem to be able to resort to it by applying the doctrine of *margin of appreciation*. This threat to the internal market and the uncertainty to its citizens can only be met by a uniformed standard of human rights.

172. Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 *ZÄÖRV* 240, 285 (1996).

173. The intention of the framers of the European Convention was never to *create* a unified standard (Macdonald, *supra* note 137, at 123; *but see* Ress, *supra* note 68, at 185).

174. Engel, *supra* note 19, at 156.

175. Macdonald, *supra* note 137, at 83.

176. *Cf.* Schokkenbroek, *supra* note 134, at 34-35; *cf. id.* at 122.

177. This also works the other way round: EU citizens take advantage of different standards between Member States. See as an example the *Centros* case (Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, 1999 E.C.R. I-01459); this example shows the inherent danger of a “race to the bottom” (*Cf.* Catherine Holst, *European Comply After Centros: Is the EU on the Road to Delaware?*, 8 *COLUM. J. EUR. L.* 323, *passim* (2002)).

*Henn and Darby*¹⁷⁸ provides a clear example of what happens when the ECJ leaves too much room for exceptionalism: ineffectiveness of the internal market. In *Henn and Darby*¹⁷⁹ the ECJ clearly failed to follow its mission as a “unifier.” With ongoing integration it is necessary that exceptions (as allowed for example under Article 30 EC) be interpreted more and more narrowly.¹⁸⁰ From the fact that the *wording* of the exception clauses of Article 30 EC¹⁸¹ and Article 10(2) of the European Convention¹⁸² are similar it does not follow that these exception clauses have to be *interpreted* similarly.¹⁸³

As mentioned in the introduction, the Union is an unfinished entity. It still needs a strong unifier, as the system is not yet settled; however the ECHR seems to lack the necessary characteristics of a unifier. Not only does the ECHR apply the doctrine of *margin of appreciation* but the highest courts of the Member States view the ECHR in a very different light to the ECJ. The German Constitutional Court recently ruled on the question of whether a judgment by the ECHR was unsatisfactorily enforced by the Naumburg Higher Regional Court as follows: “In taking into account decisions of the ECHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular when the relevant national law is a balanced partial system of domestic law that is intended to achieve equilibrium between differing fundamental rights.”¹⁸⁴ In other words there is no “schematic way”¹⁸⁵ of enforcing the ECHR’s decisions. This vests national courts with a considerable amount of discretionary power. Prioritizing the ECHR over the ECJ would weaken the integrative authority of the ECJ at least in the field of human rights, and it is in my opinion too early for the Union to let this happen. Consider as an example the following

178. *Henn and Darby*, *supra* note 127.

179. *Id.*

180. *PERNICE*, *supra* note 3, at 79.

181. Exceptions are “justified on grounds of 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 archeological value; or the protection of industrial and commercial property. . . .”

182. “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others. . . .”

183. But Toth seems to be of this opinion: A.G. Toth, *The European Union and Human Rights: The Way Forward*, 34 COMMON MKT. L. REV. 491, 515-16 (1997).

184. BVerfG, Order of the Second Senate of October 14, 2004, 2 BvR 148/04, ¶ 2 (not published yet).

185. *Id.* ¶ 1.

hypothetical case: A person wishes to import goods into a country. The country in which the goods should be imported bans the import. The ECJ could argue that the ban is not justified under Article 30 EC Treaty. The state could then bring the issue before the ECHR arguing that its *margin of appreciation* was hurt by the ECJ's decision. As argued several times during the course of this article, the ECHR is by its nature and by its whole concept more generous concerning the doctrine of *margin of appreciation*. If the ECHR were to become the highest court its opinion would prevail. As a result of this, although the ECJ could still operate as "unifier", it would be supervised by a court which does not have the same power—by far—to unify.

B. *Collision of Norms*

We have also seen in *Eugen Schmidberger*¹⁸⁶ that the phenomenon of *colliding rights* has to be answered. This collision can only be solved satisfactorily by balancing the rights.¹⁸⁷ In order to balance them one must first of all have the authority to define them. Again, the ECJ seems to be in the best position to perform the *balancing test*, "since it alone has the expertise, data and knowledge to adjudicate the double test of policy bona fide and proportionality in the Community."¹⁸⁸ It is possible, for example, that a blockade of a street in a single country might be disproportionate if it were an important traffic artery. However, if the whole EU territory were taken into consideration a blockade might seem more justifiable.¹⁸⁹ This may explain the difference between the decision denying permission for a blockade by the Austrian Constitutional Court in 1990,¹⁹⁰ and the 2003 ruling of the ECJ¹⁹¹ giving permission.

Nevertheless, one could make the argument that the ECHR could sit in judgment as a higher court similar to how the ECJ does over national courts.¹⁹² This brings us (again) to the *sui generis* character of the Union. The ECHR was designed for states so that they may *judge states*. The adaptation of the system so that the EU can also become a member of the

186. Schmidberger, *supra* note 77.

187. Stefan Griller, *Der Anwendungsbereich der Grundrechtscharta und das Verhältnis zu sonstigen Gemeinschaftsrechten, Rechten aus der EMRK und zu verfassungsgesetzlich gewährleisteten Rechten*, in GRUNDRECHTE FÜR EUROPA. DIE EUROPÄISCHE UNION NACH NIZZA 131, 153-54 (Alfred Duschanek & Stefan Griller eds., 2002)—he is touching the problem of balancing two different (human) rights.

188. Weiler, *supra* note 6, at 1132.

189. *Id.*; see also PERNICE, *supra* note 3, at 228.

190. See *supra* note 87.

191. Schmidberger, *supra* note 77.

192. Weiler, *supra* note 6, at 1133.

ECHR seems possible—assuming that there is political will.¹⁹³ But a more difficult problem remains to be solved: how to *judge* the *Union*? Whenever the ECHR has to make a decision, it would first have to decide if the Union is exercising its power. However, as we have seen “in many instances it is by no means certain whether a matter falls within or outside the scope of Community law. The problem is exacerbated by the fact that with the progress of integration . . . the precise scope of Community law is subject to constant change and reinterpretation.”¹⁹⁴ Eventually, if it comes to the conclusion that an act is one within the scope of the Union, the ECHR would need to take into consideration the broader EU context. If the ECHR falls short of doing this, it will fail to respect the characteristics of the Union. It seems unlikely that the ECHR is capable of doing this. By definition the ECHR and the ECJ follow different goals. This is also reflected in the way they interpret the European Convention:

The ECHR interprets the Convention according to the Convention’s objectives, while the ECJ interprets it according to the Community’s objectives. However, the two sets of objectives do not necessarily coincide. The Convention’s aim is to protect the *individual* as a human being, while the Community’s aim is to *further economic and social integration* [emphasis added].¹⁹⁵

In a modified system, however, the ECHR would certainly arrive (more often than today) at a position where it has to make final statements about EU-related issues; clearly the crux is that the ECHR is not the final arbitrator for these matters. The ECHR could just interpret the EC Treaty on the same basis as the ECJ currently interprets the European Convention. In my opinion this would not be a step forward but instead would just shift the problem to another place. Or as Toth fittingly formulated:

However, in the event of accession to the Convention, it seems virtually inevitable that the ECHR would get involved in the interpretation of Community law, if only to establish whether a Community rule or practice is compatible with the Convention (this would, after all, be its main judicial function). In this situation, the ECHR would interpret Community law so as to achieve the objectives of the Convention which, . . ., are not necessarily identical with those of the Community. This would re-create

193. WINKLER, *supra* note 40, at 46-71.

194. Toth, *supra* note 183, at 497.

195. *Id.* at 499.

the present problem in the reverse (as seen, at present the ECJ interprets the Convention according to Community objectives).¹⁹⁶

C. A Clash of Two Systems—Can the Problem be Solved by Incorporation?

If we consider the *Schmidberger*¹⁹⁷ case we can imagine a situation where the company goes to the ECJ in order to achieve free movement of goods but the demonstrators go to the ECHR in order to preserve the right to demonstrate. Ultimately, at the end of the day one side is going to lose. Which court should prevail? The ECJ would base its decision on arguments of the EC Treaty, whereas the ECHR would base its decision on arguments from the European Convention. How can these two positions be reconciled? Would an accession to the European Convention satisfactorily solve the problem of hierarchy of norms and courts?¹⁹⁸

Another example of uncertainty can be drawn from the same case: If the EU accedes to the European Convention, the requirement of exhaustion of domestic remedies (Article 35 of the European Convention) would depend on *who* initiates the trial. If it were the company that triggered the process there would be an additional “instance” (ECJ), whereas if it were the demonstrators, the ECJ would be excluded (because of lack of cross-border activity, which is necessary in order to invoke EC law).¹⁹⁹ This distinction seems somewhat odd, arbitrary and artificial.

D. Institutional Pitfalls

Although some might argue that institutional arguments are not convincing because they can be solved by reforms, I would argue that it is one thing to *suggest* possible reforms but another to *implement* them effectively. One striking problem for the ECHR is its huge pending caseload. It does not seem like exaggeration to argue that this caseload endangers the system of offering effective protection. For example, in June 2004 only 105 out of 1833 submitted petitions were admitted by the Court.²⁰⁰ The decision of what is admitted runs at the very least the risk of becoming arbitrary. With the accession of new Member States, this

196. *Id.* at 503-04.

197. *Schmidberger*, *supra* note 77.

198. *See* Giegerich, *supra* note 23, at 842-43.

199. *Cf.* *Pure Beer*, *supra* note 140, at 780.

200. *Verfahren vor dem Europäischen Gerichtshof für Menschenrechte-Überblick*, ÖIM-NEWSLETTER 215 (2004)—although the figures vary somewhat, the percentage of cases admitted is constantly below 10 per cent.

figure has certainly not improved, particularly as some of these countries do not have a well-established human rights past or present, for example, Albania²⁰¹ or Russia²⁰². The accession of these states has another unpleasant effect:²⁰³ it is likely to strengthen the ECHR's *margin of appreciation* approach in order to cope with these enormous challenges.

The system is in danger of becoming very fragile because of the great diversity of its Members, and it is highly doubtful that the ECHR can still keep up its current standard of human rights protection.²⁰⁴ This becomes even more likely as some of the new judges are from countries where corruption and ineffectiveness of the judiciary are part of daily life.²⁰⁵ It would have been wiser to adopt a system similar to the Inter American System, which is composed of a Court of about 7 human rights experts and a Commission, rather than creating an "army" of 45-50 judges with very different expertise.²⁰⁶ This may well be the system's future Achilles' heel. In order to avoid a collapse of the system it will be even more necessary to focus on "crucial" cases,²⁰⁷ which excludes those more minor, but to the individual still important, cases. To expect a boost of human rights from a system like this seems overly optimistic. Undisputedly, the system of the European Convention has had a glorious past but whether it will have a glorious future remains to be seen.

Prison conditions in Russia, the attitude of jailors towards prisoners in several Eastern European countries, traditions with respect to freedom of information and the freedom of the press may well influence the case law of the new European Court of Human Rights. . . . Furthermore, if the new Court is faced with a large number of infringements of prohibition on torture and inhuman treatment, will it then still have the necessary time and attention to refine further the case law on issues of private life, length of court proceedings or freedom of information.²⁰⁸

201. US Department of State, *Country Reports on Human Rights Practices (2003)—Albania* (Feb. 25, 2004), <http://www.state.gov/g/drl/rls/hrrpt/2003/27820.htm> (Feb. 10, 2005).

202. One can question the value and credibility of the whole system of the Council of Europe, as well as of the Convention and the ECHR, if one considers how Russia behaves in Chechnya. (Wolfgang Peukert, *Zur Reform des Europäischen System des Menschenrechtsschutzes*, 53 NJW 49, 49 n.7 (2000).

203. R. Alonso Garcia, *The General Provisions of the Charter of Fundamental Rights of the European Union*, 8 EUR. L.J. 492, 501-02 (2002).

204. Brems, *supra* note 172, at 257.

205. Peukert, *supra* note 202, at 49; see Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights*, 29 HUM. RTS. L.J. 161, 163 (2002).

206. Peukert, *supra* note 202, at 49.

207. *Id.* at 49-51.

208. H.G. Schermers, *The New European Court of Human Rights*, 35 COMMON MKT. L. REV. 3, 4-5 (1998).

At first sight the answer seems to be in the positive, considering the case *Hatton and Others v The United Kingdom*.²⁰⁹ In this case the applicants brought a complaint before the ECHR alleging a breach of Articles 8 and 13 of the European Convention. The applicants were living close to Heathrow Airport (not owned by the government) and complained about the noise of night flights. Surprisingly, they succeeded. The government of the United Kingdom invoked the doctrine of *margin of appreciation*. This, however, was rejected by the ECHR. What is striking in this judgment is “the stricter scrutiny when states invoke the margin of appreciation and the implication of environmental rights into Article 8.”²¹⁰ However, the question remains whether this decision was decided this way because it was the United Kingdom. Would similar decisions be conceivable in Albania? Will courts in Russia follow such “precedents”? The ECHR has to be careful not to exceed the “spirit” of the European Convention and in so doing lose Member States.²¹¹ Furthermore, it has to be asked whether the ECHR is running the risk of producing inconsistent case law, as Judge Greve seems to indicate in her dissenting opinion when she refers to *Noack and Others v Germany*.²¹² In this case an entire village was transferred in order to expand lignite-mining operations. Although the Court admitted that this interference was painful for the inhabitants it was nevertheless justified by the aim pursued by the State (economic well-being). The decision of *Hatton and Others v The United Kingdom* seems to go beyond what the ECHR was created for, and gives rise to a great number of uncertainties.

Another problem, which has to be taken into account in an eventual accession to the European Convention, is the length of the proceedings. Although some adaptations of the EU system could be made, proceedings before the ECJ are already very long; they would be followed by an additional very long-lasting procedure before the ECHR.²¹³ Thus, “[a]s a consequence, the accession to the Convention would have the adverse effect of depriving the individual of *efficient* legal protection.”²¹⁴

209. *Hatton and Others v. The United Kingdom*, App. No. 36022/97, available at <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=416031744&Notice=0&Noticemode=&RelatedMode=0>.

210. Bernard H Oxam & Rhona K. M. Smith, *International Decision*, 96 AM. J. INT’L L. 692, 699 (2002).

211. *Id.* at 698.

212. *Noack and Others v. Germany*, App. No. 46346/99, available at <http://hudoc.echr.coe.int/Hudoc1doc2/HEDEC/200108/noack%20dec.doc>.

213. Toth, *supra* note 183, at 505. *But see* WINKLER, *supra* note 40, at 67-69.

214. Toth, *supra* note 183, at 499.

IV. CONCLUSION AND OUTLOOK

Taking the arguments above seriously, the best-case scenario would clearly be the EU adopting its own independent human rights system. Toth²¹⁵ even suggests a complete withdrawal by the EU Member States from the European Convention.²¹⁶ As a consequence, the ECJ would have to jump in and take over human rights protection completely. The idea that the ECJ would deal with human rights issues, irrespective of whether there is a linkage to EU law or not, is less revolutionary than it seems at first sight if one shares the opinion of Griller, who argues that today there are hardly any fields where the ECJ is excluded from scrutiny.²¹⁷ Nevertheless, one need not be a prophet in order to predict that this *visible* concentration of power with the ECJ will most likely lead to an outcry by most Heads of State. However, if all the “nice” summit talking should lead us somewhere, there are not many other options which are equally promising.

In any case, whether one follows the idea of an absolutely encompassing ECJ with respect to human rights, or if one is of the opinion that the ECJ’s authority should be tied to EU competences, the EU Charter can offer valuable help in both scenarios.²¹⁸ As a result of all of these reforms, the strings of “classical” human rights (as vested by the European Convention) and market rights would, with the EU Charter, come together in the hands of the ECJ. This Court, as the final authority, would then be in a position to decide about these rights and could balance them accordingly. These adaptations are crucial in order to prevent the Union from becoming a paradise for lawyers but a nightmare for its citizens.²¹⁹

Furthermore, the question of hierarchy of norms has to be considered very carefully with respect to fundamental rights and primary law.²²⁰ In all likelihood, fundamental rights could rank higher than the rest of the constitution²²¹ so that the ECJ would be enabled to scrutinize even primary law as the ECHR did in *Matthews*. For the time being the

215. *But see* Georg Ress, *Die EMRK und das europäische Gemeinschaftsrecht*, 2 ZEUS 471, 474 (1999).

216. Toth, *supra* note 183, at 512.

217. Griller, *supra* note 187, at 145.

218. *Cf.* Toth, *supra* note 183, at 512-27: Toth is in favor of incorporating Articles 1-18 of the Convention into the Treaty of the Union. Although I do not share his opinion on building on these provisions, I certainly do share his approach of enriching the Treaties with human rights.

219. *See* Engel, *supra* note 19, at 167.

220. *Id.* at 166-67.

221. *See generally* Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1 (1986); Shelton *supra* note 106, at 299.

ECHR makes it clear to the EU Member States that there is no “safe haven” for them in international organizations in order to avoid scrutiny of their human rights behavior.²²²

Member States should not see the emerging human rights system of the EU as a threat. The existence of the EU Charter and its rights offers Member States arguments for negotiation if an act of the Community is contrary to these rights.²²³ By developing a system based on the EU Charter “[t]he European Union would finally catch up with the modern democracies of the world, which all have provisions on the protection of fundamental rights written in their Constitutions.”²²⁴

A strict human rights regime within the Union would help to overcome what Alston and Weiler described as a *paradoxon* in human rights policies:²²⁵

On the one hand, the Union is a staunch defender of human rights in both its internal and external affairs. On the other hand, it lacks a comprehensive or coherent policy at either level and fundamental doubts persist as to whether the institutions of the Union possesses adequate legal competence in relation to a wide range of human rights issues arising within the framework of Community policies.²²⁶

The world needs more than ever an honest broker in human rights. The Union has the advantage of being a relatively new entity and it has a great opportunity to learn from mistakes made by others. Alston and Weiler predicted in their article “An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights” published in 1999, that “as the next millennium approaches, a credible human rights policy must assiduously avoid unilateralism and double standards and that can only be done by ensuring reciprocity and consistency.”²²⁷ Today, this statement seems to be truer than ever. The question remains of whether the Union is able to undergo the necessary reforms in order to meet the required standards on human rights.

222. Ress, *supra* note 68, at 204: In particular there are worries that countries such as Russia or the Ukraine could move sovereignty to international organizations in order to avoid being scrutinized through the ECHR.

223. Engel, *supra* note 19, at 155.

224. Toth, *supra* note 183, at 513.

225. Alston & Weiler, *supra* note 36, at 6.

226. *Id.*

227. *Id.* at 9.